IN THE HIGH COURT OF JUSTICE **Claim No: KB-2025-000497**

KING'S BENCH DIVISION

B E T W E E N:

THE CHANCELLOR, MASTERS AND SCHOLARS OF THE UNIVERSITY OF CAMBRIDGE

Claimant

- and -

PERSONS UNKNOWN AS DESCRIBED IN THE CLAIM FORM

Defendants

- and -

EUROPEAN LEGAL SUPPORT CENTRE ("ELSC")

Intervener

- and -

NATIONAL COUNCIL FOR CIVIL LIBERTIES ("LIBERTY")

Proposed Intervener

INTERVENER'S AUTHORITIES BUNDLE
FOR HEARING ON 19 MARCH 2025

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[HOUSE OF LORDS.]

H. L. (E.)* 1934 June 25.

MARSHALL AND ANOTHER . . . . . APPELLANTS;

AND

THE MAYOR, ALDERMEN, AND BURGESSES OF THE COUNTY BOROUGH OF BLACKPOOL . . . RESPONDENTS.

Highway—Footpath—Adjoining owner—Right of access—Application to construct Communication across footpath—Blackpool Improvement Act, 1879 (42 & 43 *Vict. c. cxcix.*), *s.* 62.

By s. 62 of the Blackpool Improvement Act, 1879: "Every person desirous of forming a communication for horses or vehicles across any footpath so as to afford access to any premises from a street shall first submit to the corporation a plan of the proposed communication, showing where it will cut the footpath, and what provision (if any) is made for kerbing and for a paved crossing, and the dimensions and gradients of the necessary works, and after having obtained the sanction of the corporation may execute the works at his own expense under the supervision and to the satisfaction of the surveyor, and not otherwise, and if any person drives or permits or causes to be driven any horse or vehicle across any footway unless and until such a communication as aforesaid has been so made he shall be liable to a penalty not exceeding five pounds."

The appellants, proprietors of motor coaches, were owners of land bounded by a wall and abutting upon a street which was partly a footpath and partly a carriage-way. The footpath ran along the wall, and the carriage-way ran along the footpath. The appellants, being minded to open a passage for vehicles from their land across the footpath and so into the carriage-way, submitted to the respondents a plan of the proposed works in accordance with the above enactment, and applied to them to sanction the works. The respondents found no fault with the proposed works as works, but they refused to sanction them, having regard to the safety of the public and the convenience of pedestrians and vehicular traffic which might use the highway:—

Held, that the respondents were not authorized by the above section to take these matters into consideration in deciding whether to give their sanction to the proposed works; for that the owner of land adjoining a highway has at common law a right of access to any part of the highway unless some statute

* *Present:* LORD ATKIN, LORD WARRINGTON OF CLYFFE, and LORD THANKERTON.

has deprived him of the right, which s. 62 of the Blackpool Improvement Act, 1879, does not purport to do.

Order of the Court of Appeal [1933] 2 K. B. 339 reversed; order of the King's Bench Division [1933] 1 K. B. 688 restored.

APPEAL from an order of the Court of Appeal (1), reversing a judgment and order of the King's Bench Division (2) in favour of the appellants upon a case stated by the Court of Quarter Sessions for the County of Lancaster.

The question arose upon s. 62 of the Blackpool Improvement Act, 1879. (3)

The appellants, William Marshall and Rhodes William Marshall (hereinafter called "the applicants"), carried on business as motor coach proprietors in Blackpool and were the owners of No. 1 St. Chad's Road, Blackpool, which abutted on the highway. The appellant William Marshall died on December 19, 1933. His interest was represented by the surviving applicant.

No. 1 St. Chad's Road is at the corner which that road makes with another road called the Promenade. It was formerly a house let in apartments with a garden in front enclosed by a wall with no opening in it for the entrance or exit of vehicles. Around and outside the wall ran a paved and kerbed footpath. The applicants, desiring to make a way for horses and vehicles from their premises to the highway across the footpath, on April 11, 1931, submitted a plan to the Corporation as required by s. 62 of the Blackpool Improvement Act, 1879, and applied for leave to execute the proposed works.

The Corporation raised no objection to the plan as such, or to the dimensions, gradients, kerbing or paving of the proposed communication. They nevertheless refused to give their sanction. The applicants appealed to Quarter Sessions under s. 111 of the Blackpool Improvement Act, 1879, which is in these terms: "Any person deeming himself aggrieved by any order or determination of the Corporation, or of any officer or valuer of the Corporation . . . . may appeal (but

(1) [1933] 2 K. B. 339.
(2) [1933] 1 K. B. 688.
(3) The section is set out in the head-note.

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in cases where application for relief is authorized to be made to the Corporation, then only after such application) to the next practicable Court of Quarter Sessions under and according to the provisions of s. 269 of the Public Health Act, 1875."

The Court of Quarter Sessions on July 17, 1931, allowed the appeal. The ground of the decision was that in the opinion of the Court the Corporation had misdirected themselves and had taken into account not only the matters specifically mentioned in s. 62 of the Blackpool Improvement Act, 1879, namely, the point at which the proposed communication would cut the footpath, the provision (if any) for kerbing and for a paved crossing, and the dimensions and gradients of the necessary works, but also other matters to which no specific reference is made in s. 62 aforesaid.

A special case was stated for the opinion of the King's Bench Division in which the above facts were set out. Upon those facts the appellants contended that the Corporation, the respondents, in arriving at their decision, were not entitled to consider any matters other than those specifically mentioned in s. 62. The respondents contended that their powers were not so limited.

The question for the opinion of the Divisional Court was whether the Court of Quarter Sessions were right in allowing the appeal.

When the special case came before the Divisional Court an order was made remitting the case to the Quarter Sessions for statement of the matters which the Corporation had taken into account and which were outside s. 62 and which, in the view of the justices, the Corporation were not entitled to consider. In compliance with this order the Quarter Sessions stated that those matters were (1.) That the Town Planning and By-laws Sub-Committee of the respondent Corporation had taken into consideration matters in regard to the safety of the public and the convenience of pedestrians and vehicular traffic which might use Chad Street; and (2.) that the Sub-Committee had regard to certain powers which they hoped to obtain under their proposed Town Planning Scheme whereby the portion of the Borough including

Chad Street would be zoned for residential purposes only. The justices further stated that views were expressed as to the desirability of the crossing, but that they came to no decision on that point, being of opinion that in law the owners of land abutting on a highway have an absolute right of access to the highway and that this right was not taken away by the Blackpool Improvement Act, 1879.

The Divisional Court dismissed the appeal of the Corporation and confirmed the decision of Quarter Sessions. (1) The Corporation appealed to the Court of Appeal, and that Court (Scrutton and Slesser L.JJ., Eve J. dissenting) allowed the appeal (2) and remitted the matter to the Corporation, directing them at the same time that they could not exclude the applicants from all access to their premises, but that they were entitled to consider the nature of the access and the safety of the public in determining what access should be allowed.

The applicants appealed to this House.

1934. May 14. *Wilfrid Greene K.C.*, *Eastham K.C.* and *T. E. Hinchcliffe* for the appellants. The owner of land adjoining a highway is entitled to access to the highway at all points where his land adjoins it: *St. Mary, Newington (Vestry)* v. *Jacobs* (3); *Ramuz* v. *Southend Local Board* (4); *Tottenham Urban District Council* v. *Rowley*. (5) The rights of the public to pass and repass along the highway are subject to this right of the adjoining owner. The decision of the Court of Appeal would make the owner's right subject to the convenience of the public. It may be conceded that if the actual method of access, a paved crossing for example, caused an obstruction to the footway or was at a dangerous incline to the carriageway, the respondents might interfere and exert the power of refusing to sanction the proposed approach under s. 62 of the Blackpool Improvement Act, 1879. But they do not complain of the proposed method of access.

(1) [1933] 1 K. B. 688.
(2) [1933] 2 K. B. 339.
(3) (1871) L. R. 7 Q. B. 47.
(4) (1892) 67 L. T. 169.
(5) [1912] 2 Ch. 633; [1914] A. C. 95.

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[*Attorney-General* v. *Horner* (1); *Goldsmid* v. *Great Eastern Ry. Co.* (2) and *Great Eastern Ry. Co.* v. *Goldsmid* (3) were also cited.]

Montgomery K.C. and *Keith Groves* for the respondents. The Court of Appeal held that the respondents could not take into consideration powers which they hoped to acquire under a future town planning scheme. It is not intended to challenge that decision. But as to means of access to the highways in their district they claim the right and the duty to control and supervise these and refuse to sanction them if they are likely to be a danger to foot passengers or an obstruction to traffic. The streets are vested in and placed " under the control of " the respondents as the urban authority under s. 149 of the Public Health Act, 1875. It is submitted that those words confer on the respondents some power of directing where a proposed crossing of a public footway shall be situated. If next door to the appellants' sheds there were a school for young children, it would be reasonably within the powers of the respondents to refuse their sanction to any crossing of the footway from that part of appellants' premises which adjoined the site of the school. Or if the appellants proposed to open access to the highway at a point where traffic was usually congested, the respondents may reasonably refuse to sanction an approach at that point.

Counsel was not called upon in reply.

The House took time for consideration.

June 25. LORD ATKIN. My Lords, the question in this case arises on a case stated by the Court of Quarter Sessions for the County of Lancaster on an appeal by the appellants from the refusal of the Corporation of Blackpool to sanction works forming a communication from the appellants' premises across a footpath in St. Chad's Road, Blackpool. The appellants are motor coach proprietors and are the owners of premises No. 1 St. Chad's Road. St. Chad's Road is a road running into the Blackpool Promenade. The premises No. 1

(1) (1884) 14 Q. B. D. 245, 256, 257.
(2) (1883) 25 Ch. D. 511.
(3) (1884) 9 App. Cas. 927.

have a narrow frontage to the Promenade and a long frontage to St. Chad's Road. They abut on the road, the footway about 8 feet wide intervening between the premises and the roadway, which is about 20 feet wide. As the appellants wished to have access from their premises to the roadway in St. Chad's Road, and for that purpose their vehicles would have to cross the footpath, they had to comply with the provisions of s. 62 of the Blackpool Improvement Act, 1879. That section is as follows: [His Lordship read the section, and proceeded.] A plan of the proposed communication was duly submitted to the Corporation containing the statutory particulars. The Corporation refused to sanction the execution of the works. No objection was taken to the works as such, but, as found by Quarter Sessions, the Corporation took into consideration matters in regard to the safety of the public and convenience of pedestrians and vehicular traffic which might use Chad Street, and also had regard to certain powers which they hoped to obtain under their proposed town planning scheme whereby this portion of the Borough would be zoned for residential purposes only. The Court of Quarter Sessions, to whom by s. 111 of the Act an appeal lay from the refusal of the Corporation, came to the conclusion that the Corporation was not entitled to take into consideration the foregoing matters, and subject to a case stated allowed the appeal. The Divisional Court, consisting of the Lord Chief Justice and Avory and Branson JJ., affirmed the decision of Quarter Sessions. The Court of Appeal by a majority (Scrutton and Slesser L.JJ., Eve J. dissenting) allowed the appeal. They agreed that the zoning question could not be considered but thought that the first question could, and remitted the matter to the Corporation for decision upon that footing.

My Lords, in order to construe the section it seems desirable to consider what the rights of the appellants would be if no such enactment were in existence. The law appears to me to be as stated by the Lord Chief Justice, who has cited the relevant authorities. With no hope of improving that statement, but as a foundation for my own opinion, I propose to

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say shortly what I conceive the legal position to be. The owner of land adjoining a highway has a right of access to the highway from any part of his premises. This is so whether he or his predecessors originally dedicated the highway or part of it and whether he is entitled to the whole or some interest in the ground subjacent to the highway or not. The rights of the public to pass along the highway are subject to this right of access: just as the right of access is subject to the rights of the public, and must be exercised subject to the general obligations as to nuisance and the like imposed upon a person using the highway. Apart from any statutory provision there is no obligation upon an adjoining owner to fence his property from the highway: and though in urban districts fencing is usual, your Lordships will be familiar with many instances to the contrary, as for instance in country towns, where it is common to find large open forecourts to country inns and the like where market carts and farm vehicles are left during business hours. Moreover the ordinary traffic on any highway is always liable to be increased by the exercise by an adjoining owner of this right of access. A building estate may be developed, or a theatre, concert hall, cinema, or hotel erected on premises which will necessarily involve incalculable increase of traffic. Subject to special statutory provisions protecting footpaths, the right of access is not affected by the fact that part of the highway is only dedicated as a footway, or is otherwise lawfully appropriated to foot passengers. The passage of the public along a footway is always liable to be temporarily interrupted by adjoining owners' right of access, whether to the footway or the roadway: and the dangers, if dangers there be, of a pedestrian having his path crossed by vehicles exercising right of access may be increased, and lawfully increased, by the adjoining owner or owners increasing their means of access.

As was pointed out by the Lord Chief Justice, it would be remarkable to find this well established right of an adjoining owner taken away and without compensation, especially in a local Act, unless there were very plain words to that effect. As far as I can see the section does not even purport to affect

the right at all. It is directed to works and to works only. The place of the communication must be stated: not to enable the Corporation to reject the place apart from the nature of the works, but to fix it on the plan and enable the Corporation to judge what provision is made for kerbing and for a paved crossing, and to consider the dimensions and gradients of the necessary works. Plainly the Corporation may consider the nature of the proposed user in order to judge how the way should be constructed, both as to surface and kerbing and in relation to the gradient. If the actual works, either by the steepness of the gradient or the depth of the side kerbing, would be likely to affect the safety of pedestrians on the footway or of vehicles on the roadway, there seems to me no reason why they should not take those factors into account. But in my opinion they are not entitled to take into account questions of safety and convenience of the public except in so far as affected by the nature of the works. They may not therefore take into account the nature and extent of the proposed user of a communication in itself safe and sufficient for that user. That user is, as has been pointed out, controlled by the general highway law. It follows that however large the existing traffic in St. Chad's Road may be both of vehicles and pedestrians, the corporation may not restrict the addition of further traffic to it, even for the promotion of the convenience or safety of the public, by using the powers of s. 62 so as to refuse sanction to works which in themselves are safe and adequate. That there is no objection to the works as works is stated in the agreed case; and I feel no doubt that the order of Quarter Sessions operates to give the sanction which was withheld by the Corporation, a power which the unrestricted terms of s. 111 undoubtedly confers upon Quarter Sessions. For these reasons I am of opinion that the order of the Court of Appeal should be set aside and the order of the King's Bench Division should be restored. The appellants should have the costs here and in the Court of Appeal.

LORD WARRINGTON OF CLYFFE. My Lords, I concur.

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LORD THANKERTON. My Lords, I agree.

Order of the Court of Appeal reversed: Order of the King's Bench Division of the High Court of Justice, thereby set aside, restored: Respondents to pay to the Appellant the costs incurred in the Courts below and also the costs of the Appeal to this House: Cause remitted back to the King's Bench Division of the High Court of Justice to do therein as shall be just and consistent with this Order.

Lords' Journals, June 25, 1934.

Solicitors for appellants: *Johnson, Peacock, Hepworth & Chowne, for James E. Harrison, Blackpool,*

Solicitors for respondents: *Sharpe, Pritchard & Co., for D. L. Harbottle, Town Clerk, Blackpool.*

[HOUSE OF LORDS.]

H. L. (N. Ir.)* 1934 *June* 28.

McEVOY . . . . . APPELLANT;

AND

THE BELFAST BANKING COMPANY, LIMITED . . . . . } RESPONDENTS.

Banker and Customer—Deposit Account—Deposit Receipt in Names of father and infant son—Will of father—Son residuary legatee—Deposit money transferred by Bank to Account of executors—Claim of son against Bank—Ratification—Acquiescence.

J. M., being in failing health and expecting death in a short time, deposited a sum of 10,000*l.* with the B. Bank and received from the Bank a deposit receipt in this form: "10,000*l.* . . . . . Received from J. M. and J. D. M. (a minor)," the son of J. M., ... "the sum of ten thousand pounds sterling for credit in deposit account. Not transferable. . . . . Payable to either or the survivor. . . . . This receipt must be produced when payment of either principal or interest is desired."

* *Present:* LORD ATKIN, LORD WARRINGTON OF CLYFFE, LORD THANKERTON, and LORD MACMILLAN.

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expressed in this case by the legal assessor that the doctrine, primarily of equity, which can be summed up in the phrase: He who takes the benefit of a grant must also bear its burden, operates in the very different sphere of planning law to carry with a planning permission, which by force of section 18 (4) of the 1947 Act "runs with the land," all attached burdens, limitations or conditions. Whether or not this view is sound in law may have to be decided in some other case. The court need not, and therefore should not, now pronounce any opinion upon it. This appeal is dismissed.

Appeal dismissed with costs.
Leave to appeal.

Solicitors: *Beddington, Hughes & Hobart; Sharpe, Pritchard & Co. for E. R. Davies, Clerk to the Berkshire County Council.*

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Nov. 18.

Lord Parker C.J., Winn and Fenton Atkinson, JJ.

Crime — Public nuisance — Obstruction of the highway — Incitement to commit nuisance by obstructing highway—Crowd obstructing street during political demonstration—Jury not told to consider whether reasonable user of highway—Whether a misdirection.

The defendant, the field secretary of the Campaign for Nuclear Disarmament, was indicted on a charge of inciting persons to commit a public nuisance by obstructing the highway in and around Whitehall. The charge arose out of incidents that occurred on July 9, 1963, in the course of a demonstration organised by the Committee of 100 during the visit of the King and Queen of Greece. Two police officers, who whilst in plain clothes had mingled with the crowd, gave evidence for the prosecution that the defendant had led a crowd of some 500 people from Whitehall to Pall Mall which was obstructed by the crowd by then numbering about 2,000; that, on reaching a police cordon at Waterloo Place, the defendant told people near him to go behind the cordon; and that the crowd followed his instructions, later partially blocking Lower Regent Street and completely blocking Charles II Street. Further evidence was given that, at Pall Mall, the defendant encouraged the crowd to carry on; that, at Marlborough Gate, the crowd turned right in accordance with the defendant's instructions; and that, after marching up St. James' Street and blocking half of Piccadilly, the crowd went across Green Park towards Buckingham

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[Reported by H. STEINBERG, Barrister-at-Law.]

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Palace where the defendant was arrested. The defendant's case was that he was not a ringleader but merely one of the crowd. The deputy chairman directed the jury, inter alia, that if there was a physical obstruction of the highway, that amounted to a nuisance. The defendant was convicted and sentenced to 18 months' imprisonment.

On appeal, on the ground, inter alia, of misdirection:—

Held, that, for the purposes of the offence of public nuisance by an obstruction of the highway, the question was whether, in all the circumstances, there was or was not a reasonable user of the highway; and that, therefore, as the jury was directed that a physical obstruction amounted to a nuisance and was not directed as to the question of reasonableness or unreasonableness, there had been a material misdirection and the court would quash the conviction.

Lowdens v. *Keaveney* [1903] 2 I.R. 82 applied.

APPEAL against conviction and sentence.

The following facts are taken substantially from the judgment of Lord Parker C.J.

On September 9, 1963, the defendant, George Clark, the field secretary of the Campaign for Nuclear Disarmament, was charged at London Sessions before the deputy chairman (O. S. Macleay, Esq.), and a jury on an indictment alleging that on July 9, 1963, in the county of London he "unlawfully incited divers persons "to commit a nuisance to the public by unlawfully obstructing "the highway at Pall Mall, Lower Regent Street, Charles II "Street, St. James' Square, Piccadilly and Constitution Hill." The events giving rise to the alleged offence occurred in the course of a demonstration organised by the Committee of 100 on July 9, 1963, during the visit of the King and Queen of Greece.

The prosecution case was based on the evidence of two police officers who, whilst in plain clothes, had mingled with the crowd. According to their evidence, the defendant said to various groups of people gathered in Whitehall, "We can't "get through that way. Follow me," and then marched to Trafalgar Square, beckoning the crowd of some 500 people to follow him. The police officers further stated that the defendant and the crowd went along Cockspur Street into Pall Mall and that the crowd, by then numbering about 2,000, spread over Pall Mall. It was further testified that the defendant, on reaching a police cordon at Waterloo Place, told persons near him to turn right before the cordon and walk round behind it, and that the crowd did turn right, later partially blocking Lower Regent Street and completely blocking Charles II Street.

Evidence was also given that the crowd went through St. James' Square into Pall Mall where the defendant shouted encouragement to it and that, when it reached Marlborough Gate, the defendant called out, "Turn right again, we'll beat them this "time." It was further stated that the crowd then marched up St. James' Street, turned into Piccadilly, blocking about half of that road, and then went across to Green Park to Buckingham Palace where the defendant was arrested. The defendant denied that he was a ringleader and contended that he was merely one of the crowd.

The deputy chairman directed the jury in the following terms: "Did the defendant unlawfully incite various people "to commit a nuisance to the public by the unlawful obstruc-"tion of various streets? And therefore what you have got "to decide is this, was there a public nuisance? in fact, were "the streets obstructed? and was the defendant inciting those "persons to go on and behave in this way and—if I may use a "real colloquialism—egging them on? That is what it comes "to, doesn't it?" The defendant was convicted and sentenced to 18 months' imprisonment. He appealed against conviction and sentence, his appeal against conviction being on the ground, inter alia, of misdirection in that the deputy chairman had failed to direct the jury on the question whether there was or was not a reasonable user of the highway.

F. Elwyn Jones Q.C. and *Keith McHale* for the defendant. The deputy chairman was wrong in directing the jury to decide only whether the streets were in fact obstructed and whether the defendant had incited persons to commit a public nuisance by obstructing the highway. The question that should have been left to the jury is whether there was or was not an unreasonable user of the highway, bearing in mind that the procession was prima facie lawful. In *Lowdens* v. *Keaveney*,[1] where the defendant was a member of a band which collected a crowd by playing in the streets, it was held that a conviction of obstructing the free passage of the street must be quashed, as the justices had not decided the real question, namely, whether that user was reasonable. Although the charge in that case was under the Irish (Summary Jurisdiction) Act, 1851, Gibson J. stated that the obstruction there contemplated was such as would be in the nature of a common law nuisance. Further, Gibson J., considering the matter at common law, said[2]: "Where the use of a

[1] [1903] 2 I.R. 82. [2] Ibid. 89.

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"highway is unreasonable and excessive, that is a nuisance, "irrespective of any guilty or wrongful intention." With regard to processions, he said [3] that they "may use the streets for "passage on lawful occasions and for lawful objects; and provided "the user is reasonable there is no nuisance." Lord O'Brien C.J. stated that no public nuisance was caused by lawful processions unless the use of the highway was unreasonable. *Lowdens* v. *Keaveney* [4] is on all fours with the present case, both as regards the facts and as to the lack of direction on the question of reasonable user of the highway. *Original Hartlepool Collieries Co.* v. *Gibb* [5] and *Attorney-General* v. *Brighton & Hove Co-operative Supply Association*,[6] cited in *Lowdens* v. *Keaveney*,[7] support the contention that the jury must consider the question of reasonable user. [Reference was also made to *Rex* v. *Carlyle*.[8]]

The jury might have come to a different conclusion if they had been properly directed on the question whether the user of the highway was unreasonable. In view of the material misdirection, the court should refuse to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1901, and should quash the conviction.

C. J. Crespi for the prosecution. It is clear that the deputy chairman did not direct the jury on the question of reasonable user of the highway. In considering the law of public nuisance the question there was substantial interference with the rights of other people. If a group of people walks along the highway in such a way as to obstruct the rights of others, they cannot be heard to say that they were merely exercising their own rights. The crowd of some 2,000 people who obstructed the streets around Whitehall could not claim as a defence that they had a right to use the highway. In *Wolverton Urban District Council* v. *Willis* [9] it was held, on a charge of unlawful obstruction of a footpath contrary to section 28 of the Town Police Clauses Act, 1847, that any encroachment of the footpath was deemed to obstruct and incommode, even though there was no evidence that anyone was obstructed or incommoded.

The word "reasonable" as used in the cases cited for the defendant, and in particular in *Lowdens* v. *Keaveney*,[10] was not

[3] [1903] 2 I.R. 82, 89.
[4] Ibid. 82.
[5] (1877) 5 Ch.D. 713.
[6] [1900] 1 Ch. 276; 16 T.L.R. 144, C.A.
[7] [1903] 2 I.R. 82.
[8] [1834] 6 C. & P. 636.
[9] [1962] 1 W.L.R. 205; [1962] 1 All E.R. 243, D.C.
[10] [1903] 2 I.R. 82.

intended to refer to the motive of the persons causing the obstruction, as such motive is irrelevant. In *Beatty* v. *Gillbanks*,[11] where the appellants, whose purpose was a lawful one, were convicted of unlawful assembly, Field J. said [12] "that everyone "must be taken to intend the natural consequences of his own "act, and it is clear to me that if this disturbance of the peace "was a natural consequence of acts of the appellants they would "be liable. . . . But the evidence does not support this con-"tention; . . ." In the present case there was a substantial obstruction of the highway and the defendant was guilty of inciting persons to commit a public nuisance by obstructing the highway.

LORD PARKER C.J. stated the facts and continued: The point taken by Mr. Elwyn Jones for the defendant in this appeal is that the deputy chairman's approach was wrong. He submits that the question was not whether the highway was obstructed and, if so, then there was a public nuisance, but that the question was whether, granted obstruction, there was an unreasonable user of the highway, bearing in mind that this procession, on the face of it and unless it did amount to a public nuisance, was under our law perfectly lawful. He refers to the Irish case of *Lowdens* v. *Keaveney*.[1] It is convenient to refer to that case because all the relevant earlier decisions are there mentioned, and in some cases summarised. In that case the defendant was a member of a band playing tunes in the streets of Belfast which went down a street followed by a large crowd. A constable cautioned the band but they went on, persisted in playing and the crowd followed, with the result that the free passage of foot passengers and vehicles was temporarily interrupted. It was held that the conviction must be quashed, the justices having overlooked or omitted to decide the real question, which was whether the user of the street was, under the circumstances, unreasonable.

The justices found in that case that [2]: "in Donegall Street "on the occasion in question the free passage of foot passengers "and vehicles was obstructed, that several of the foot passengers "had to take refuge in doorways, and that vehicles had to "come to a standstill; and . . . further found as a question "of fact that the said obstruction was caused by the defendant

[11] (1882) 9 Q.B.D. 308, D.C.
[12] Ibid. 308, 314.
[1] [1903] 2 I.R. 82.
[2] Ibid. 84.

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"and the other members of the band and the crowd accom-
"panying them . . . and that it was the direct result of the band
"playing in Donegall Street in spite of the police warning
"not to do so, and [they] accordingly adjudged the defendants
"guilty."

It is true that the prosecution in that case was under the Irish (Summary Jurisdiction) Act, 1851, which provides by section 13 (3): "Any person who wilfully prevents or interrupts the "free passage of persons or carriages in the public street shall "be subject to the criminal liability thereby created." But Gibson J. referred to that section in *Lowdens* v. *Keaveney*[3] in these terms: "Is the obstruction contemplated such an "obstruction as would be in the nature of a common law "nuisance, or does the statute extend to every physical "obstruction apart from any question of reasonableness? I "think the former view is the correct one." In other words, the judge was treating the matter in that case as no different from what it would have been at common law.

Further, in the same case, Lord O'Brien C.J. points to the way in which the case was there conducted, which was the same as in the present case. He said[4]: "Now how "was this decision sought to be sustained in argument? In "all the earlier stages of the argument the position taken was "this, that every person is presumed to intend the natural "and probable consequences of his act; that the procession "on the day in question did in fact create a physical obstruc-"tion; that this was the natural and probable consequence "of the procession passing through the street; and that "accordingly the defendant, being presumed to intend the "natural consequence of his act, was rightly convicted of "wilfully creating an obstruction." Observe that the present-ation there was much as it was presented in the present case, bearing in mind, of course, that the present case is dealing with a charge of incitement.

Then Lord O'Brien C.J. went on to refer to the fact that what he said was the true criterion was never left to the jury. He pointed out that many processions are perfectly lawful, and that no public nuisance is created by obstruction thereby unless the user of the highway in all the circumstances is unreasonable. He pointed out that there may be considerable, even complete, obstruction and yet the use of the street may be quite reasonable.

[3] [1903] 2 I.R. 82, 91.

[4] Ibid. 86.

In his judgment Gibson J.[5] specifically considered the matter at common law: "A public highway is primarily for the "free passage of the public for all reasonable purposes of "business or pleasure; but persons using such highway may "stop on lawful occasions, as for example for the purpose of "taking up or discharging persons or goods at adjoining houses, "provided that in so doing they do not unreasonably interfere "with corresponding rights of others. Where the use of the "highway is unreasonable and excessive, that is a nuisance, "irrespective of any guilty or wrongful intent." Further, Gibson J. went on to deal with processions, which he said[6]: "may use "the streets for passage on lawful occasions and for lawful "objects; and provided the user is reasonable there is no "nuisance."

Lowdens v. *Keaveney*[7] is valuable as setting out the true position, as this court understands it, after reviewing the previous cases. Unfortunately in the present case, as I have already said, there was no direction to the jury as to the question of reasonableness or unreasonableness. It may well be that on a proper direction this defendant would, all the same, have been convicted, but the question was really withdrawn from the jury since they were told that, if in fact there was a physical obstruction, that constituted nuisance, and that the defendant, if he incited it, was guilty.

The court feels that this is a case in which they are unable to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907. It follows that, since there was a material misdirection as to the law, this appeal must be allowed and the conviction quashed.

Appeal allowed.

Solicitor: *Benedict Birnberg; Solicitor, Metropolitan Police.*

[5] [1903] 2 I.R. 82, 89.
[6] Ibid. 89.
[7] Ibid. 82.

R v UNIVERSITY COLLEGE LONDON EX PARTE URSULA RINIKER

Queen's Bench Division

Sedley J

9 September 1994

Freedom of speech – Universities, polytechnics and colleges – Education (No 2) Act 1986, s 43 – Former teacher of German at University College London – Successfully bringing claim for unfair dismissal and being offered, and refusing, monetary compensation – Offered renewal of employment subject to condition relating to involvement in matters concerning language centre and entry into language centre premises – Whether contractual powers of UCL limited by statutory guarantee of freedom of speech – Justiciability of s 43 of 1986 Act

R had been employed as a teacher of German at University College London (UCL). She succeeded before an industrial tribunal and secured an admission of unfair dismissal and an offer of monetary compensation. R refused that offer. An offer of renewal of her contract of employment included the following condition: 'it is a condition of your appointment that you should cease to be involved in matters concerning the running of the language centre and that you should not enter the language centre premises except with the prior permission of the director of the centre or the chair of the UCL language centre management committee'. R argued that this condition went beyond a simple contractual relationship between an institution and an individual, and raised questions of public law. R submitted that the contract was overridden by public law considerations affecting the powers of UCL. Those considerations were to be found in s 43 of the Education (No 2) Act 1986. This provides for 'Freedom of speech in universities, polytechnics and colleges':

> '(1) Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment, and for visiting speakers.
>
> (2) The duty imposed by subsection (1) includes in particular the duty to ensure so far as is reasonably practicable that the use of any premises of the establishment is not denied to any individual or body of persons on any ground connected with—
>
> (a) the beliefs or views of that individual or of any member of that body, or
>
> (b) he policy or objectives of that body.'

R applied for leave for judicial review of the decision of UCL.

Held – refusing leave –

(1) If R had grounds for judicial review and for seeking a mandatory order of reinstatement, then the fact that unfair dismissal had been admitted and compensation offered would not necessarily be a sufficient bar. Although an order for reinstatement was a very rare event, the court undoubtedly had that power.

(2) The discretion to grant leave out of time would be sympathetically approached by the court where the applicant had not been sleeping on her rights, but had been attempting to canvass them by other legitimate means.

(3) Although the principal purpose of s 43 of the Education (No 2) Act 1986 was to prevent the banning from campuses of speakers whose views might be

unacceptable to a majority, or even a vocal minority, of either the student body or the teaching body or both, the breadth of subs (1) was somewhat larger and sought to secure freedom of speech in all respects. However, the conditions which UCL sought to impose did not seek to gag R or to rob her of the right to express her views. The conditions imposed related to administrative matters. The fact that it might impede the conduct of whatever debate R was engaging in was not irrelevant, but it was far from a condition which gagged a teacher in a university, or perhaps even a member of the university, in the exercise of the right of free speech.

(4) The judge was prepared to accept that s 43 was justiciable by judicial review in an appropriate case. It did not appear to create private rights which could readily be assured by any other means.

(5) UCL was undoubtedly a public body, but the condition sought to be imposed by UCL did not in its terms arguably fall foul of s 43. Therefore, the factual basis of a justiciable abuse of power by a public body was absent.

Statutory provision considered
Education (No 2) Act 1986, s 1

The applicant appeared in person.

SEDLEY J:
Mrs Riniker renews her application for leave to move for judicial review of decisions of and acts done by University College London where she was formerly a teacher of German. Popplewell J refused leave on the papers on four grounds: first, that this was not a public law case, secondly, that it was long out of time, thirdly, that there was no possibility of any court ordering reinstatement (I interpose that reinstatement is a principal objective of the proceedings) and, fourthly, that the court would, in any event, not be disposed to intervene in her favour because the college have now admitted unfair dismissal and offered a financial settlement. Latham J heard a renewal of the application in open court and refused it, but because it emerged that not all the papers had been placed before him through a clerical error, his decision is now overtaken, with his knowledge and agreement, by the application that has been further renewed before me today.

Mrs Riniker has presented her case with very great skill, with a clarity that would do a lawyer credit and with learning that is all the more remarkable for the fact that, as she tells me, she has no legal training and has acquired all her knowledge in the course of seeking to advance her case in person over the last 2 years. She comes to this court because she says that, understandably, she has found that her dismissal has made her unemployable in a competitive field of work. She also considers, again quite understandably, that neither the amount offered nor any amount of money is capable of compensating a skilled and trained individual for the loss of their career. With all of this I have unhesitating sympathy.

Taking Popplewell J's grounds, as Mrs Riniker has herself done, as the basis of further consideration, and taking them, for reasons which will become apparent, in reverse, I am prepared for the present to accept that Mrs Riniker can legitimately say that if she otherwise has grounds for judicial review and for seeking a mandatory order of reinstatement, then the fact that unfair dismissal has been admitted and

compensation offered would not necessarily be a sufficient bar. As to the unlikelihood of the court ordering reinstatement, while it is a very rare event there is undoubtedly power which the courts have exercised on occasions, for example to give specific performance of contracts of employment. Equally, although this application is, in spite of Mrs Riniker's ingenious argument to the contrary, out of time within the meaning of Ord 53, r 4(1), the discretion to enlarge time beyond the ordinary 3 months is one which will be sympathetically approached by the court where the applicant in the meantime has not been sleeping on her rights but has been attempting to canvass them by other legitimate means.

I turn to what in my view is the nub of this case: Popplewell J's first ground that what is actually complained of here is not a public law issue. What Mrs Riniker is concerned with is the non-renewal of her contract of employment, together with an offer of renewal upon terms which were unacceptable. She has succeeded in her own industrial tribunal proceedings in securing an admission of unfair dismissal and an offer, albeit unacceptable to her, of monetary compensation. But, as she puts it in her application, the offer of renewal included a condition which read as follows:

> 'It is a condition of your appointment that you should cease to be involved in matters concerning the running of the language centre and that you should not enter the language centre premises except with the prior permission of the director of the centre or the chair of the UCL language centre management committee.'

This, says Mrs Riniker, goes beyond a simple contractual relationship between an institution and an individual and raises questions of public law.

Pausing there, it is clearly the case that, in the ordinary way, employment relationships between an individual and a public body are matters of private contract law, notwithstanding that the public body owes its existence, for example, to statute or to some other public form of incorporation. This is, in Mrs Riniker's submission, the class of case in which a contract is overridden by public law considerations affecting the very power of the college to do what it has done. These considerations are found in s 43 of the Education (No 2) Act 1986 which provides under the rubric 'Freedom of speech in universities, polytechnics and colleges':

> '(1) Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment, and for visiting speakers.
> (2) The duty imposed by subsection (1) includes in particular the duty to ensure so far as is reasonably practicable that the use of any premises of the establishment is not denied to any individual or body of persons on any ground connected with—

(a) the beliefs or views of that individual or of any member of that body, or
(b) the policy of objectives of that body.'

Further provisions are made by the section which I need not read out.

It is well known that the principal purpose of this enactment was to prevent the banning from campuses of speakers whose views might be unacceptable to a majority, or even a vocal minority, of either the student body or the teaching body or both or, come to that, of the governing body. But its breadth is, in subs (1), somewhat larger and seeks the securing of freedom of speech in all respects.

I have no doubt that behind Mrs Riniker's non-renewal and the conditional offer which was made lies a history of disagreement in which Mrs Riniker's view was as entitled to respect as anybody else's, but the condition which it was sought to impose did not seek to gag her or to rob her of the right to express her views; it did, however, seek to disengage her from involvement in matters which concerned the running of the language centre, an administrative matter, and to restrain her from entering the language centre premises save with permission. This, too, seems to me to have been a matter of administration. The fact that it might impede the conduct of whatever debate Mrs Riniker was engaging in is not irrelevant, but it is far from a condition which gags a teacher in a university–a member, perhaps, of the university–in the exercise of the right of free speech.

I am prepared to accept that s 43 is justiciable by judicial review in an appropriate case. It does not appear to create private rights which can readily be assured by other means. But the matter sought to be canvassed here, although pursued with real learning and ingenuity by Mrs Riniker, is a condition which does not in its terms arguably fall foul of s 43. It is for that reason that in my view the factual basis of a justiciable abuse of power by the public body, which University College London undoubtedly is, is absent from the material before me, and for that principal reason that I refuse the application for leave.

DOMINIC McGOLDRICK
Barrister

reason that I was in favour of allowing the appeal and granting the injunction in the terms proposed.

Appeal allowed with costs.
Injunction granted.

Solicitors: Lovell White Durrant; Stephenson Harwood.

[Reported by SHIRANIKHA HERBERT, Barrister]

[HOUSE OF LORDS]

DIRECTOR OF PUBLIC PROSECUTIONS . . . RESPONDENT

AND

JONES (MARGARET) AND ANOTHER . . . . APPELLANTS

1998 Oct. 20, 21; 1999 March 4 — Lord Irvine of Lairg L.C., Lord Slynn of Hadley, Lord Hope of Craighead, Lord Clyde and Lord Hutton

Crime—Public order—Trespassory assembly—Order in force prohibiting trespassory assemblies—Peaceful, non-obstructive assembly on highway—Extent of public's rights of access to highway—Whether assembly trespassory—Public Order Act 1986 (c. 64), ss. 14A, 14B(2) (as inserted by Criminal Justice and Public Order Act 1994 (c. 33), s. 70)

The defendants took part in a peaceful, non-obstructive assembly on a highway in respect of which there was in force an order under section 14A of the Public Order Act 1986,[1] as inserted by section 70 of the Criminal Justice and Public Order Act 1994, prohibiting the holding of trespassory assemblies. They were convicted before justices of taking part in a trespassory assembly knowing it to be prohibited, contrary to section 14B(2) of the Act of 1986, as inserted. On appeal, the Crown Court held that there was no case for them to answer on the basis that the holding of a peaceful, non-obstructive assembly was part of the public's limited rights of access to the highway and so was not prohibited by the order. The Divisional Court allowed an appeal by the Director of Public Prosecutions.

On appeal by the defendants:—

Held, allowing the appeal (Lord Slynn of Hadley and Lord Hope of Craighead dissenting), that (*per* Lord Irvine of Lairg L.C.) the public highway was a public place that the public

[1] Public Order Act 1986, s. 14A, as inserted: see post, p. 252A–E.
S. 14B(2), as inserted: see post, p. 252E.

might enjoy for any reasonable purpose, provided that the activity in question did not amount to a public or private nuisance and did not obstruct the highway by unreasonably impeding the public's primary right to pass and repass, and within those qualifications there was a public right of peaceful assembly on the highway; that (*per* Lord Clyde) a peaceful assembly for a reasonable period that did not unreasonably obstruct the highway was not necessarily unlawful, nor did it necessarily constitute a trespassory assembly within sections 14A and 14B(2) of the Act of 1986, the matter being essentially one to be judged in the light of the particular facts; that (*per* Lord Hutton) the right of public assembly could, in certain circumstances, be exercised on the highway provided that it caused no obstruction to persons passing along the highway and that the tribunal of fact found that it had been a reasonable user; and that, in the circumstances, the Crown Court had been entitled to allow the defendants' appeals (post, pp. 254G–255A, F–G, 257D–G, 279C–F, 281B–F, G–H, 288D–E, 291A–B, 292H–293B, 294A).

Harrison v. Duke of Rutland [1893] 1 Q.B. 142, C.A. and *Hickman v. Maisey* [1900] 1 Q.B. 752, C.A. considered.

Decision of the Divisional Court of the Queen's Bench Division [1998] Q.B. 563; [1997] 2 W.L.R. 578; [1997] 2 All E.R. 119 reversed.

The following cases are referred to in their Lordships' opinions:

Aldred v. Miller, 1924 J.C. 117

Atholl (Duke of) v. Torrie (1850) 12 D. 691; (1852) 1 Macq. 65, H.L.(Sc.)

Attorney-General v. Antrobus [1905] 2 Ch. 188

Attorney-General v. Guardian Newspapers Ltd. (No. 2) [1990] 1 A.C. 109; [1988] 3 W.L.R. 776; [1988] 3 All E.R. 545, H.L.(E.)

C. (A Minor) v. Director of Public Prosecutions [1996] A.C. 1; [1995] 2 W.L.R. 383; [1995] 2 All E.R. 43, H.L.(E.)

Committee for the Commonwealth of Canada v. Canada (1991) 77 D.L.R. (4th) 385

Derbyshire County Council v. Times Newspapers Ltd. [1992] Q.B. 770; [1992] 3 W.L.R. 28; [1992] 3 All E.R. 65, C.A.

Ellenborough Park, In re [1956] Ch. 131; [1955] 3 W.L.R. 892; [1955] 3 All E.R. 667, C.A.

Fielden v. Cox (1906) 22 T.L.R. 411

Harrison v. Duke of Rutland [1893] 1 Q.B. 142, C.A.

Hickman v. Maisey [1900] 1 Q.B. 752, C.A.

Hirst v. Chief Constable of West Yorkshire (1986) 85 Cr.App.R. 143, D.C.

Hubbard v. Pitt [1976] Q.B. 142; [1975] 3 W.L.R. 201; [1975] 3 All E.R. 1, C.A.

Lewis, Ex parte (1888) 21 Q.B.D. 191, D.C.

Liddle v. Yorkshire (North Riding) County Council [1934] 2 K.B. 101, C.A.

Llandudno Urban District Council v. Woods [1899] 2 Ch. 705

Lowdens v. Keaveney [1903] 2 I.R. 82

M'Ara v. Magistrates of Edinburgh, 1913 S.C. 1059

Macpherson v. Scottish Rights of Way and Recreation Society Ltd. (1888) 13 App.Cas. 744, H.L.(Sc.)

Mann v. Brodie (1885) 10 App.Cas. 378, H.L.(Sc.)

Nagy v. Weston [1965] 1 W.L.R. 280; [1965] 1 All E.R. 78, D.C.

Randall v. Tarrant [1955] 1 W.L.R. 255; [1955] 1 All E.R. 600, C.A.

Reg. v. Graham (1888) 16 Cox C.C. 420

Reg. v. Pratt (1855) 4 E. & B. 860

Wills' Trustees v. Cairngorm Canoeing and Sailing School Ltd., 1976 S.C.(H.L.) 30, H.L.(Sc.)

The following additional cases were cited in argument:

Anderson v. United Kingdom [1998] E.H.R.L.R. 218
Burden v. Rigler [1911] 1 K.B. 337, D.C.
Chappell v. United Kingdom (1987) 10 E.H.R.R. 510
Christians against Racism and Fascism v. United Kingdom (1980) 21 D. & R. 138
Cooper v. Metropolitan Police Commissioner (1985) 82 Cr.App.R. 238, D.C.
De Morgan v. Metropolitan Board of Works (1880) 5 Q.B.D. 155, D.C.
Dovaston v. Payne (1795) 2 H.Bl. 527
Ferguson (L.L.) Ltd. v. O'Gorman [1937] I.R. 620
Greek Case, The (1969) 12 Yearbook of the European Convention on Human Rights
Homer v. Cadman (1886) 16 Cox C.C. 51, D.C.
Plattform "Ärzte für das Leben" v. Austria (1988) 13 E.H.R.R. 204
Rassemblement jurassien v. Switzerland (1979) 17 D. & R. 93
Reg. v. Clark (No. 2) [1964] 2 Q.B. 315; [1963] 3 W.L.R. 1067; [1963] 3 All E.R. 884, C.C.A.
Sunday Times v. United Kingdom (1979) 2 E.H.R.R. 245
Wheeler v. Leicester City Council [1985] A.C. 1054; [1985] 2 All E.R. 151, C.A.

APPEAL from the Divisional Court of the Queen's Bench Division.

This was an appeal by the defendants, Margaret Jones and Richard Lloyd, by leave of the House of Lords (Lord Lloyd of Berwick, Lord Hope of Craighead and Lord Clyde) given on 14 January 1988 from the judgment of the Divisional Court of the Queen's Bench Division (McCowan L.J. and Collins J.) on 23 January 1997 allowing an appeal by the Director of Public Prosecutions by case stated from the decision of the Crown Court at Salisbury (Judge MacLaren Webster Q.C. and justices). The Crown Court on 4 January 1996 had allowed appeals by the defendants against their convictions by Salisbury justices on 3 October 1995 of offences of trespassory assembly contrary to section 14B(2) of the Public Order Act 1986, as inserted by section 70 of the Criminal Justice and Public Order Act 1994.

The point of law of general public importance certified by the Divisional Court was: "Where there is in force an order made under section 14A(2) [of the Act of 1986, as inserted], and on the public highway within the area and time covered by the order there is a peaceful assembly of 20 or more persons which does not obstruct the highway, does such an assembly exceed the public's right of access to the highway so as to constitute a trespassory assembly within the terms of section 14A?"

The facts are stated in their Lordships' opinions.

Edward Fitzgerald Q.C., *Keir Starmer* and *Anthony Hudson* for the defendants. The public's right of access in the context of the criminal offence of trespassory assembly is not exceeded if the use of the highway is a reasonable use of the highway. A peaceful, non-obstructive assembly is a reasonable use of the highway.

The definition of "limited" in section 14A(9) of the Act of 1986 is merely illustrative of the type of circumstances in which the public's right of access to land is not absolute. It does not restrict or cut down the public's pre-existing common law right of access. The extent of the public's

A right of access is therefore left untouched by section 14A and is found in the common law. That limited right is not necessarily exceeded by a peaceful, non-obstructive assembly. It is to be inferred from the wording of section 14A(1)(*a*), including the reference to "conduct," that an assembly can be held on the public highway that does not of itself exceed the limits of the public's right of access to the highway. Parliament intended courts to consider the conduct of the assembly and whether its conduct was B reasonable. If the law were otherwise, much reasonable conduct would amount to a trespass and therefore would be made unlawful by an order under section 14A. It is both inappropriate and contrary to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) for the freedom to carry out such activities to be dependent on the forbearance of the relevant authorities. It is C inappropriate for such a fundamental civil liberty to be subject to potentially arbitrary enforcement.

The early trespass cases (*Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 and *Hickman v. Maisey* [1900] 1 Q.B. 752) established that the public's right of access extended beyond that of the right to pass and repass and recognised that the breadth of that right would be subject to further D extensions as society developed. The more recent obstruction cases, applying the test in a modern setting and in the context of a criminal offence, show that the test includes consideration of whether the use in question is a "reasonable user" of the highway. Lord Esher M.R.'s formulation of the public's right of access in *Harrison v. Duke of Rutland*, at pp. 146–147 necessarily requires a consideration of what is "reasonable" and necessarily recognises that the answer will change as society does. His E judgment is to be preferred to those of Lopes and Kay L.JJ. as the authoritative statement of the law in 1893, since it was the leading judgment and was cited with approval in *Hickman v. Maisey*. The "reasonable extensions" recognised as necessary by the Court of Appeal in *Hickman v. Maisey* in 1900 are found in the subsequent cases on obstruction. *Burden v. Rigler* [1911] 1 K.B. 337 demonstrates that in F determining whether a public meeting held on a highway is unlawful it is necessary to look at the circumstances of the assembly. McCowan L.J. and Collins J. erred in relying upon *Ex parte Lewis* (1888) 21 Q.B.D. 191 in support of their conclusion that no right of peaceful, non-obstructive assembly on the highway exists in English law. *Ex parte Lewis* is of little assistance because (a) the ratio of the decision concerned the jurisdiction G of the Divisional Court to review the decisions of magistrates to refuse to issue summonses; (b) the comments about the public's right of access were obiter; (c) those comments were essentially concerned with the right on the part of the public to occupy Trafalgar Square for the purposes of holding public meetings; (d) Trafalgar Square was completely regulated by Act of Parliament; and (e) any other comments about the public's right of access to the highway are ambiguous and/or not inconsistent with a development H of that right, as demonstrated by *Harrison v. Duke of Rutland* and *Hickman v. Maisey*. *Reg. v. Graham* (1888) 16 Cox.C.C. 420 fails to take account of the concept of reasonable user. [Reference was also made to Review of Public Order Law (1985) (Cmnd. 9510).]

The test of "reasonable user" applied in the obstruction cases is of particular relevance as, like the offence of trespassory assembly, it involves the adoption and application of the civil test of the public's right of access in relation to a criminal offence. To the extent that the definition of the public's right of access found in the obstruction cases differs from the civil law test of trespass, the former is the applicable test when considering the criminal offence of trespassory assembly. The obstruction cases, e.g., *Nagy v. Weston* [1965] 1 W.L.R. 280 and *Hirst v. Chief Constable of West Yorkshire* (1986) 85 Cr.App.R. 143, establish that a person whose use of a highway is reasonable has a lawful excuse even if he is a demonstrator. The right to demonstrate peacefully on the public highway has received judicial recognition in *Hubbard v. Pitt* [1976] Q.B. 142, 174–175, 177D–G, 178E–H; *Hirst v. Chief Constable of West Yorkshire,* 85 Cr.App.R. 143, 151–152 and Lord Scarman's statement in his report on The Red Lion Square Disorders of 15 June 1974 (1975) (Cmnd. 5919), p. 38, para. 6. Concepts based on the protection of private rights of ownership must be modified when dealing with a publicly owned highway, the public ownership of which engages the state's duty to protect and foster the right to peaceful demonstration. [Reference was made to *Committee for the Commonwealth of Canada v. Canada* (1991) 77 D.L.R. (4th) 385, 393–394; *Lowdens v. Keaveney* [1903] 2 I.R. 82, 86–87, 89–91; *Cooper v. Metropolitan Police Commissioner* (1985) 82 Cr.App.R. 238, 242 and section 137 of the Highways Act of 1980.

Rights, although not "positive" in the sense that they are enshrined in statute, nonetheless exist in the sense that under English law it is recognised that citizens are entitled to act unless their conduct is restricted by law: see *Wheeler v. Leicester City Council* [1985] A.C. 1054, 1065C and *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 178. Individuals have freedom, and therefore a right, to engage in activity on the highway so long as it does not constitute a civil wrong or a criminal offence in other words, so long as it does not transgress that which is reasonable and usual. Collins J. [1998] Q.B. 563, 571 erred in rejecting the approach of the Crown Court on the ground that the public's right of access, "must mean a right given by law." It is a misconceived approach in the context of English law, to look for a positive right of freedom of assembly. It is necessary to start from the premise that the public has right of access, including potentially to assemble, except to the extent that that right is restricted by law. The law restricts the right of access to the extent that it does not amount to passage or repassage and reasonable and usual user. If, in a particular set of circumstances, an assembly constitutes reasonable and usual usage, the public has a right to so assemble. The magistrates will take account of that is usual. Collins J.'s analysis at pp. 571–572, that "a right to do something only exists if it cannot be stopped: the fact that it would not be stopped does not create a right to do it" is, in the present context, also misconceived. The public does have a right of access to public highways. The argument is over the extent of that right. The public's right of access is a right to engage in activity on the highway that is reasonable and usual. If such activity is neither a trespass nor a criminal offence it cannot be stopped unless and until the limits of reasonableness are exceeded. [Reference was made to articles 10 and 11 of

A the European Convention for the Protection of Human Rights and Fundmental Freedoms (1953) (Cmd. 8969).] The judgment of the Divisional Court creates a fundamental divergence between English laws and the Convention. The highway should be regarded as a public place or open space where all activities may reasonably go on. The test of reasonableness will be the same in all cases, but the fact that the land in question is private rather than public property may be a factor to be taken into B account. [Reference was made to *Dicey, Introduction to the Study of the Law of the Constitution,* 10th ed. (1965), pp. 270–272 and *Aldred. v. Miller,* 1924 J.C. 117, 120.]

Collins J. erred in distinguishing *Hirst v. Chief Constable of West Yorkshire* as he did, at p. 573D: see the commentary of Professor Sir John Smith on the decision of the Divisional Court [1997] Crim.L.R. 599, 600. C Moreover, the judgment of Glidewell L.J. in *Hirst v. Chief Constable of West Yorkshire,* at p. 150, makes it clear that lawful excuse is not limited as suggested by Collins J. "in terms of offending" in the context of the criminal offence of obstruction. The effect of the Divisional Court's judgment is to create an unfortunate dichotomy whereby peaceful non-obstructive assembly is deemed a reasonable user of the highway and therefore lawful when obstruction charges are preferred but unreasonable D user of the highway and therefore unlawful when trespassory assembly charges are preferred.

Starmer following. The European Convention for the Protection of Human Rights and Fundamental Freedoms is relevant in two respects: (a) as an aid to statutory interpretation; (b) as a yardstick against which to resolve any uncertainty in the common law or to guide its development: E see *Derbyshire County Council v. Times Newspaper Ltd.* [1992] Q.B. 770.

The obligation on a contracting party to the Convention under article 1 to "secure" to its citizens the right to freedom of peaceful assembly under article 11 and to provide an "effective remedy" in cases of arguable violation (article 13) requires domestic law to recognise a "right" to peaceful assembly; a mere practice of tolerance or non-interference (even if established on the facts) is not enough, being ineffective and F illusory. The analysis of article 11(1) by Collins J. is wrong. The wording of article 11 suggests a positive right of peaceful assembly and limits restrictions on that right: see *Rassemblement jurassien v. Switzerland* (1979) 17 D. & R. 93. In keeping with the constant jurisprudence of the European Court of Justice and the Commission of Human Rights, any restrictions on the right of peaceful assembly should be narrowly construed. An G unfettered discretion on the part of a local authority or private landlord to restrict the public's right of peaceful assembly is wholly inconsistent with the requirements of article 11(2). For the proper approach to restrictions such as those under article 11(2), see *Sunday Times v. United Kingdom* (1979) 2 E.H.R.R. 245. An unfettered discretion to restrict the public's right of peaceful assembly is not prescribed by law because the circumstances in which it can be exercised are arbitrary, nor will any H restriction necessarily pursue a legitimate aim, and the pre-conditions of necessity will not be met. [Reference was made to *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 283 and *Anderson v. United Kingdom* [1998] E.H.R.L.R. 218.]

The wording of article 11 has to be read with article 1 (the obligation to secure Convention rights) and article 13 (the obligation to provide an effective remedy for arguable violations). For proper approach to article 13, see *Plattform "Ärzte für das Leben" v. Austria* (1988) 13 E.H.R.R. 204, 209–210, paras. 25, 28–34. If the Director of Public Prosecutions were right in his assertion that the right of peaceful assembly under article 11 is "secured" in the United Kingdom through tolerance or non-interference, article 11 read in conjunction with article 13 would be rendered meaningless. The narrow view advocated by him is wholly inconsistent with the approach of the European Court of Human Rights to positive obligations arising under article 11. This approach is consistent with the "principle of effectiveness" developed by the court and the Commission. The conclusion should be that section 14A of the Act of 1986 and/or the common law of civil trespass to the highway can be reconciled with the Convention only if the right to peaceful assembly is recognised wthin the public's right of access to the highway. If this is right, recourse to article 11(2) is unnecessary. [Reference was made to The Greek Case (1969) 12 Yearbook of the European Convention on Human Rights, pp. 170–171, paras. 392–394.]

The right to peaceful assembly under article 11 of the Convention includes a right to assemble on the highway: *Rassemblement jurassien v. Switzerland*, p. 17 D. & R. 93, pp. 118–119, para. 3, *Plattform* and *Anderson v. United Kingdom* [1998] E.H.R.L.R. 218.

Unless the order in issue in this case is construed narrowly so as to exclude the assembly in issue, it cannot be justified as "necessary in a democratic society" under article 11(2) of the Convention: *Christians against Racism and Fascism v. United Kingdom* (1980) 21 D. & R. 138, 149–150. No issue under article 11(1) arose there because (i) the effect of an order under section 3(3) of the Public Order Act 1936, now section 13(1) of the Act of 1986, was to ban *all* public processions, with one or two exceptions, not just those taking place in prohibited circumstances, and (ii) a right to process has always been recognised. The pre-conditions to making an order under section 3(3) of the Act of 1936 were much stricter than those under section 14A of the Act of 1986. The House of Lords should draw on the Commission's comments about the narrow circumspection of the order in question and, by analogy, construe the order in question in these proceedings so as to ring-fence and thereby preserve the applicants' right of peaceful assembly under article 11 of the Convention. The principle of proportionality derived from paragraph (2) of articles 10 and 11 requires section 14A of the Act of 1986 to be construed so as to ensure, if possible, that an order made under that section does not infringe the rights guaranteed under paragraph (1) of articles 10 and 11.

Chappell v. United Kingdom (1987) 10 E.H.R.R. 510 does not advance the issue for determination. It concerned rights of access to Stonehenge itself and was not dealing with article 11 rights on the highway.

The "margin of appreciation," being a principle of international law applicable on the international plane, is irrelevant to the determination of the present issues: see *Harris, O'Boyle and Warbrick, Law of the European Convention on Human Rights* (1995) pp. 12–15. In any event, as *Christians*

against Racism and Fascism v. United Kingdom shows, the Strasbourg bodies apply a fairly strict test even when the margin of appreciation is in play.

Victor Temple Q.C. and *Michael Butt* for the Director of Public Prosecutions. The question whether an assembly on the highway is a trespassory assembly is to be determined only by reference to the common law relating to rights of access to the highway and the principles of trespass. This is a consequence of the clear language of section 14A(9) of the Act of 1986. It is clear from the definition of "limited" in section 14A(9) that, where the land in question is a highway or road, to which there is only a limited right of access for the public, use of the land in excess of the right is intended to fall within the "prohibited circumstances" of section 14A(5)(*b*). It is also clear that the draftsman has singled out highways as being the starting-point of any test, so that all that one has to do is to look at the public right of access to the highway. Since the authorities are all one way in showing that this is limited to passing and trepassing for the purposes of legitimate travel and purposes incidental thereto, section 14A(9) is not opening the floodgates to general use of the highway. [Reference was also made to section 328 and 329 of the Highways Act 1980.]

The limits of the public's rights of access to the highway have been established by a very long line of clear and settled authority: see *Halsbury's Laws of England,* 4th ed. reissue, vol. 21 (1995), pp. 77–78, para. 110; *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142, 146–147, 152, 154, 155–156; *Dovaston v. Payne* (1795) 2 H.Bl. 527; *Reg. v. Pratt* (1855) 4 E. & B. 860; *Llandudno Urban District Council v. Woods* [1899] 2 Ch. 705; *Hickman v. Maisey* [1900] 1 Q.B. 752; *Fielden v. Cox* (1906) 22 T.L.R. 411 and *Liddle v. Yorkshire (North Riding) County Council* [1934] 2 K.B. 101. Any extension to the right to pass and repass must always be consistent with the paramount principle that the right of the public is that of passage.

If the applicants are correct and the public's right of access is based on reasonableness, that would, being contrary to a long line of authority, constitute a fundamental and radical extension to the common law, which is not a matter for the judiciary: see *C. (A Minor) v. Director of Public Prosecutions* [1996] A.C. 1.

Use of the highway for purposes other than passing and repassing, etc., is prima facie trespass. In particular, there is no right to use the highway for static meetings, assemblies, protests or demonstrations, peaceful or otherwise. Such activities, while commonly taking place on the highway without hindrance or objection, are nevertheless acts of trespass if they are not licensed or permitted. The Salvation Army holding a service on the highway do, strictly speaking, commit a trespassory offence. The order in this case was made for good reason, anticipating trouble. Where no order is made, as would be the case with the Salvation Army, charitable collections, tourists and so on, the fact that there is, strictly speaking, an offence does not in practice give rise to problems, tolerance and common sense inevitably prevailing. However, it is still necessary to have the power to remove even prima facie peaceful groups, because otherwise the position could arise where the first 20 were joined by another 20, and so on, and they became violent or, in the case of Stonehenge, make an excursion over

the perimeter fence. [Reference was made to *Dovaston v. Payne*, 2 H.Bl. 527, 530; *Reg. v. Pratt*, 4 E.&B. 860, 868–869; *Harrison v. Duke of Rutland*, [1893] 1 Q.B. 142, 152–153; *Llandudno Urban District Council v. Woods* [1899] 2 Ch. 705, 709; *Hickman v. Maisey* [1900] 1 Q.B. 752, 755–756, 757–758 and *Fielden v. Cox*.]

Certain activities incidental to passage and repassage on the public highway may be considered necessary, usual and reasonable for the purpose of exercising the right. Such activities will not be trespass if they do not go further than use of the highway *as a highway* and are not inconsistent with the paramount idea that the right of the public is a right of passage: see *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142, 146, 147, 156; *Hickman v. Maisey* [1900] 1 Q.B. 752, 756, 757–758 and *Randall v. Tarrant* [1955] 1 W.L.R. 255, 259–260. An activity which is "lawful" in itself is not prevented thereby from being a trespass on the highway: see *Reg. v. Pratt*, 4 E.&B. 860 and *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142, 146. There is no authority for the proposition that a static assembly, meeting or demonstration on the public highway is to be considered a use incidental to the right of passage and repassage. Such use is wholly inconsistent with the dedication of a public highway, and must therefore prima facie be a trespass on the highway: see *De Morgan v. Metropolitan Board of Works* (1880) 5 Q.B.D. 155, 157; *Homer v. Cadman* (1886) 16 Cox C.C. 51, 54; *Ex parte, Lewis* (1888) 21 Q.B.D. 191, 197 and *Reg. v. Graham* (1888) 16 Cox C.C. 420 and compare *L. L. Ferguson Ltd. v. O'Gorman* [1937] I.R. 620, 644, 648. Attempts to demonstrate the existence of a common law right to hold assemblies on the highway (see the argument advanced in *Burden v. Rigler* [1911] 1 K.B. 337) are misconceived. In that case a political meeting held on the highway in the course of an election was at least tacitly licensed by the urban authority and could not therefore have been a trespass against it. No evidence of obstruction or nuisance had been called. The justices were held to have been wrong in finding that all meetings on the highway were unlawful for the purposes of the Public Meeting Act 1908, but it is plain that the judgment of Lord Alverstone C.J. was concerned with the question of the statute and the matter of obstruction. It has nothing to say about trespass and does not establish any general principle that the only meetings on a highway that are unlawful are those that cause a material obstruction.

In principle, where a highway vests in the highway authority by virtue of section 263 of the Act of 1980, there appears to be nothing to prevent it from seeking and obtaining relief for acts of trespass on it. Indeed, both at common law and now by statute it has not only the right but the duty to remove obstruction interfering with free passage along the highway and assert and protect the rights of the public to the use and enjoyment of it: see section 130 of the Act of 1980. In practice, however, throughout the 20th century acts amounting to civil trespass on the highway have been dealt with by way of the criminal offence of obstruction under successive Highway Acts, or by way of prosecutions for public nuisance. For the first time (apart from the offence of burglary), section 14A of the Act of 1986 brings consideration of the civil wrong of trespass into the criminal domain.

A Nothing in the obstruction and nuisance cases, or other authority, suggests that the defence of "reasonable use" is relevant where trespass is the issue, as in the context of trespassory assembly. The fact that the defendant is or may be a civil trespasser is immaterial in deciding the lawfulness or otherwise of his activity for the purposes of the criminal offence of obstruction: *Lowdens v. Keaveney* [1903] 2 I.R. 82 and *Nagy v. Weston* [1965] 1 W.L.R. 280. Essentially the same test is to be applied in B cases of public nuisance: see *Reg. v. Clark (No. 2)* [1964] 2 Q.B. 315. These cases establish a defence that excuses liability for specific criminal offences. They do not establish rights that did not exist before. They neither establish nor propose that activities on the highway that may be reasonable in the context of obstruction and nuisance cannot thereby be trespass. "Lawful excuse" in a crimnal case is not the same as a positive right in C civil law: There is no suggestion in *Hirst v. Chief Constable of West Yorkshire,* 85 Cr.App.R. 143 or *any* of the obstruction cases that the concept of "reasonable use" has been borrowed from the civil law of trespass, still less does section 137 of the Act of 1980 deem any particular activity to be a reasonable or unreasonable use of the highway. "Reasonable user" has never been a defence to a civil accusation of trespass. It follows that there is nothing inconsistent in an activity being "reasonable" for the D purposes of section 137 and yet remaining a civil wrong in trespass for the purpose of founding an offence under section 14B of the Act of 1986. In such circumstances, the court is saying no more than that it shall not attract a criminal sanction. Further, to say that the public's *rights* of access to the highway are now determined simply by what is reasonable and usual is an unjustified extension of the principle in the obstruction and nuisance E cases and ignores the clear line of authority in the trespass cases. If an activity is to avoid being a trespass on the highway, it must be incidental to the right of passage and repassage and must not trangress the usual and reasonable mode of using the highway *as a highway*, or otherwise have the consent of the owner of the surface. The concept of trespass on highways has laid dormant for most of the century. That concept, firmly established in the common law, is now the foundation of section 14A of F the Act of 1986. There can be no warrant for grafting on to it the body of case law that has grown up around obstruction and nuisance.

Recourse to the European Convention to assist in interpretation is neither necessary nor permissible where, as here, English law is settled and unambiguous. It is neither uncertain, nor developing, nor incomplete. Nor is the United Kingdom yet in the position where the courts must resolve G conflicts between the Convention and national law: *Derbyshire County Council v. Times Newspapers Ltd.* [1992] Q.B. 770, 812E. Any discussion about rights in English law must take into account the difference between countries whose written constitutions *confer* clearly defined rights on citizens, and countries such as the United Kingdom without written constitutions where rights are only really definable in terms of the extent to which they are restricted or abrogated. Rights such as freedom of H peaceful assembly are "secured" in the United Kingdom for the purposes of article 1 of the Convention through toleration, or non-interference. No general assessment as to whether such rights are secured in accordance with article 1 can be made without reference to tradition and practical

experience. Freedom of assembly inevitably raises a number of problems, especially where public meetings are involved. These pose threats to public order through the disruption of communications, the prospect of confrontation with the police and the danger of violence with rivals, the latter claiming their own freedom to demonstrate. The European Commission of Human Rights and the European Court of Human Rights have confirmed that in these particular circumstances there are positive duties on a state to protect those exercising their right of freedom of peaceful assembly from violent disturbance by counter-demonstrators.: see *Plattform "Ärzte für das Leben" v. Austria* (1988) 13 E.H.R.R. 204, 210, para. 32. In none of the cases brought against the United Kingdom under article 11 has it been argued that the relevant freedoms do not exist in the United Kingdom, and the only questions have been whether there has been a restriction on the freedoms and, if so, whether it has been justified under article 11(2). Each case has been decided against the complaint on the basis either that there has been no interference with the freedoms or that, if there has, it was justified under article 11(2) (the so-called state's "margin of appreciation"): *Chappell v. United Kingdom*, 10 E.H.R.R. 510 and *Anderson v. United Kingdom* [1998] 2 E.H.R.L.R. 218.

In England, the state and the courts recognise and give practical effect to a "right" of peaceful assembly. Peaceful, non-obstructive demonstrations on the highway are in fact permitted. In 1985 the Government declined to extend to static assemblies the power to ban that was provided in respect of processions and marches: see Review of Public Order Law (1985) (Cmnd. 9510), p. 2, para. 1.7, p. 31–32, para. 5.3. In 1994, however, the Criminal Justice and Public Order Act 1994 provided a limited such power by the insertion of section 14A into the Act of 1986. The power provided in section 14A to prohibit trespassory assemblies represents an encroachment, albeit limited, on the right to freedom of assembly. This right has never been absolute and has always been subject to the requirement of good order. By 1994, however, events had largely overtaken the 1985 decision. These included various attempts to defy the exclusion of the public from the Stones at Stonehenge and led to successive annual outbreaks of violence and disorder: see *Chappell v. United Kingdom* and section 19 of the Ancient Monuments and Archaeological Areas Act 1979, as amended by section 33 of and Schedule 4, paragraph 45 to The National Heritage Act 1983.

In any event, such interference with the freedom of peaceful assembly as is caused by a section 14A(2) order is justified under article 11(2) of the Convention. The conditions required to be met before an order under section 14A(1) will issue are entirely compatible with article 11(2): see *Rassemblement jurassien v. Switzerland* (1979) 17 D. & R. 93, 120. [Reference was also made to section 14A(6) of the Act of 1986.]

It is to be observed that, while English law recognises and gives effect to a *right* of peaceful assembly as such, there is no legal *right* to exercise that freedom on the public highway, although commonly that is where assemblies/demonstrations/protests do in fact take place without objection or hindrance.

Fitzgerald Q.C. in reply. As to "judicial legislation," the concept of reasonable user is nothing new but is simply rationalising the law and two conflicting lines of authority. There is no reason why the common law cannot develop it; indeed, Parliament has expressly left the development of these matters to the courts.

There must be some objective evidence to justify an inference that persons may behave unreasonably. If the assembly is not peaceful and non-obstructive and there is evidence that the persons involved are a group of conspirators, that right render the user unreasonable.

Article 11(1) of the Convention guarantees a right of peaceful assembly on the highway. That right can only be restricted in pursuit of a legitimate aim under article 11(2), e.g, for the prevention of disorder or crime, and where restriction is "necessary," i.e., is proportionate to the legitimate aim pursued. If the public's rights of access to a highway include all such uses as are reasonable but not inconsistent with the rights of others to passage, e.g., peaceful assembly, article 11 is complied with in full. If they exclude a right of peaceful assembly, article 11 is not complied with. There is no content to the right given by article 11(1) if the argument for the Director of Public Prosecutions is correct.

Their Lordships took time for consideration.

4 March 1998. LORD IRVINE OF LAIRG L.C. My Lords, this appeal raises an issue of fundamental constitutional importance: what are the limits of the public's rights of access to the public highway? Are these rights so restricted that they preclude in all circumstances any right of peaceful assembly on the public highway?

On 1 June 1995 at about 6.40 p.m. Police Inspector Mackie counted 21 people on the roadside verge of the southern side of the A344, adjacent to the perimeter fence of the monument at Stonehenge. Some were bearing banners with the legends, "Never Again," "Stonehenge Campaign 10 years of Criminal Injustice" and "Free Stonehenge." He concluded that they constituted a "trespassory assembly" and told them so. When asked to move off, many did, but some, including the defendants, Mr. Lloyd and Dr. Jones, were determined to remain and put their rights to the test. They were arrested for taking part in a "trespassory assembly" and convicted by the Salisbury justices on 3 October 1995. Their appeals to the Salisbury Crown Court, however, succeeded. The court held that neither of the defendants, nor any member of their group, was "being destructive, violent, disorderly, threatening a breach of the peace or, on the evidence, doing anything other than reasonably using the highway."

About an hour before, a different group of people had scaled the fence of the monument and entered it. They had been successfully escorted away by police officers without any violence or arrests; but there were no grounds for apprehension that any of the group of which Mr. Lloyd and Dr. Jones were members proposed an incursion into the area of the monument.

An appeal by way of case stated to the Divisional Court [1998] Q.B. 563 followed. It was assumed for the purposes of that appeal (*per* McCowan L.J., at p. 568C) that (a) the grass verge constituted part of the

public highway; and (b) the group was peaceful, did not create an obstruction and did not constitute or cause a public nuisance. A

The defendants had been charged with "trespassory assembly" under section 14B(2) of the Public Order Act 1986 (as inserted by section 70 of the Criminal Justice and Public Order Act 1994). Section 14A(1) (as inserted) of the Act of 1986 permits a chief officer of police to apply, in certain circumstances, to the local council for an order prohibiting for a specified period "trespassory assemblies" within a specified area. An order of that kind may be obtained only in respect of land "to which the public has no right of access or only a limited right of access;" had been obtained in this case; and covered the area in which the defendants, with others, had assembled. B

Section 14A(5) provides:

> "An order prohibiting the holding of trespassory assemblies operates to prohibit any assembly which—(*a*) is held on land to which the public has no right of access or only a limited right of access, and (*b*) takes place in prohibited circumstances, that is to say, without the permission of the occupier of the land or *so as to exceed* the limits of any permission of his or *the limits of the public's right of access.*" (Emphasis added.) C D

Section 14A(5) thus indicates that a "trespassory assembly" must be "trespassory" in the sense that it must involve the commission of the tort of trespass by those taking part, either by entering land to which they have no right of access, or by exceeding a limited right of access to land.

Section 14A(9) provides, inter alia:

> "In this section ... 'limited,' in relation to a right of access by the public to land, means that their use of it is restricted to use for a particular purpose (as in the case of a highway or road) . . ." E

The offence with which the defendants were charged is set out in section 14B(2): "A person who takes part in an assembly which he knows is prohibited by an order under section 14A is guilty of an offence."

The Divisional Court reinstated the defendants' convictions. It held that a peaceful assembly on the public highway exceeds the limits of the public's right of access (within the meaning of section 14A(5)). The "particular purpose" mentioned in the definition of "limited" in section 14A(9) was held not to include the use of the highway for peaceful assembly. F

The central issue in the case thus turns on two interrelated questions: (i) what are the "limits" of the public's right of access to the public highway at common law? and (ii) what is the "particular purpose" for which the public has a right to use the public highway? G

The basis of the Divisional Court's decision

The reasoning underlying the Divisional Court's judgments is not altogether clear. McCowan L.J. stated, at p. 570: H

> "counsel for the defendants ... argued as he did before the Crown Court that any assembly on the highway is lawful as long as it is peaceful and non-obstructive of the highway. This view appears to

A have been accepted by the Crown Court. In my judgment, however, it is mistaken. It leaves out of account the existence of the order made under section 14A and its operation to prohibit the holding of any assembly which occurs to restrict the limited right of access to the highway by the public."

In my judgment that reasoning is circular. There is no suggestion in B the Act of 1986 that the making of any order under section 14A(1) *in itself* defines the limits on the public's right of access to the highway. Rather, the conditions under which it is appropriate to make an order, and the conditions for the breach of such an order, are defined by reference to the *existing* limits upon the public's right of access. In other words, section 14A presupposes limited rights of access; it does not purport to impose such limits.

C Collins J. concluded, at pp. 571–572, that, at common law, an assembly on the highway, however peaceable, exceeds the limits of the public's right of access. This is the conclusion which lies at the heart of the Divisional Court's decision.

In addition, Collins J. rejected the defendants' argument that article 11(1) of the European Convention for the Protection of Human D Rights and Fundamental Freedoms (1953) (Cmd. 8969) requires that there is a *right* of assembly on the public highway (albeit a right which may be subject to restrictions under article 11(2)), as opposed merely to a toleration of assemblies. Collins J. concluded, at p. 574, that the common law conforms with the Convention right of assembly because "The reality is that peaceful and non-obstructive assemblies on the highway are normally permitted."

E Thus in broad terms the basis of the Divisional Court's decision is the proposition that the public's right of access to the public highway is limited to the right to pass and repass, and to do anything incidental or ancillary to that right. Peaceful assembly is not incidental to the right to pass and repass. Thus peaceful assembly exceeds the limits of the public's right of access and so is conduct which fulfils the actus reus of the offence of F "trespassory assembly."

The position at common law

The Divisional Court's decision is founded principally on three authorities. In *Ex parte Lewis* (1888) 21 Q.B.D. 191 the Divisional Court held obiter that there was no public right to occupy Trafalgar Square for the purpose of holding public meetings. However, Wills J., giving the G judgment of the court, had in mind, at p. 197, an assembly "to the detriment of others having equal rights ... in its nature irreconcilable with the right of free passage ..." Such an assembly would probably also amount to a public nuisance, and, today, involve the commission of the offence of obstruction of the public highway contrary to section 137(1) of the Highways Act 1980. Such an assembly would probably also amount to unreasonable user of the highway. It by no means follows that this same H reasoning should apply to a peaceful assembly which causes no obstruction nor any public nuisance.

In *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 the plaintiff had used the public highway, which crossed the defendant's land, for the sole and

deliberate purpose of disrupting grouse-shooting upon the defendant's land, and was forcibly restrained by the defendant's servants from doing so. The plaintiff sued the defendant for assault; and the defendant pleaded justification on the basis that the plaintiff had been trespassing upon the highway. Lord Esher M.R. held, at p. 146:

> "on the ground that the plaintiff was on the highway, the soil of which belonged to the Duke of Rutland, not for the purpose of using it in order to pass and repass, *or for any reasonable or usual mode of using the highway as a highway*, I think he was a trespasser." (Emphasis added.)

Plainly Lord Esher M.R. contemplated that there may be "reasonable or usual" uses of the highway beyond passing and repassing. He continued, at pp. 146–147:

> "Highways are, no doubt, dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser."

Lopes L.J., by contrast, stated the law in more rigid terms, at p. 154:

> "if a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil ..."

Similarly, Kay L.J. stated, at p. 158:

> "the right of the public upon a highway is that of passing and repassing over land the soil of which may be owned by a private person. Using that soil for any other purpose lawful or unlawful is a trespass."

The rigid approach of Lopes and Kay L.JJ. would have some surprising consequences. It would entail that two friends who meet in the street and stop to talk are committing a trespass; so too a group of children playing on the pavement outside their homes; so too charity workers collecting donations; or political activists handing out leaflets; and so too a group of members of the Salvation Army singing hymns and addressing those who gather to listen.

The question to which this appeal gives rise is whether the law today should recognise that the public highway is a public place, on which all manner of reasonable activities may go on. For the reasons I set out below in my judgment it should. Provided these activities are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the primary right of the general public to pass and repass, they should not constitute a

trespass. Subject to these qualifications, therefore, there would be a public right of peaceful assembly on the public highway.

The third authority relied upon by the Divisional Court is the decision of the Court of Appeal in *Hickman v. Maisey* [1900] 1 Q.B. 752. In that case, the defendant, a racing tout, had used a public highway crossing the plaintiff's property for the purpose of observing racehorses being trained on the plaintiff's land. A. L. Smith L.J. expressly followed the approach of Lord Esher M.R. in *Harrison v. Duke of Rutland.* Applying that reasoning, he accepted, at p. 756, that a man resting at the side of the road, or taking a sketch from the highway, would not be a trespasser. The defendant's activities, however, fell outside "an ordinary and reasonable user of the highway" and so amounted to a trespass. Collins L.J. similarly approved Lord Esher M.R.'s approach, noting, at pp. 757–758, that:

> "in modern times a reasonable extension has been given to the use of the highway as such ... The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage."

Romer L.J. was to similar effect, at p. 759.

I do not, therefore, accept that, to be lawful, activities on the highway must fall within a rubric "incidental or ancillary to" the exercise of the right of passage. The meaning of Lord Esher M.R.'s judgment in *Harrison v. Duke of Rutland*, at pp. 146–147, is clear: it is not that a person may use the highway only for passage and repassage and acts incidental or ancillary thereto; it is that any "reasonable and usual" mode of using the highway is lawful, provided it is not inconsistent with the general public's right of passage. I understand Collins L.J.'s acceptance in *Hickman v. Maisey*, at pp. 757–758, of Lord Esher M.R.'s judgment in *Harrison v. Duke of Rutland* in that sense.

To commence from a premise, that the right of passage is the only right which members of the public are entitled to exercise on a highway, is circular: the very question in this appeal is whether the public's right is confined to the right of passage. I conclude that the judgments of Lord Esher M.R. and Collins L.J. are authority for the proposition that the public have the right to use the public highway for such reasonable and usual activities as are consistent with the general public's primary right to use the highway for purposes of passage and repassage.

Nor can I attribute any hard core of meaning to a test which would limit lawful use of the highway to what is incidental or ancillary to the right of passage. In truth very little activity could accurately be described as "ancillary" to passing along the highway: perhaps stopping to tie one's shoe lace, consulting a street-map, or pausing to catch one's breath. But I do not think that such ordinary and usual activities as making a sketch, taking a photograph, handing out leaflets, collecting money for charity, singing carols, playing in a Salvation Army band, children playing a game on the pavement, having a picnic, or reading a book, would qualify. These

examples illustrate that to limit lawful use of the highway to that which is literally "incidental or ancillary" to the right of passage would be to place an unrealistic and unwarranted restriction on commonplace day-to-day activities. The law should not make unlawful what is commonplace and well accepted.

Nor do I accept that the broader modern test which I favour materially realigns the interests of the general public and landowners. It is no more than an exposition of the test Lord Esher M.R. proposed in 1892. It would not permit unreasonable use of the highway, nor use which was obstructive. It would not, therefore, afford carte blanche to squatters or other uninvited visitors. Their activities would almost certainly be unreasonable or obstructive or both. Moreover the test of reasonableness would be strictly applied where narrow highways across private land are concerned, for example, narrow footpaths or bridle-paths, where even a small gathering would be likely to create an obstruction or a nuisance.

Nor do I accept that the "reasonable user" test is tantamount to the assertion of a right to remain, which right can be acquired by express grant, but not by user or dedication. That recognition, however, is in no way inconsistent with the "reasonable user" test. If the right to use the highway extends to reasonable user not inconsistent with the public's right of passage, then the law does recognise (and has at least since Lord Esher M.R.'s judgment in *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 recognised) that the right to use the highway, goes beyond the minimal right to pass and repass. That user may in fact extend, to a limited extent, to roaming about on the highway, or remaining on the highway. But that is not of the essence of the right. That is no more than the scope which the right might in certain circumstances have, but always depending on the facts of the particular case. On a narrow footpath, for example, the right to use the highway would be highly unlikely to extend to a right to remain, since that would almost inevitably be inconsistent with the public's primary right to pass and repass.

A highway may be created either by way of the common law doctrine of dedication and acceptance, or by some statutory provision. Dedication presupposes an intention by the owner of the soil to dedicate the right of passage to the public. Whilst the intention may be expressed, it is more often to be inferred; but the requirement of an inference of an intention to dedicate does not, in my judgment, advance the question of the extent of the public's right of user of the highway. The dedication is for the public's use of the land as a highway and the question remains: what is the proper extent of the public's use of the highway? Given that intention to dedicate is usually inferred, it would be a legal fiction to assert that actual intention was confined to the right to pass and repass and activities incidental or ancillary to that right. There is no room in the judgment of Collins L.J. in *Hickman v. Maisey* [1900] 1 Q.B. 752, 757–758 for the fiction of an immutable, subjective original intention. Neither highway users nor the courts are in any position to ascertain what the landowner's original intentions may have been, years or even centuries after the event. In many cases, where the intention to dedicate is merely inferred from the fact of user as of right, there will not even have been a subjective intention. Nor would it be sensible to hold that the extent of the public's right of user

A should differ from highway to highway, as necessarily it would if actual subjective intention were the test. It is time to recognise that the so-called intention of the landowner is no more than a legal fiction imputed to the landowner by the court.

It would have been possible for the common law to have imposed tight constraints on the public's right of user of the highway in one of two ways. First, it could have held that the right was no wider than the bare B minimum required for the use of the highway as such: a test of necessity. Or, secondly, it could have been held that the right was static, so that a user which could not have been in contemplation as reasonable and usual at the time of dedication could never become a lawful user in changing social circumstances. I have already demonstrated that the former has been rejected. Nor could the latter be sustained. I doubt whether, when a C highway was first dedicated in, say, the early 19th century, a landowner would have contemplated the traversal at very high speed of the land dedicated by vehicles powered by internal combustion engines. The fact is that the common law permits vehicles to be driven at high speed on the highway because that is a reasonable user in modern conditions: it would be a fiction to attribute that to an actual intention at the time of dedication.

D I conclude therefore the law to be that the public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass: within these qualifications there is a public right of peaceful assembly on the highway.

E Since the law confers this public right, I deprecate any attempt artificially to restrict its scope. It must be for the magistrates in every case to decide whether the user of the highway under consideration is both reasonable in the sense defined and not inconsistent with the primary right of the public to pass and repass. In particular, there can be no principled basis for limiting the scope of the right by reference to the subjective intentions of the persons assembling. Once the right to assemble within F the limitations I have defined is accepted, it is self-evident that it cannot be excluded by an intention to exercise it. Provided an assembly is reasonable and non-obstructive, taking into account its size, duration and the nature of the highway on which it takes place, it is irrelevant whether it is premeditated or spontaneous: what matters is its objective nature. To draw a distinction on the basis of anterior intention is in substance to G reintroduce an incidentality requirement. For the reasons I have given, that requirement, properly applied, would make unlawful commonplace activities which are well accepted. Equally, to stipulate in the abstract any maximum size or duration for a lawful assembly would be an unwarranted restriction on the right defined. These judgments are ever ones of fact and degree for the court of trial.

H Further, there can be no basis for distinguishing highways on publicly owned land and privately owned land. The nature of the public's right of use of the highway cannot depend upon whether the owner of the subsoil is a private landowner or a public authority. Any fear, however, that the rights of private landowners might be prejudiced by the right as defined

are unfounded. The law of trespass will continue to protect private landowners against unreasonably large, unreasonably prolonged or unreasonably obstructive assemblies upon these highways.

Finally, I regard the conclusion at which I have arrived as desirable, because it promotes the harmonious development of two separate but related chapters in the common law. It is neither desirable in theory nor acceptable in practice for commonplace activities on the public highway not to count as breaches of the criminal law of wilful obstruction of the highway, yet to count as trespasses (even if intrinsically unlikely to be acted against in the civil law), and therefore form the basis for a finding of trespassory assembly for the purposes of the Act of 1986. A system of law sanctioning these discordant outcomes would not command respect.

Wilful obstruction of the highway

By section 137 of the Act of 1980: "(1) If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence ..." The relevant case law was extensively considered by the Divisional Court in *Hirst v. Chief Constable of West Yorkshire* (1986) 85 Cr.App.R. 143.

The appeal was by animal rights supporters, who had been demonstrating against the use of animal fur both outside and in the doorway of a furrier's shop. They handed out leaflets, held banners and attracted groups of passers-by who blocked the street. The issue whether they were guilty of the statutory offence was held (*per* Glidewell L.J., at pp. 150–151) to turn on three questions: (i) was there an obstruction (with "any stopping on the highway," unless de minimis, counting as an obstruction)? (ii) was the obstruction deliberate? and (iii) was the obstruction without lawful excuse?

The latter question, if the obstruction was not unlawful in itself (as in the case of unlawful picketing), was "to be answered by deciding whether the activity in which the defendant was engaged was or was not a reasonable user of the highway." Glidewell L.J. instanced, at p. 150:

> "what is now relatively commonplace, at least in London and large cities, distributing advertising material or free periodicals outside stations, when people are arriving in the morning. Clearly, that is an obstruction; clearly, it is not incidental to passage up and down the street because the distributors are virtually stationary. The question must be: is it a reasonable use of the highway or not? ... It may be decided that if the activity grows to an extent that it is unreasonable by reason of the space occupied or the duration of time for which it goes on that an offence would be committed, but it is a matter on the facts for the magistrates . . ."

In so holding Glidewell L.J. applied the reasoning of the Divisional Court in *Nagy v. Weston* [1965] 1 W.L.R. 280, where the activity in question, the sale of hot dogs in the street, "could not ... be said to be incidental to the right to pass and repass along the street." The question was one of fact: "whether the activity was or was not reasonable."

I find it satisfactory that there is a symmetry in the law between the

activities on the public highway which may be trespassory and those which may amount to unlawful obstruction of the highway.

Article 11 of the European Convention

If, contrary to my judgment, the common law of trespass is not as clear as I have held it to be, then at least it is uncertain and developing, so that regard should be had to the Convention for the Protection of Human Rights and Fundamental Freedoms in resolving the uncertainty and in determining how it should develop: *Derbyshire County Council v. Times Newspapers Ltd.* [1992] Q.B. 770, *per* Balcombe L.J., at p. 812B–C, and Butler-Sloss L.J., at p. 830A–B; and see *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 283, *per* Lord Goff of Chieveley. Article 11 confers a "right to freedom of peaceful assembly" and then entitles the state to impose restrictions on that right. The effect of the Divisional Court's decision in this case would be that any peaceful assembly on the public highway, no matter how minor or harmless, would involve the commission of the tort of trespass.

Its conclusion is that all peaceful assemblies on the highway are tortious, whilst seeking to justify that state of affairs by observing that peaceful assemblies are in practice usually tolerated. In my judgment it is none to the point that restrictions on the exercise of the right of freedom of assembly may under article 11 be justified where necessary for the protection of the rights and freedoms of others. If the Divisional Court were correct, and an assembly on the public highway always trespassory, then there is not even a prima facie right to assembly on the public highway in our law. Unless the common law recognises that assembly on the public highway *may* be lawful, the right contained in article 11(1) of the Convention is denied. Of course the right may be subject to restrictions (for example, the requirements that user of the highway for purposes of assembly must be reasonable and non-obstructive, and must not contravene the criminal law of wilful obstruction of the highway). But in my judgment our law will not comply with the Convention unless its *starting-point* is that assembly on the highway will not necessarily be unlawful. I reject an approach which entails that such an assembly will always be tortious and therefore unlawful. The fact that the letter of the law may not in practice always be invoked is irrelevant: mere toleration does not secure a fundamental right. Thus, if necessary, I would invoke article 11 to clarify or develop the common law in the terms which I have held it to be; but for the reasons I have given I do not find it necessary to do so. I would therefore allow the appeal.

LORD SLYNN OF HADLEY. My Lords, in section 14A of the Public Order Act 1986 (inserted by section 70 of the Criminal Justice and Public Order Act 1994) Parliament gave a new power of control to local councils and to the police to deal with assemblies of 20 or more persons on land to which the public had a limited right of access or no right of access.

A chief officer of police who reasonably believes that such an assembly is intended to be held and that it is likely to be held without the permission of the occupier of the land, or to conduct itself in such a way as to exceed the public's limited right of access, and to cause significant damage to land

or buildings of historical or archaeological importance, may apply to the council of the district for an order "prohibiting for a specified period the holding of all trespassory assemblies in the district or a part of it, as specified:" section 14A(1). It is thus necessary to show that the land is such that the public has no or only a limited right of access, and

> "'limited,' in relation to a right of access by the public to land, means that their use of it is restricted to *use for a particular purpose (as in the case of a highway or road)*:" section 14A(9) (emphasis added).

With the consent of the Secretary of State the council may then make an order prohibiting such assemblies for a period not exceeding four days and in respect of an area not exceeding five miles from a specified centre. When such an order is made: "A person who takes part in an assembly which he knows is prohibited by an order under section 14A is guilty of an offence:" section 14B(2) (as inserted).

This new offence is thus subject to important conditions being satisfied before prosecutions can be brought—the reasonable belief of the chief officer of police as to the matters specified, the consent of the Secretary of State and the decision of the council to make such an order, but it is plain that Parliament in 1994 was intending to give additional powers to councils and to the police to disperse trespassory assemblies over and above any other remedies (often slower and less effective) which might be available where people trespassed, committed nuisance or were violent.

On 22 May 1995 Salisbury District Council made an order prohibiting the holding of trespassory assemblies within a four-mile radius of Stonehenge for a period from 29 May to 1 June 1995 inclusive.

It is agreed that on 1 June 1995 a group of people were on the grass verge of the A344 road. The group was not fixed or static; people came and went. At about 6.45 p.m. the present defendants were on the verge in a group said by the police to have numbered 21 persons. A police inspector formed the view that this group constituted a prohibited trespassory assembly and they were told to move on. Some apparently did. The two defendants refused and were subsequently charged with the offence under section 14B(2) of the Act. They were convicted by the Salisbury justices but on appeal the Crown Court ruled that there was no case to answer and allowed the appeal.

The Crown Court found that the group, including the defendants, were not "destructive, violent, disorderly, threatening a breach of the peace or, on the evidence, doing anything other than reasonably using the highway." The court further concluded that the group's use of the highway was a "reasonable user" and that the conduct of the defendants and the group as a whole did not exceed the public's right of access to the highway.

The Divisional Court on appeal allowed the appeal and ruled that a peaceful assembly of 20 or more persons on the highway which does not obstruct the highway is still a trespassory assembly for the purposes of section 14B(2). The sole question on the appeal to your Lordships is thus whether the public has the right of access to the highway in order to assemble there when it does not at the time obstruct the highway and when those present are not violent and are not threatening a breach of the peace.

A It cannot, of course, be said that the public has no right of access to the highway; it is not suggested that the public's right of access is absolute. The question is what are the limits to the right (not, it should be noted, the practice) of the public to use or be on the highway. For this purpose it is not necessary to distinguish between "highway" and "road" since the definition of "limited" includes both, though no issue has been raised that the place where the defendants were was not a highway. I assume that it B was and that as such the public had some right of access to it.

It is necessary to remember when considering this case that both at common law and by the Highways Act 1980 the public have an analogous right of way over bridleways and footpaths. It is not, however, necessary in this case to consider the case of a private road or other place where the permission of the occupier is needed and where additional factors may C need to be taken into account, but the arguments here have implications in principle for both.

It is hardly surprising that the public's rights of access to and use of the highway have been considered on previous occasions by the courts though in different contexts. As I see it the essential feature of the public's right was explained in the judgment of Lopes L.J., with whom in substance Kay L.J. agreed, in *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142. D Lopes L.J. said, at p. 152: "The interest of the public in a highway consists solely in the right of passage . . ." He quotes, at p. 153, Crompton J. in *Reg. v. Pratt* (1855) 4 E. & B. 860, 868–869 who said:

> ". . . I take it to be clear law that, if a man use the land over which there is a right of way for any purpose, lawful or unlawful, other than that of passing and repassing, he is a trespasser." E

Lopes L.J. added: "I do not think the language used by the learned judges in that case too large or that it in any way imperils the legitimate use of highways by the public." He said, at p. 154:

> "The conclusion which I draw from the authorities is that, if a person uses the soil of the highway for any purpose other than that F in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has, subject to this easement, precisely the same estate in the soil as he had previously to any easement being acquired by the public." G

Thus the core right is to pass and to repass although I do not think that Lopes L.J. would have said that uses incidental to passing and repassing—stopping to adjust a bridle or to repair a carriage wheel—would have constituted a trespass. Lord Esher M.R. was more specific. He said, at p. 146:

H
> "on the ground that the plaintiff was on the highway, the soil of which belonged to the Duke of Rutland, not for the purpose of using it in order to pass and repass, or for any reasonable or usual mode of using the highway as a highway, I think he was a trespasser."

He added, at pp. 146–147, that if the language of Erle J. and Crompton J. were construed too largely the effect might be to interfere

> "with the universal usage as regards highways in this country in a way which would be mischievous, and would derogate from the reasonable exercise of the rights of the public. Construed too strictly, it might imply that the public could do absolutely nothing but pass or repass on the highway, and that to do anything else whatever upon it would be a trespass. I do not think that is so. Highways are, no doubt, dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser."

It does not seem to me that his words "any reasonable or usual mode of using the highway as a highway" or "a reasonable and usual mode of using a highway *as such*" (emphasis added) were intended to include acts done by people who were not in the ordinary sense of the term "passing and repassing along the highway." This is how A. L. Smith L.J. appears to have read Lord Esher M.R. in his judgment in *Hickman v. Maisey* [1900] 1 Q.B. 752, 755–756. He then said: "I quite agree with what Lord Esher M.R. said in *Harrison v. Duke of Rutland*, though I think it is a *slight* extension of the rule as previously stated ..." (Emphasis added.) He accepted that for a man to stop to rest or to take a sketch in the highway would not be considered an act of trespass but he continued:

> ". . . I cannot agree with the contention of the defendant's counsel that the acts which this defendant did, not really for the purpose of using the highway as such, but for the purpose of carrying on his business as a racing tout to the detriment of the plaintiff by watching the trials of racehorses on the plaintiff's land, were within such an ordinary and reasonable user of the highway as I have mentioned."

Collins L.J. said, at pp. 757–758:

> "The question must in the last resort be whether what the defendant did after he got upon the highway comes within the ordinary and reasonable use of the highway *as a highway,* that is, for the purpose for which it is dedicated to the public. Now primarily the purpose for which the highway is dedicated is that of passage, as is shown by the case of *Dovaston v. Payne* (1795) 2 H.Bl. 527; and, although in modern times a reasonable extension has been given to the use of the highway as such, the authorities show that the primary purpose of the dedication must always be kept in view. The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage." (Emphasis added.)

A It seems to me that Collins L.J. is saying no more than that developments which were incidental to the right of passage might be accepted as falling within the public's right of limited access to the highway.

That ruling as to the law had already been reflected in two cases involving specifically the holding of public meetings in Trafalgar Square. Thus in *Reg. v. Graham* (1888) 16 Cox C.C. 420, 429–430 Charles J., rejecting the claim that there was a right of public meeting in Trafalgar B Square or any other thoroughfare, said:

> "So far as I know the law of England, the use of public thoroughfares is for people to pass and repass along them. That is the purpose for which they are, as we say, dedicated by the owner of them for the use of the public, and they are not dedicated to the public use for any other purpose that I know of than for the purpose of passing and C repassing ..."

Similarly, in *Ex parte Lewis,* 21 Q.B.D. 191, 197, Wills J. said that a public right of passage is a "right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance."

D It was reflected subsequently in *Randall v. Tarrant* [1955] 1 W.L.R. 255 where Sir Raymond Evershed M.R. said, at p. 259:

> "The rights of members of the public to use the highway are, prima facie, rights of passage to and from places which the highway adjoins; but equally clearly it is not a user of the highway beyond what is legitimate if, for some purposes, a driver of a vehicle pauses from time to time on the highway. Nobody would suggest to the contrary. On E the other hand, it is well established that a highway must not be used in quite a different manner from passage along it and the pretext of walking up and down along it will not legitimise such a use."

and in *Clerk & Lindsell on Torts*, 17th ed. (1995), p. 861, para. 17-41:

> "The right of the public in respect of a highway is limited to the use F of it for the purpose of passing and repassing and for such other reasonable purposes as it is usual to use the highway; if a member of the public uses it for any other purpose than that of passing and repassing he will be a trespasser."

The right of assembly, of demonstration, is of great importance but in G English law it is not an absolute right which requires all limitations on other rights to be set aside or ignored.

These cases, in limiting or linking rights of user by the public of the highway to passage or repassage, in themselves exclude a right to stay on the highway other than for purposes connected with such passage, but they are to be read with cases of wider application which reject the possibility of a right of staying on or wandering over land being acquired by user or H prescription. See, for example, *Attorney-General v. Antrobus* [1905] 2 Ch. 188, where a claim of a right for the public to visit Stonehenge acquired by user was rejected, and in *In re Ellenborough Park* [1956] Ch. 131 where a claim that the public had acquired a right to wander in a pleasure park

was asserted. In the latter case, Sir Raymond Evershed M.R. said, at p. 184:

> "There is no doubt, in our judgment, but that *Attorney-General v. Antrobus* was rightly decided; for no such right can be granted (otherwise than by statute) to the public at large to wander at will over an undefined open space, nor can the public acquire such a right by prescription."

On existing authority, I consider that the law is clear. The right is restricted to passage and reasonable incidental uses associated with passage.

It seemed to be suggested or at least implicit in argument that demonstrations and assemblies are a new development of the late 20th century and cannot have been in the mind of judges when they defined the law in the 19th century and even as late as Sir Raymond Evershed M.R.'s judgment to which I have referred. This is plainly wrong as the two Trafalgar Square cases (and 19th century descriptions of contemporary conditions) show, even though the extent, nature, size and object of such demonstrations and assemblies have changed. I am willing to assume that more people are now more conscious of the importance of assembly and demonstration than they were in previous centuries, but I do not see that this in itself is enough to justify changing the nature and scope of the public's right to use the highway. That it cannot in itself justify as of right assemblies or demonstrations on private land is obvious. The defendants' argument in effect involves giving to members of the public the right to wander over or to stay on land for such a period and in such numbers as they choose so long as they are peaceable, not obstructive, and not committing a nuisance. It is a contention which goes far beyond anything which can be described as incidental or ancillary to the use of a highway as such for the purposes of passage; nor does such an extensive use in my view constitute a reasonable, normal or usual use of the highway as a highway. If the defendants' claim is right, it seems to me to follow that other uses of the highway than assembly would be permitted—squatting, putting up a tent, selling and buying food or drinks—so long as they did not amount to an obstruction or a nuisance. To get over the fence from adjoining land (as could have happened here) and to sit or stand on the highway, including the verge, in order to demonstrate does not seem to me to be a normal or usual use of the highway as such and has nothing to do with passing and repassing.

The fact that the purpose of the demonstration or assembly is one which most or many people would approve does not change what is otherwise a trespass into a legal right. Nor does the fact that an assembly is peaceful or unlikely to result in violence, or that it is not causing an obstruction at the particular time when the police intervene, in itself change what is otherwise a trespass into a legal right of access.

It is objected that very often people on the highway singly or in groups take part in activities which go beyond passage and repassage and are not stopped. That is no doubt so, but reasonable tolerance does not create a new right to use the highway and indeed may make it unnecessary to create such a right which in its wider definition goes far beyond what is justified or needed. It may well be in the situation with which your

Lordships are concerned that, but for section 14 of the Act of 1986, nothing would have been done to a peaceful non-obstructive group like the one in which the defendants took part. But Parliament in 1994 has enabled action to be taken over and above existing remedies to deal with trespass on the highway, or on land for entry on which the landowner's permission is required, to deal with what was seen as a growing problem. If Parliament wants to take away that form of control, it can obviously do so. I do not consider that disapproval of this near statutory power justifies a change in the law by the courts as to the public's rights over the highway, which is what at times seemed to be one of the bases of the defendants' arguments.

Reference was made to cases such as *Lowdens v. Keaveney* [1903] 2 I.R. 82; *Hirst v. Chief Constable of West Yorkshire*, 85 Cr.App.R. 143 (under section 137(1) of the Act of 1980); *Nagy v. Weston* [1965] 1 W.L.R. 280 and *Hubbard v. Pitt* [1976] Q.B. 142, which concern wilful obstruction of the passage along a highway without reasonable excuse. That is a different question from the one raised in the present case and I do not consider that the passages relied on from those judgments directly assist in answering it.

Reference was also made to the European Convention for the Protection of Human Rights and Fundamental Freedoms, not, of course, as in itself governing the legal position in the United Kingdom, but as indicating what our law should now be. It is desirable to look at the Convention for guidance even at the present time, but this is not a case in my opinion where there is any statutory ambiguity to be resolved or any doubt as to what the common law is: see *per* Butler-Sloss L.J. in *Derbyshire County Council v. Times Newspapers Ltd.* [1992] Q.B. 770, 830. In any event, I am not satisfied that the existing law on highways is necessarily in conflict with article 11 of the Convention providing for a right of assembly, or of article 10 relating to freedom of expression. Both provide for exceptions to the rights created. I accept that it is arguable that a restriction on assembly even on the highway may interfere with the right of assembly in some situations, as the decisions of the European Court of Human Rights, which have been referred to, show, but I am not satisfied that there was here such a violation either by the law relating to access to the highway as it stands, or in its application to the facts of this case, which should compel us to change the law as I believe it to be.

It follows in my view that the Crown Court deciding essentially that what happened was a reasonable use of the highway erred in law and that the Divisional Court was right in the result to reverse their decision. The justices who heard the case through were entitled to find that there had been a trespassory assembly.

The question certified in essence asks whether the lack of obstruction prevents an assembly of 20 or more persons on the highway from being a trespassory assembly. I would answer that in the negative. Put in the way in which the question is framed, i.e. whether such an assembly where there is no obstruction does exceed the public right of access to the highway so as to constitute a trespassory assembly contrary to section 14A of the Act of 1986, I would answer in the affirmative.

I would accordingly dismiss the appeal.

LORD HOPE OF CRAIGHEAD. My Lords, the point which is at issue in this appeal arises out of an incident which took place on 1 June 1995 on the grass verge of the A344 road beside the perimeter fence of the monument at Stonehenge. It relates to the extent of the use which members of the public are entitled to make of a highway in the exercise of the public's right of access to it. The question is whether members of the public who join together to form a peaceful, non-obstructive assembly upon the highway, their purpose being not to pass along the road but to remain in the place where they have gathered for such time as they choose to remain there, are acting in such a way as to exceed their public right of access to the highway.

On 22 May 1995 Salisbury District Council made an order under section 14A(2) of the Public Order Act 1986, as inserted by the Criminal Justice and Public Order Act 1994, prohibiting the holding of all trespassory assemblies within a radius of four miles from the junction of the A303 and A344 roads adjoining Stonehenge from 2359 hours on Sunday, 28 May 1995 until 2359 hours on Thursday, 1 June 1995. At about 6.40 p.m. on 1 June 1995 the defendants had gathered with others on the grass verge of the perimeter fence to the west of the Heelstone. They were spread out along the verge, which was about five feet wide, over a distance of about 10 to 15 yards. The conduct of the group was entirely peaceful. No obstruction was being caused to anybody who wished to use the highway. No member of the group was on the roadway, and nobody was abusive, offensive or violent to the police or anybody else in any way. There had been some movement, as people joined the group and others left it during the afternoon and those who were on the verge moved around. But the group was in the nature of an assembly, not a procession. Its members were not pausing for conversation, rest or refreshment while passing along the highway. They had taken up a position upon it in a place where they proposed to stay for the time being. It can be assumed that they did so because they believed they had a right to be there.

A police officer who was at the scene formed the view, after counting its members, that this was an assembly of 20 or more persons and that it was a trespassory assembly which had been prohibited by the order made under section 14A. He informed those present of the terms of the order and at about 6.45 p.m. he instructed them to move on. Most of those who were present complied with this instruction. But the defendants refused to do so, and just after 7 p.m. they were arrested on the ground that they were committing an offence under section 14B of the Act by taking part in an assembly which they knew was prohibited by an order under section 14A. They were tried before the Salisbury magistrates and convicted of an offence under section 14B(2). They appealed against their convictions to the Salisbury Crown Court, which allowed their appeals on the ground that the group's user of the highway was a reasonable one which did not exceed the public's right of access. This decision was reversed when the case came before a Divisional Court of the Queen's Bench Division [1998] Q.B. 563 on the ground that the public's right of access to the highway was limited to a right of passage and that an assembly, although peaceful and non-obstructive, could not be said to be on the highway in the exercise of that right. McCowan L.J. rejected, at p. 570, the suggestion that the

holding of an assembly of 21 persons was incidental to the right of passage and repassage. Collins L.J. said, at p. 571H, that the holding of a meeting, demonstration or vigil on the highway, however peaceable, has nothing to do with the right of passage.

The case has obvious implications for the relationship between the criminal law and the right of peaceful assembly under article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as it arises out of a prosecution brought under the Act of 1986. But the problem which it has raised seems to me to depend for its answer upon an application of the principles which are to be found in the law of real property and landownership. This is because of the words which section 70 of the Act of 1994 has used to define what it describes as a trespassory assembly. Section 14A(5), which it has inserted into Part II of the Act of 1986, states:

> "An order prohibiting the holding of trespassory assemblies operates to prohibit any assembly which—(*a*) is held on land to which the public has no right of access or only a limited right of access, and (*b*) takes place in the prohibited circumstances, that is to say, without the permission of the occupier of the land or so as to exceed the limits of any permission of his or the limits of the public's right of access."

"Assembly" for this purpose means an assembly of 20 or more persons, and "land" means land in the open air: see subsection (9). The word "limited" is defined by subsection (9) in these terms:

> " 'limited,' in relation to a right of access by the public to land, means that their use of it is restricted to use for a particular purpose (as in the case of a highway or road) or is subject to other restrictions."

This section may be contrasted with section 14 of the Act of 1986 which deals with the imposition of conditions on public assemblies. Section 16 defines "public assembly" as "an assembly of 20 or more persons in a public place which is wholly or partly open to the air." It defines "public place" for this purpose as meaning any highway and any place to which the public or any section of it has access, on payment or otherwise, as of right or by virtue of express or implied permission. The technique which section 14 uses to enable the police to control assemblies of this kind is that of enabling the police to impose conditions on the place where it may be held, its numbers and its duration. A person who knowingly fails to comply with any of these conditions commits an offence. The assumption is that, so long as the conditions are complied with, a public assembly in a public place is lawful and that the police have no power to require its members to disperse.

The technique which section 14A uses is entirely different. It brings into the arena of the criminal law the rights, if any, which the public have as against the occupier of the land in private law. It does so by enabling the police to take action against those taking part in an assembly if the occupier of the land would be entitled to treat the assembly as trespassing on his land. But the police may exercise their powers independently of the occupier, whose knowledge of or consent to the action which they are

taking is not required. It is sufficient that an order under section 14A is in force for the time being and that the assembly is within the area to which it applies.

In this situation it is necessary first to identify the extent of the public's right of access to a highway before looking more broadly at the human rights issues which this case has raised. Mr. Fitzgerald for the defendants accepted that the public's right of access was a limited one, and he did not suggest that there was any relevant distinction in this regard between a "road" and a "highway." The definition of "limited" in section 14A(9) uses both expressions. At common law the expression "highway" includes all ways to which the public have access, from footpaths and bridleways to carriageways. It may therefore be said to include a "road," and in particular a road such as the A344 the solum of which is vested in the statutory highway authority.

The most important point to note about these expressions is their generality. The certified question refers to "*the public* highway" (emphasis added). The use of the definite article and the addition of the adjective "public" suggest that a distinction can be drawn between those highways which are public and those which are not. But section 14A(9) refers simply to "a highway." In doing so it follows the wording used in other statutes to which I shall refer later. It also follows the common law, which uses the word "highway" to describe a place to which the public have access in order to exercise the public right. All highways are in that sense "public." The only distinction which might relevantly be drawn is that the land over which a highway passes is not always vested in a public authority. But it has not been suggested that the right of access is different according to the public or private character of the landowner. The conclusions which I would draw from this are that the addition of the word "public" is tautologous, and that anything which we may say about the limits of the public right of access to a highway must be taken, in law, to apply to each and every highway.

The next point is that no question arises in this case as to the limits of any permission given by the occupier. But it is worth noting that section 14A(5), by treating an assembly which exceeds the limits of such permission as a trespassory assembly, is relying for its application on a matter which the law would normally be content to leave to the discretion of the occupier. The same may also be said of cases where the assembly is held on land to which the public have a right of access which is limited. The law would normally be content to leave it to the occupier to intervene if any members of the public were acting in a way which exceeded the limits of the public right. Although the right to complain that there is a trespass has been taken out of the hands of the occupier and placed at the disposal of the police by section 14A, the extent of these limits must nevertheless be found in the relationship in private law between the public and the occupier.

It may be convenient to begin an examination of this subject with some general statements. A highway is a way over which there is a public right of way. A public right of way is similar to but not in all respects the same as an easement of way. The right is exercisable by anyone whether he owns land or not, whereas an easement is a right exercisable by the owner of

land for the time being by virtue of his estate in the land of which he is the dominant proprietor. There are other differences. But a public right of way closely resembles an easement of way in regard to the nature of the user from which its creation may be inferred and the nature of the use which may be made of it. *Halsbury's Laws of England*, 4th ed. reissue, vol. 21 (1995), pp. 77–78, para. 110, states that it is a right to pass along a highway for the purpose of legitimate travel, not to be on it, except so far as the public's presence is attributable to a reasonable and proper use of it as such. In the same volume, p. 9, para. 1, it is stated that a highway is a way over which there exists a public right of passage, that is to say a right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance. In *Megarry & Wade, The Law of Real Property*, 5th ed. (1984), p. 844 it is stated:

> "The land over which a public right of way exists is known as a highway; and although most highways have been made up into roads, and most easements of way exist over footpaths, the presence or absence of a made road has nothing to do with the distinction. There may be a highway over a footpath, while a well made road may be subject only to an easement of way, or may exist only for the landowner's benefit and be subject to no easement at all."

In *Clerk & Lindsell on Torts*, 17th ed., p. 861, para. 17-41 the current state of the law as to the question of use is summarised in these terms:

> "The right of the public in respect of a highway is limited to the use of it for the purpose of passing and repassing and for such other reasonable purposes as it is usual to use the highway; if a member of the public uses it for any other purpose than that of passing and repassing he will be a trespasser."

The law of Scotland, which is relevant to this case as section 14A applies also to Scotland (section 42(2)), is the same on the question as to the use which may be made of the public right. In *Rankine, The Law of Land-ownership in Scotland*, 4th ed. (1909), p. 325 it is stated that the definition of a highway in English law as "a right of passage in general to all the King's subjects" applies also to Scotland. At p. 327 it is observed that "the public right of passage, called a highway" is regarded as a limitation or restriction on the landowner's use of his property. In *Wills' Trustees v. Cairngorm Canoeing and Sailing School Ltd.*, 1976 S.C.(H.L.) 30, 125 Lord Wilberforce said: "A public right of way on highways is established by use over the land of a proprietor . . ."

But it is worth nothing that there are some important differences between the law of Scotland and the law of England as to the constitution of the right. I think that it is right to mention this, because Scots law does not regard the assertion that actual intention is confined to the right to pass and repass and to activities incidental or ancillary to that right as a legal fiction. This is regarded in Scotland as a matter of fact which requires to be established by the evidence. The differences between the laws of the two countries on this matter were discussed in *Mann v. Brodie* (1885) 10 App.Cas. 378. Lord Blackburn observed, at p. 385, that any reference to the law of England in that case, which was to be governed by the law

of Scotland, was apt to mislead unless the difference of the law of the two countries was borne in mind. He pointed out, at p. 386, that, although in both countries a right of public way may be acquired by prescription, it was in England never practically necessary to rely on prescription to establish a public way. It was enough that there was evidence on which those who had to find the fact might find that there was a dedication by the owner whoever he was. Lord Watson said, at pp. 390–391, that the constitution of such a right according to the law of Scotland does not depend upon any legal fiction, but upon the fact of user by the public, as matter of right, continuously and without interruption, for the full period of the long prescription. There are many examples in the Scottish authorities of cases where the parties have joined issue on the question whether the evidence of user was sufficient to establish this fact: e.g. *Duke of Atholl v. Torrie* (1850) 12 D. 328, affirmed (1852) 1 Macq. 65; *Macpherson v. Scottish Rights of Way and Recreation Society Ltd.* (1888) 13 App.Cas. 744. As *Rankine*, pp. 329–330, puts it: "The books are rich in illustrations of this matter, for no actions have been more obstinately fought out than cases of right of way."

The statutes which make provision as regards highways in England and Wales and as regards roads in Scotland follow the approach of the common law as to the nature of the public right of access. Section 328(1) of the Highways Act 1980 provides that in that Act, except where the context otherwise requires, "highway" means the whole or part of a highway other than a ferry or waterway. Section 329(1) defines "bridleway," "carriageway," "footpath" and "footway" respectively as meaning a way over which the public have a right of way on horseback, for the passage of vehicles or on foot only, as the case may be. As the term "highway" is not itself defined, it is necessary to apply the common law meaning of the word as a way over which members of the public have a right to pass and repass. Section 151(1) of the Roads (Scotland) Act 1984 is more explicit on this point. It defines "road" as meaning any way over which there is a public right of passage by whatever means. From this it follows that it is not possible to draw any relevant distinction as regards the nature of the public right of access between a highway which passes over land which is in private ownership and a highway which is vested in the statutory highway or roads authority.

It seems that at one time the extent of the right of passage was stated more narrowly than appears from the current textbooks. In *Ex parte Lewis*, 21 Q.B.D. 191 it was held that there was no right in the public to occupy Trafalgar Square for the purpose of holding public meetings there. Wills J. said, at p. 197:

> "The only 'dedication' in the legal sense that we are aware of is that of a public right of passage, of which the legal description is a 'right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance.' A claim on the part of persons so minded to assemble in any numbers, and for so long a time as they please to remain assembled, upon a highway, to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage, and there is, so far as we have been able to ascertain, no authority whatever in favour of it."

In *Reg. v. Graham,* 16 Cox C.C. 420, 429–430 Charles J. addressed the jury in these terms:

> "I have anxiously considered the observations of Mr. Asquith" —counsel for the defendant Graham—"and I can find no warrant for telling you that there is a right of public meeting either in Trafalgar Square or any other public thoroughfare. So far as I know the law of England, the use of public thoroughfares is for people to pass and repass along them. That is the purpose for which they are, as we say, dedicated by the owner of them to the use of the public, and they are not dedicated to the public use for any other purpose that I know of than for the purpose of passing and repassing; and, if you come to regard Trafalgar Square as a place of public resort simply, it seems to me it would be very analogous to the case of public thoroughfares . . ."

In *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142, 152 Lopes L.J. said that the interest of the public in a highway consisted solely in the right of passage. He went on to say, at p. 154:

> "The conclusion which I draw from the authorities is that, if a person uses the soil of a highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has, subject to this easement, precisely the same estate in the soil as he had previously to any easement being acquired by the public."

Kay L.J., at p. 158, was to the same effect. He said that the right of the public upon a highway is that of passing and repassing over the land the soil of which may be owned by a private person, and that using the land for any other purpose lawful or unlawful was a trespass.

I note in passing that he also made the point that, for trespass, the purpose need not be unlawful in itself, it being enough that it should be a user of the soil for a purpose other than that which is the proper use of a highway, namely that of passing and repassing along it. These observations seem to me to be directly in point in the present case. On this approach it would not matter in the least whether the assembly was or was not a peaceful one or whether or not it was causing an obstruction to anyone. The motives or behaviour of those who constitute the assembly are irrelevant to the question whether there is a trespass. The mere fact that it was a use of the soil for a purpose other than that of passing or repassing along the highway would be enough to make it a trespassory assembly.

But the strict approach indicated by the earlier authorities was departed from by Lord Esher M.R. in the same case. He observed, at p. 146, that, if the proposition that the use of the highway for any purpose, lawful or unlawful, other than that of passing or repassing was a trespass were to be construed too largely, the effect might be to interfere with the universal usage as regards highways in a way which would derogate from the

reasonable exercise of the rights of the public. He went on to give this explanation, at pp. 146–147:

> "Construed too strictly, it might imply that the public could do absolutely nothing but pass or repass on the highway, and that to do anything else whatever upon it would be a trespass. I do not think that is so. Highways are, no doubt, dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway *as such*. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser." (Emphasis added.)

In *Hickman v. Maisey* [1900] 1 Q.B. 752, 755 A. L. Smith L.J. said that he agreed with what Lord Esher M.R. said in *Harrison v. Duke of Rutland*, although he thought that it was a slight extension of the rule as previously stated which showed that the right of the public was merely to pass and repass along the highway. He gave, at p. 756, as examples of acts which no reasonable person would regard as trespassing, that of a man who sat down by the road for a time to rest himself or who took a sketch from the highway—of which the modern equivalent might be the tourist who pauses to take a photograph. But it is important to notice that the distinction which he drew was between acts which were an ordinary and reasonable use of the highway as such, which were permissible, and acts which were not within that description, which were not. Collins L.J. put the matter in this way, at pp. 757–758:

> "The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage. This is in effect what Lord Esher M.R. said in *Harrison v. Duke of Rutland*."

While therefore Lord Esher M.R. may be said to have extended the previous statements of the law, the extension which he was willing to accept did not depart from the essential principle. The test of what is ordinary and reasonable is not to be applied in the abstract, as one may legitimately do in order to discover whether the activity is in itself lawful. It has to be applied in the context of the exercise of the right of passage, which is the only right which members of the public are entitled to exercise when "using the highway *as a highway*" (emphasis added): see his words at p. 146. So the question remains whether what is being done is an ordinary and reasonable thing for a person to do while using the highway as such in the exercise of that right.

Some of the cases indicate a disinclination on the part of the judges to favour resort to the courts for a remedy in cases where the trespass was so trivial or technical that no reasonable person would have objected to it: *Llandudno Urban District Council v. Woods* [1899] 2 Ch. 705, where the

objection was to a clergyman holding services and delivering addresses on the seashore; *Fielden v. Cox* (1906) 22 T.L.R. 411, where the defendants had set up appliances on the highway for the purpose of catching moths. But the fact that some activities on the highway are or ought to be tolerated does not mean that they are being done there in the exercise of the public's right of access to it. It is the extent of the right of access, not the question whether the activity in question ought to be tolerated, which is in issue in the present case. For the purposes of section 14A(5) the question is not whether the assembly is of a kind which a reasonable occupier of the land would tolerate, but whether it exceeds the limits of any permission of his or the limits of the public's right of access.

We were referred to a number of later authorities, but these seem to me to be illustrations of the application of the law as settled by these previous cases and not to indicate that the law is in need of any further extension or relaxation as to the test to be applied. For example, in *Randall v. Tarrant* [1955] 1 W.L.R. 255, 259 Sir Raymond Evershed M.R. said:

> "The rights of members of the public to use a highway are, prima facie, rights of passage to and from places which the highway adjoins; but equally clearly it is not a user of the highway beyond what is legitimate if, for some purposes, a driver of a vehicle pauses from time to time on the highway. Nobody would suggest to the contrary. On the other hand, it is well established that a highway must not be used in quite a different manner from passage along it and the pretext of walking up and down along it will not legitimise such a use."

These observations are consistent with the opinion which the Lord President (Lord Dunedin) expressed in *M'Ara v. Magistrates of Edinburgh*, 1913 S.C. 1059. The question in that case was whether the magistrates were entitled to issue a proclamation ordering that "persons shall not assemble or congregate or hold meetings" in certain streets of the city unless they had been licensed to do so. It was held that they had no power to do so either under the Act of 1606, c. 17, for staying unlawful conventions or at common law. As the Lord President explained, at pp. 1074–1075, they had power by means of the police to move the people on if they were causing an obstruction or their conduct was such as to be likely to amount to a breach of the peace. What they could not do without statutory authority was to create an offence and impose penalties. (It should be noted that the Lord President was referring here to the magistrates not as judges—not as a tribunal of fact of that kind—but as members of the town council, with the power at common law by means of the police—and by proclamation, if necessary—of moving on people who were causing an obstruction. The Lord President said, as to the limits of the public right of access, at p. 1073:

> "As regards the common law, I wish most distinctly to state it as my opinion that the primary and overruling object for which streets exist is passage. The streets are public, but they are public for passage, and there is no such thing as a right in the public to hold meetings as such in the streets."

He went on to say that, although the streets are for passage and that passage is paramount to everything else, this does not necessarily mean

that anyone is doing an illegal act if he is not at the moment passing along—the whole question being one of degree. As for the right of free speech, he said that it undoubtedly exists but that: "the right of free speech is a perfectly separate thing from the question of the place where that right is to be exercised." I think therefore that the law as stated by Lord Esher M.R. in *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 can be taken to be the law as it must be applied between members of the public who seek to exercise the public's right of way on a highway and the occupier of the land which has been dedicated to that right. The question is one of degree. But the principle which must be applied is that the highway is for passage, and such other uses as may be made of it as of right must be capable of being recognised as a reasonable and usual mode of using the highway as such.

This brings me to the wider questions which were raised in the course of the argument. Mr. Fitzgerald's submission was that the assembly in this case was a reasonable use of the highway because it was an entirely peaceful one and because it was not obstructing anybody. His argument was that this was a reasonable use of the highway, not because it was incidental or accessory to the activity of passing and repassing along it, but because as a purpose and end in itself it was reasonable. He said that the test which had been stated by Lord Esher M.R. was capable of development to bring it into line with what society in the late 20th century would consider to be reasonable. In order to strike a fair balance between the rights to freedom of expression and of assembly and the rights of those who wished to pass and repass on the highway, an assembly which was causing an obstruction could not be considered to be reasonable. But an assembly which was not obstructive and was otherwise lawful was a reasonable and usual use of the highway simply because the activity was in itself a reasonable one. So it should not be regarded as a trespassory assembly within the meaning of section 14A.

I do not think that this broad argument can be reconciled with Lord Esher M.R.'s statement of the law or with principle. In my opinion the distinction between the use of a highway for passage and its use as a place of assembly as an end in itself is a fundamental one, although the question is ultimately one of fact. The purpose of those who are said to have formed an assembly may be to remain in the place where they have gathered for a short time only before continuing to pass along the road, in which case it may be inferred that they are making reasonable use of the highway as a highway. Or it may be that their purpose to remain there indefinitely, in which case the only inference which can be drawn is that they are using the highway as a place of assembly. This point that the right is to pass or repass, not to remain, is perhaps best illustrated by using the language which Farwell J. adopted in *Attorney-General v. Antrobus* [1905] 2 Ch. 188 when he was asking himself whether the public could acquire by user the right to visit a public monument.

In that case also, as it happens, Stonehenge was the subject of the controversy—although in rather different circumstances, as the monument was then in private ownership. The owner of the land had enclosed the monument by fencing on the view that this was necessary for its protection. The Attorney-General wished to remove the fencing in order to keep the

A place open so that the public could visit it. The action failed, because there could be no public right of way to the monument acquired by mere user or by the fact that the public had been in the habit of visiting it. Farwell J. said, at p. 198, that the jus spatiandi—the right to walk about or to promenade—was not known to our law as a possible subject matter of prescription. He said, at p. 206, that the public had no jus spatiandi or manendi—the right to stay or remain—within the circle. In *In re Ellenborough Park* [1956] Ch. 131, in which it was held that the jus spatiandi, in regard to a right to use a pleasure park, could be acquired by grant as an easement, Sir Raymond Evershed M.R. observed, at p. 163, that Farwell J.'s rejection of it may have been derived in part from its similar rejection by the law of Rome, and that there was no other judicial authority for adopting the Roman view in this respect into English law. But as to the matter of public right he went on to say, at p. 184:

> "There is no doubt, in our judgment, but that *Attorney-General v. Antrobus* was rightly decided; for no such right can be granted (otherwise than by statute) to the public at large to wander at will over an undefined open space, nor can the public acquire such a right by prescription."

Although the use of these Latin words may seem out of date in present circumstances, they serve nevertheless as a valuable reminder of the place which the right to assemble must occupy in the context of the law relating to real property. Easements and public rights to land which are acquired by user or by dedication are limited rights, as against the occupier or owner of the land which is affected by them. They are granted or acquired for a particular purpose only, and they are not to be confused with the use of the land for other purposes. Thus a right of way or passage is entirely different from a right to walk about or a right to remain in one place. The law recognises that a right of way or passage may be acquired by user or by dedication. But it takes a different view of the right to walk about or to remain in one place. These are not rights which the public can acquire by user or by dedication. If rights of this kind can be acquired at all they can be acquired only by express grant. So they cannot be included among the rights of access which the public can enjoy as of right without the consent of the landowner.

The assembly which was said by the police to have formed on this occasion was undoubtedly a peaceful and non-obstructive one and, as it was on the grass verge of a road which was vested in the statutory highway authority, it may reasonably be said to have been doing no harm to anybody. But the consequences of accepting that anyone who was behaving in this way was exercising the public's right of access to the highway—was doing so as of right and not by mere tolerance—would have implications far beyond the facts of this case. It would affect the position of every private owner of land throughout the country over which there is a public right of way, irrespective of whether this is a made-up road or a footpath or bridleway. The right of assembly which Mr. Fitzgerald was seeking to establish was what would be described in the terms of property law as a right to remain. I wish to stress that the purpose for which the defendants were seeking to remain where they had gathered is not material in this

context. Any member of the public may use a highway for passage in the exercise of the public right whatever his reason may be for doing so. In the same way, if such a thing as a public right to assemble and remain in one place on the highway were to be recognised, the purpose of those who wished to exercise it would be immaterial. If it was an unlawful purpose it could be stopped on that ground. But if it was lawful there would be nothing to prevent those who wished to exercise it from remaining where they were for however long they wished, whatever their number and whatever their purpose might be in doing so.

It is not difficult to see that to admit a right in the public in whatever numbers to remain indefinitely in one place on a highway for the purpose of exercising the freedom of the right to assemble could give rise to substantial problems for landowners in their attempts to deal with the activities of demonstrators, squatters and other uninvited visitors. It would amount to a considerable extension of the rights of the public as against those of both public and private landowners which would be difficult for the courts to control by reference to any relevant principle. The margin between what is and what is not a nuisance is an imprecise one, as to which he who wishes to put a stop to it may be in difficulty in obtaining an immediate remedy. The test of reasonable use of the highway as such is consistent with the rule that the public's right of way is essentially a right of passage. It is also consistent with the law as to the kind of user which must be shown in order to show that a public right of way has been constituted over the land of the proprietor. The proposition that the public are entitled to do anything on the highway which amounts in itself to a reasonable user may seem at first sight to be an attractive one. But it seems to me to be tantamount to saying that members of the public are entitled to assemble, occupy and remain anywhere upon a highway in whatever numbers as long as they wish for any reasonable purpose so long as they do not obstruct it. I do not think that there is any basis in the authorities for such a fundamental rearrangement of the respective rights of the public and of those of public and private landowners.

Mr. Fitzgerald said that, whatever the difficulties might be in regard to the holding of assemblies on footpaths and bridleways over the property of private landowners, there was no good reason why the same view should be applied to highways which were vested in the statutory highway authority. He said that, as highways which are used as roads by the public are now almost all in public ownership and as section 14A had brought the whole issue of trespass into the realm of public law, there should now be a coherent system of public law to deal with assembly cases. His argument was that the approach which the criminal law had taken in obstruction cases showed that the concept of reasonable user was capable of providing the required symmetry.

I do not need to go into a detailed analysis of the obstruction cases. We were referred to *Hirst v. Chief Constable of West Yorkshire*, 85 Cr.App.R. 143, in which the question was considered in the context of the offence which is created by section 137(1) of the Act of 1980 where a person without lawful authority or reasonable excuse in any way wilfully obstructs the free passage along a highway. In that context it is necessary to consider whether what was done was in itself reasonable, striking a

balance between the right to free speech and to demonstrate on the one hand and the need for peace and good order on the other: *per* Otton L.J., at p. 151.

Mr. Fitzgerald said that the common law was capable of development within the concept of reasonable user in order to rationalise what he accepted were two conflicting lines of authority. But I do not think that section 14A requires us to attempt such an exercise. On the contrary, the intention of Parliament as disclosed by the language of that section was to rely upon the existing state of the law relating to trespass as between members of the public and the occupiers of land to which members of the public have no right of access or only a limited right of access. Like it or not, this approach makes the lack of symmetry of which Mr. Fitzgerald complains inevitable. The private law upon which section 14A depends for its application is concerned to regulate the rights of the owners and occupiers of land in regard to the use of their land by the public. Public law, which is concerned with the relationship between the state and its citizens, depends upon entirely different concepts. Furthermore it is a striking feature of the present case that the question whether the law relating to the public's right of access should be rationalised in order to give the public greater freedom in the exercise of that right is being discussed in a case to which no landowner is a party. It seems to me to be contrary to elementary concepts of justice that the rights of landowners as against the public in relation to access to their land should be diminished by a decision of your Lordships' House when nobody who is in a position to defend their interest has yet been heard.

We were invited to have regard to the European Convention for the Protection of Human Rights and Fundamental Freedoms both as an aid to statutory interpretation and as a yardstick against which to resolve any uncertainty in the common law or to guide its development. I do not think that there is any need to have resort to the Convention as an aid to statutory interpretation, as there is no ambiguity in the statutory provisions which are relevant to this case. Nor do I think that there is any uncertainty as to the test which must be applied under the common law relating to the use which the public may make of a highway in the exercise of the public's right of access. In *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 283G, Lord Goff of Chieveley said that he conceived it to be his duty, when he was free to do so, to interpret the law in accordance with the obligations of the Crown under the treaty. Adopting this approach, in *Derbyshire County Council v. Times Newspapers Ltd.* [1992] Q.B. 770, 830B–C Butler-Sloss L.J. said that, where there was an ambiguity in the law or the law was otherwise unclear or so far undeclared by an appellate court, the English court was not only entitled but obliged to consider the implications of the Convention. For the defendants it was contended that the law is unclear because the inconsistency between the private law relating to trespass and the criminal law relating to obstruction in public places had still to be reconciled. For the reasons which I have already given I do not accept that there is such an inconsistency.

In any event it seems to me that there are clear indications in the Convention that restrictions on the exercise of fundamental rights and freedoms such as the freedom of assembly under article 11(1) of the

Convention may be justified where this is necessary for the protection of the rights and freedoms of others. This is stated in terms in article 11(2). Article 1 of the First Protocol states that every natural or legal person is entitled to the peaceful enjoyment of his possessions and that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law. The precise effect of these provisions in regard to the right of a landowner to exclude trespassers from his property was not explored in the course of the hearing before us. But I do not think that it would be right to regard the Convention as providing unqualified support to the argument that the public's right of access should be enlarged so as to enable the public to exercise what article 11(1) of the Convention describes as "the right to freedom of peaceful assembly" wherever there is a public right of access to a highway. Such an enlargement would be bound to result in loss of the protection of the owners of land which the existing state of the law gives to them. In that sense and to that extent it could be said that they were being deprived of their right to the quiet enjoyment of their possessions contrary to article 1 of the First Protocol.

It seems to me therefore that what I can best describe as the horizontal effect of the defendants' argument as to the Convention in regard to the private rights of landowners gives rise to questions of considerable difficulty. I am not persuaded that the balance which is struck in private law between the rights of the public and those of landowners is in need of adjustment in order to enable members of the public to exercise their freedom of assembly. In practice members of the public are allowed to assemble in public places as they wish without objection or hindrance so long as they do not obstruct others and are peaceful. As Lord Goff of Chieveley said in *Attorney-General v. Guardian Newspapers Ltd. (No. 2)* [1990] 1 A.C. 109, 283F, everybody is free to do anything in this country, subject only to the provisions of the law. The law of trespass exists to protect the interests of landowners where such assemblies exceed the limits which they are willing to tolerate. Such provisions as exist in public law, as in the case of section 14A, may be justified on the ground that they have been carefully drafted having regard to the need to protect the public from arbitrary action on the part of the police while at the same time enabling the police to intervene to prevent disorder or crime. I do not think that the Convention requires us to attempt to reform the private law relating to trespass on which section 14A relies in order to mitigate the effects of its application to trespassory assemblies which are held in breach of an order obtained under that section.

For these reasons I would answer the certified question in the affirmative and dismiss the appeal.

LORD CLYDE. My Lords, the defendants were convicted of having taken part in an assembly which they knew was prohibited under section 14 of the Public Order Act 1986. The question is whether the assembly was a prohibited one. Section 14A(5) explains what is meant by a prohibited, or a "trespassory," assembly. The relevant words for the purposes of the present case are that the assembly "(*a*) is held on land to which the public has ... only a limited right of access, and (*b*) takes place in the prohibited circumstances ..."

There is no doubt but that the assembly in the present case took place on a highway and that a highway is land to which the public had a limited right of access. So one has next to consider the prohibited circumstances. Those circumstances are defined in section 14A(5)(*b*). The critical qualification here claimed is that the assembly so took place "as to exceed ... the limits of the public's right of access." So the question comes to be what is the extent of the public's right of access. That is a quite general question which will apply universally, whether an individual member of the public or a group of people is involved. It will also be applicable to any other kind of public road, subject to any particular limitations which may restrict the use of such a road, whenever or however imposed.

The Act gives a little further explanation. Section 14A(9) defines "limited" in relation to a right of access by the public to land as meaning that "their use of it is restricted to use for a particular purpose (as in the case of a highway or road) or is subject to other restrictions." So one has to consider what was the particular purpose for which Parliament considered the use of a highway was restricted.

The fundamental purpose for which roads have always been accepted to be used is the purpose of travel, that is to say, passing and repassing along it. But it has also been recognised that the use comprises more than the mere movement of persons or vehicles along the highway. The right to use a highway includes the doing of certain other things subsidiary to the user for passage. It is within the scope of the right that the traveller may stop for a while at some point along the way. If he wishes to refresh himself, or if there is some particular object which he wishes to view from that point, or if there is some particular association with the place which he wishes to keep alive, his presence on the road for that purpose is within the scope of the acceptable user of the road. The view was expressed by A. L. Smith L.J., in *Hickman v. Maisey* [1900] 1 Q.B. 752, 756, that if a man took a sketch from the highway no reasonable person would treat that as an act of trespass. So, as it seems to me, the particular purpose for which a highway may be used within the scope of the public's right of access includes a variety of activities, whether or not involving movement, which are consistent with what people reasonably and customarily do on a highway. In *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142, 146 Lord Esher M.R. defined trespass in terms of a person being on the highway "not for the purpose of using it in order to pass and repass, or for any reasonable or usual mode of using the highway as a highway . . ." But what is reasonable or usual may develop and change from one period of history to another. That was recognised by Collins L.J. where in *Hickman v. Maisey* he said, at pp. 757–758:

> "The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage."

On the other hand the purpose for which the road is used must be for ordinary and lawful uses of a roadway and not for some ulterior purpose for which the road was not intended to be used. Thus in *Hickman v. Maisey* it was held to be a trespass for someone to use the road as a vantage point for observing the performance of racehorses undergoing trial. To use the language of Collins L.J., that was a use of the highway "in a manner which is altogether outside the purpose for which it was dedicated ..." So also in the earlier case of *Harrison v. Duke of Rutland* it was held to be a trespass for a person to use the road for the purpose of disrupting the adjoining landowner's enjoyment of his sporting rights.

But it must immediately be noticed that the public's right is fenced with limitations affecting both the extent and the nature of the user. So far as the extent is concerned the user may not extend beyond the physical limits of the highway. That may often include the verges. It may also include a lay-by. Moreover, the law does not recognise any jus spatiendi which would entitle a member of the public simply to wander about the road, far less beyond its limits, at will. Further, the public have no jus manendi on a highway, so that any stopping and standing must be reasonably limited in time. While the right may extend to a picnic on the verge, it would not extend to camping there.

So far as the manner of the exercise of the right is concerned, any use of the highway must not be so conducted as to interfere unreasonably with the lawful use by other members of the public for passage along it. The fundamental element in the right is the use of the highway for undisturbed travel. Certain forms of behaviour may of course constitute criminal actings in themselves, such as a breach of the peace. But the necessity also is that travel by the public should not be obstructed. The use of the highway for passage is reflected in all the limitations, whether on extent, purpose or manner. While the right to use the highway comprises activities within those limits, those activities are subsidiary to the use for passage, and they must be not only usual and reasonable but consistent with that use even if they are not strictly ancillary to it. As was pointed out in *M'Ara v. Magistrates of Edinburgh*, 1913 S.C. 1059 and in *Aldred v. Miller*, 1924 J.C. 117 the use of a public street for free unrestricted passage is the most important of all the public uses to which public streets are legally dedicated. No issue regarding the nature of the user arises in the present case. It appears that everyone was behaving with courtesy and civility and restraint. Moreover there was no obstruction at all to any traffic.

In the generality there is no doubt but that there is a public right of assembly. But there are restrictions on the exercise of that right in the public interest. There are limitations at common law and there are express limitations laid down in article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms. I would not be prepared to affirm as a matter of generality that there is a right of assembly at any place on a highway at any time and in any event I am not persuaded that the present case has to be decided by reference to public rights of assembly. If a group of people stand in the street to sing hymns or Christmas carols they are in my view using the street within the legitimate scope of the public right of access to it, provided of course that they do so for a

reasonable period and without any unreasonable obstruction to traffic. If there are shops in the street and people gather to stand and view a shop window, or form a queue to enter the shop, that is within the normal and reasonable use which is matter of public right. A road may properly be used for the purposes of a procession. It would still be a perfectly proper use of the road if the procession was intended to serve some particular purpose, such as commemorating some particular event or achievement. And if an individual may properly stop at a point on the road for any lawful purpose, so too should a group of people be entitled to do so. All such activities seem to me to be subsidiary to the use for passage. So I have no difficulty in holding that in principle a gathering of people at the side of a highway within the limits of the restraints which I have noted may be within the scope of the public's right of access to the highway.

In my view the argument for the defendants, and indeed the reasoning of the Crown Court, went further than it needed to go in suggesting that any reasonable use of the highway, provided that it was peaceful and not obstructive, was lawful, and so a matter of public right. Such an approach opens a door of uncertain dimensions into an ill-defined area of uses which might erode the basic predominance of the essential use of a highway as a highway. I do not consider that by using the language which it used Parliament intended to include some distinct right in addition to the right to use the road for the purpose of passage.

I am not persuaded that in any case where there is a peaceful non-obstructive assembly it will necessarily exceed the public's right of access to the highway. The question then is, as in this kind of case it may often turn out to be, whether on the facts here the limit was passed and the exceeding of it established. The test then is not one which can be defined in general terms but has to depend upon the circumstances as a matter of degree. It requires a careful assessment of the nature and extent of the activity in question. If the purpose of the activity becomes the predominant purpose of the occupation of the highway, or if the occupation becomes more than reasonably transitional in terms of either time or space, then it may come to exceed the right to use the highway.

The only point which has caused me some hesitation in the circumstances of the present case is the evident determination by the two defendants to remain where they were. That does seem to look as if they were intending to go beyond their right and to stay longer than would constitute a reasonable period. But I find it far from clear that there was an assembly of 20 or more persons who were so determined and in light of the fluidity in the composition of the grouping and in the consistency of its component individuals I consider that the Crown Court reached the correct conclusion.

I do not find it possible to return any general answer to the certified question. The matter is essentially one to be judged in light of the particular facts of the case. But I am prepared to hold that a peaceful assembly which does not obstruct the highway does not necessarily constitute a trespassory assembly so as to constitute the circumstances for an offence where an order under section 14A(2) is in force. I would allow the appeal.

LORD HUTTON. My Lords, on 1 June 1995 a number of people were present in the vicinity of Stonehenge. There were tourists and sightseers, and there were also a number of people who were present because it was the tenth anniversary of a disturbance known as "the Battle of the Beanfield" when the police had had to eject persons who had tried to enter the site of Stonehenge.

About 6.45 p.m. on 1 June the two defendants together with about 19 other persons, constituting a group of more than 20 persons, were on the grass verge between the perimeter fence of Stonehenge and the metal surface of the roadway of the A344. Some of the group were carrying banners with the words "Never Again," "Stonehenge Campaign 10 years of Criminal Injustice" and "Free Stonehenge." The grass verge was about 4 feet 6 inches to 5 feet wide and the group, which was not static but fluid, was moving around on the verge and was spread out over 10 to 15 yards. It is not in dispute that the grass verge is to be considered as part of the public highway.

In 1994 Parliament amended the Public Order Act 1986 by section 70 of the Criminal Justice and Public Order Act 1994 which inserted section 14A and section 14B after section 14. The effect of section 14A in relation to the circumstances of the present case can be broadly stated as follows: where a chief officer of police reasonably believes that an assembly of 20 or more persons is intended to be held in any district at a place on land to which the public has only a limited right of access, and that the assembly is likely to conduct itself in such a way as to exceed the limits of the public's right of access and may result in serious disruption to the life of the community or in significant damage to a monument of historical, architectural, archaeological or scientific importance on the land, he may apply to the council of the district for an order prohibiting for a specified period the holding of all trespassory assemblies in the district or in part of it. On receiving such an application a council in England, with the consent of the Secretary of State, may make such an order.

On 22 May 1995 Salisbury District Council made an order pursuant to section 14A that the holding of all trespassory assemblies within a radius of four miles from the junction of the A303 and A344 roads adjoining the monument at Stonehenge were prohibited for four days commencing at 23.59 hours on 28 May 1995 and terminating at 23.59 hours on 1 June 1995.

Section 14A(5) provides:

> "An order prohibiting the holding of trespassory assemblies operates to prohibit any assembly which—(*a*) is held on land to which the public has no right of access or only a limited right of access, and (*b*) takes place in the prohibited circumstances, that is to say, without the permission of the occupier of the land or so as to exceed the limits of any permission of his or the limits of the public's right of access."

Section 14A(9) provides:

> " 'limited,' in relation to a right of access by the public to land, means that their use of it is restricted to use for a particular purpose (as in the case of a highway or road) or is subject to other restrictions."

Section 14B(2) provides: "A person who takes part in an assembly which he knows is prohibited by an order under section 14A is guilty of an offence."

The two defendants were charged with an offence under section 14B(2). They were tried before the Salisbury justices and on 3 October 1995 they were each convicted of that offence. They appealed against their convictions to the Salisbury Crown Court and their appeals were heard by Judge MacLaren Webster Q.C. and two justices on 3 and 4 January 1996. At the close of the prosecution case the defendants submitted that there was no case to answer and the Crown Court accepted this submission and allowed the appeals in a fully reasoned judgment setting out its findings and conclusions. The Director of Public Prosecutions appealed by case stated to a Divisional Court of the Queen's Bench Division, constituted by McCowan L.J. and Collins J., which allowed the Director's appeal and ordered that the case be remitted to the Salisbury Crown Court to be reheard by a differently constituted bench.

In its judgment the Crown Court set out its findings of fact. These included:

> "At no time was either appellant or, for that matter any other person in the group of people in the area extending 10 to 15 yards westward from the Heelstone abusive, obstructive or in any way offensive or violent to the police or anyone else. None of those to whom Inspector Mackie addressed himself was in the roadway—the A344 itself, they were not obstructing the freedom of movement of others on the verge nor were they causing a public nuisance ... I pause to remind us that we have found that the assembly of 20 or more people was merely that. It was a presence. It was not, let alone any member of it, let alone either of the appellants, other than present. Neither as a group nor as individuals were any of those 20, and in particular, of course, the defendants (whom it must always be remembered we have to consider individually as distinct both from the group and each other) being destructive, violent, disorderly, threatening a breach of the peace or, on the evidence, doing anything other than reasonably using the highway."

Therefore the issue which arose for determination before the Crown Court and the Divisional Court was whether the entirely peaceful assembly which did not obstruct passage along the highway constituted a trespassory assembly because it was taking place "so as to exceed the limits of ... the public's right of access" to the highway, the A344.

The conclusion of the Crown Court was stated as:

> "we find that everything that was done by the appellants was done peaceably and in good order. Although Lord Denning M.R. in *Hubbard v. Pitt* [1976] Q.B. 142 was dealing with an interlocutory injunction and Otton J. in *Hirst v. Chief Constable of West Yorkshire,* 85 Cr.App.R. 143 with obstruction (which, let it be recalled, did not occur in the instant case), we too are of the view that the passage cited from Lord Denning, at pp. 178–179, is, to adopt and adapt the words of Otton J., at p. 152, of importance when considering whether appellants (behaving as we find, on the evidence thus far, these

appellants to have been behaving), have committed a criminal offence of knowingly taking part in a *prohibited* assembly. What the order prohibited was a trespassory assembly. We accept Mr. Butt's contention [for the prosecution] that a trespassory assembly is one where the public's right of access to land has been exceeded. We do not in the light of our conclusion on that aspect have to consider whether the appellants knew they were taking part in a prohibited assembly. Their user of the highway was a reasonable user. Accordingly, for the reasons we have sought to explain we have unanimously reached the conclusion that the evidence is not such that properly directed we could properly convict of that offence. Accordingly there is no case for the appellants to answer and their appeals must be allowed."

In the case stated to the Divisional Court two questions were stated for its opinion:

"(i) Where there is in force an order under section 14A(2), and on the public highway within the area and time covered by the order there is a peaceful assembly of 20 or more persons which does not obstruct the highway, does such assembly exceed the public's rights of access to the highway so as to constitute a trespassory assembly within the terms of section 14A? (ii) In order to prove an offence under section 14B(2), is it necessary for the prosecution to prove that each of the 20 or more persons present is exceeding the limits of the public's right of access or merely that 20 or more persons were present and that some of them were exceeding the limits of the public's right of access?"

The Divisional Court answered the first question in the affirmative. In his judgment in the Divisional Court [1998] Q.B. 563, 570 McCowan L.J. stated:

"In the present case counsel for the defendants, Mr. Starmer, argued as he did before the Crown Court that any assembly on the highway is lawful as long as it is peaceful and non-obstructive of the highway. This view appears to have been accepted by the Crown Court. In my judgment, however, it is mistaken. It leaves out of account the existence of the order made under section 14A and its operation to prohibit the holding of any assembly which occurs to restrict the limited right of access to the highway by the public. I would accordingly answer the first question posed by the Crown Court for this court in the affirmative. Counsel for the defendants also argued before us that a right to passage and repassage must include anything incidental thereto. I would accept that, but it leaves the question of what is incidental to passage or repassage. Passing the time of day with an acquaintance whom one happens to meet on the highway might well qualify, but I would reject the suggestion that the holding of an assembly of 21 persons possibly could, any more than I would accept counsel's suggestion, by way of analogy, that a photographer on a public highway adjacent to the Queen's land taking photographs from the highway of members of the Royal Family on that land would only be doing something which was incidental to his right of passage or repassage on that highway."

Collins J. stated, at pp. 571–572:

> "The holding of a meeting, a demonstration or a vigil on the highway, however peaceable, has nothing to do with the right of passage. Such activities may, if they do not cause an obstruction, be tolerated, but there is no legal right to pursue them. A right to do something only exists if it cannot be stopped: the fact that it would not be stopped does not create a right to do it."

He said, at p. 573:

> "The existence of a lawful excuse for doing something does not necessarily establish a legal right to do it. In the context of the criminal offence of obstruction, lawful excuse is naturally seen in terms of offending and not in terms of civil trespass."

It was agreed before the Divisional Court that the second question should be answered in the negative, in the sense that the prosecution need prove no more than that the assembly consisted of 20 or more persons and that the particular person accused was taking part in that assembly knowing it to be prohibited by an order under section 14A.

The point of law of general public importance stated for the opinion of this House is the same as that contained in the first question stated for the opinion of the Divisional Court:

> "Where there is in force an order made under section 14A(2), and on the public highway within the area and time covered by the order there is a peaceful assembly of 20 or more persons which does not obstruct the highway, does such an assembly exceed the public's rights of access to the highway so as to constitute a trespassory assembly within the terms of section 14A?"

My Lords, I consider that in the light of the well known authorities cited to the House the present state of the law is correctly stated in the following passage in *Halsbury's Laws of England,* 4th ed. reissue, vol. 21, pp. 77–78, para. 110:

> "The right of the public is a right to pass along a highway for the purpose of legitimate travel, not to be on it, except so far as the public's presence is attributable to a reasonable and proper user of the highway as such. A person who is found using the highway for other purposes must be presumed to have gone there for those purposes and not with a legitimate object, and as against the owner of the soil he is to be treated as a trespasser."

However I consider that there are indications in the authorities that the public's right to use the highway may be extended and that the important issue before your Lordships' House is whether that right should be extended so that the public has a right in some circumstances to hold a peaceful assembly on the public highway provided that it does not obstruct the use of the highway.

To consider this issue I must first turn to the principal authorities which establish the principle stated in *Halsbury's Laws of England.* In *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 it was held that the plaintiff was a trespasser when, on the occasion of a grouse drive upon a moor

owned by the Duke of Rutland, the plaintiff went upon a highway which crossed it, not for the purpose of using it as a highway, but solely for the purpose of using it to interfere with the defendant's enjoyment of his right of shooting, by preventing the grouse from flying towards the butts occupied by the guns. Lopes L.J. stated, at p. 154:

> "The conclusion which I draw from the authorities is that, if a person uses the soil of the highway for any purpose other than that in respect of which the dedication was made and the easement acquired, he is a trespasser. The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel, and the use of the soil for any other purpose, whether lawful or unlawful, is an infringement of the rights of the owner of the soil, who has, subject to this easement, precisely the same estate in the soil as he had previously to any easement being acquired by the public."

In his judgment, having considered the authorities, Kay L.J. stated, at p. 158:

> "According to these authorities, the right of the public upon a highway is that of passing and repassing over land the soil of which may be owned by a private person. Using that soil for any other purpose lawful or unlawful is a trespass. I understand those words to mean that the purpose need not be unlawful in itself; as for example, to commit an assault or a felony upon the high road. It is enough that it should be a user of the soil of the high road for a purpose other than that which is the proper use of a highway, namely that of passing and repassing along it."

In *Hickman v. Maisey* [1900] 1 Q.B. 752 the defendant, who published information as to the performances of racehorses in training, walked backwards and forwards on a portion of the highway over the plaintiff's land about 15 yards in length for a period of about an hour and a half, watching and taking notes of the trials of racehorses on the plaintiff's land. The Court of Appeal following the decision in *Harrison v. Duke of Rutland* upheld a verdict that the defendant was a trespasser.

In *Liddle v. Yorkshire (North Riding) County Council* [1934] 2 K.B. 101, 125–127 Slesser L.J. stated the right of the public to use the highway in the terms employed by Lopes L.J. in *Harrison v. Duke of Rutland*, at p. 154, and in *Randall v. Tarrant* [1955] 1 W.L.R. 255, 259 Sir Raymond Evershed M.R. stated:

> "it is well established that a highway must not be used in quite a different manner from passage along it and the pretext of walking up and down along it will not legitimise such a use."

Therefore, as I have stated, the issue which arises in the present appeal is whether the right of the public to use the highway, as stated by Lopes L.J. in *Harrison v. Duke of Rutland,* should be extended and should include the right to hold a peaceful public assembly on a highway, such as the A344, which causes no obstruction to persons passing along the highway and which the Crown Court found to be a reasonable user of the highway.

A In my opinion your Lordships' House should so hold for three main reason which are as follows. First, the common law recognises that there is a right for members of the public to assemble together to express views on matters of public concern and I consider that the common law should now recognise that this right, which is one of the fundamental rights of citizens in a democracy, is unduly restricted unless it can be exercised in some circumstances on the public highway. Secondly, the law as to trespass on B the highway should be in conformity with the law relating to proceedings for wilful obstruction of the highway under section 137 of the Highways Act 1980 that a peaceful assembly on the highway may be a reasonable use of the highway. Thirdly, there is a recognition in the authorities that it may be appropriate that the public's right to use the highway should be extended, in the words of Collins L.J. in *Hickman v. Maisey*, at p. 758:

C "in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage."

I now turn to state these reasons more fully.

D *The common law right of public assembly is unduly restricted unless it can be exercised in some circumstances on the public highway*

In *Hubbard v. Pitt* [1976] Q.B. 142, 178–179 Lord Denning M.R. stated:

"Finally, the real grievance of the plaintiffs is about the placards and leaflets. To restrain these by an interlocutory injunction would be contrary to the principle laid down by the court 85 years ago in E *Bonnard v. Perryman* [1891] 2 Ch. 269, and repeatedly applied ever since. That case spoke of the right of free speech. Here we have to consider the right to demonstrate and the right to protest on matters of public concern. These are rights which it is in the public interest that individuals should possess; and, indeed, that they should exercise without impediment so long as no wrongful act is done. It is often the only means by which grievances can be brought to the knowledge F of those in authority—at any rate with such impact as to gain a remedy. Our history is full of warnings against suppression of these rights. Most notable was the demonstration at St. Peter's Fields, Manchester, in 1819 in support of universal suffrage. The magistrates sought to stop it. At least 12 were killed and hundreds injured. Afterwards the Court of Common Council of London affirmed 'the G undoubted right of Englishmen to assemble together for the purpose of deliberating upon public grievances.' Such is the right of assembly. So also is the right to meet together, to go in procession, to demonstrate and to protest on matters of public concern. As long as all is done peaceably and in good order, without threats or incitement to violence or obstruction to traffic, it is not prohibited: see *Beatty v. Gillbanks* (1882) 9 Q.B.D. 308. I stress the need for peace and good H order. Only too often violence may break out: and then it should be firmly handled and severely punished. But so long as good order is maintained, the right to demonstrate must be preserved. In his recent inquiry on the Red Lion Square disorders, Scarman L.J. was asked to

recommend that 'a positive right to demonstrate should be enacted.' He said that it was unnecessary: 'The right, of course, exists, subject only to limits required by the need for good order and the passage of traffic:' The Red Lion Square Disorders of 15 June 1974 (1975) (Cmnd. 5919), p. 38. In the recent report on Contempt of Court (1974) (Cmnd. 5794), the committee considered the campaign of the 'Sunday Times' about thalidomide and said that the issues were 'a legitimate matter for public comment:' p. 28, line 7. It recognised that it was important to maintain the 'freedom of protest on issues of public concern:' p. 100, line 5. It is time for the courts to recognise this too. They should not interfere by interlocutory injunction with the right to demonstrate and to protest any more than they interfere with the right of free speech; provided that everything is done peaceably and in good order."

In *Hubbard v. Pitt* the issue before the Court of Appeal was whether the judge in the High Court was right to grant an interlocutory injunction. Lord Denning M.R. dissented on this issue from the other members of the court, Stamp and Orr L.JJ., but they did not express an opinion on the right of public assembly.

In *Hirst v. Chief Constable of West Yorkshire*, 85 Cr.App.R. 143, 151–152 Otton J. cited the above passage from the judgment of Lord Denning M.R. in *Hubbard v. Pitt* and said:

> "The courts have long recognised the right to free speech to protest on matters of public concern and to demonstrate on the one hand and the need for peace and good order on the other."

If, as in my opinion it does, the common law recognises the right of public assembly, I consider that the common law should also recognise that in some circumstances this right can be exercised on the highway, provided that it does not obstruct the passage of other citizens, because otherwise the value of the right is greatly diminished. The principles of law in Canada governing the right of public assembly are different to those in England, in part because the Canadian Charter of Rights and Freedoms gives an express right of freedom of expression, but I consider that the reasoning in the following passage in the judgment of Lamer C.J.C. in the Supreme Court of Canada in *Committee for the Commonwealth of Canada v. Canada* (1991) 77 D.L.R. (4th) 385, 394 should also apply to the common law right of public assembly:

> "the freedom of expression cannot be exercised in a vacuum ... it necessarily implies the use of physical space in order to meet its underlying objectives. No one could agree that the exercise of the freedom of expression can be limited solely to places owned by the person wishing to communicate: such an approach would certainly deny the very foundation of the freedom of expression."

Conformity between the law of trespass to the highway and the law relating to wilful obstruction of the highway

Section 137(1) of the Highways Act 1980 provides: "If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence ..."

In *Hirst v. Chief Constable of West Yorkshire* the defendants were members of a group of animal rights' supporters which stood on the public street in the vicinity of a furrier's shop offering leaflets to pedestrians and holding banners. They were charged with an offence contrary to section 137(1). They were convicted by the justices and their appeals to the Crown Court were dismissed. They then appealed by case stated to the Divisional Court. Both in the Crown Court and in the Divisional Court the submission of the prosecutor was, 85 Cr.App.R. 143, 146:

> "that unless the presence of the defendants upon the highway was for the purpose of its lawful use (i.e. passing and repassing over and along it) or some purpose incidental to that lawful use then their presence on the highway constituted an obstruction. [The prosecutor] further contended that the question of 'reasonableness' did not fall to be decided if the court was satisfied that the presence of the defendants upon the highway was not for the purpose of its lawful use or some purpose incidental to it."

The Crown Court stated its conclusion as follows:

> "We considered ourselves bound by the decision in *Waite v. Taylor* (1985) 149 J.P. 551. We found that to stand in the highway offering and distributing leaflets or holding a banner was not incidental to its lawful user, and accordingly that each of the defendants had wilfully obstructed the highway contrary to section 137 of the Highways Act 1980. We therefore dismissed the appeals."

The Divisional Court allowed the appeals and quashed the convictions. In his judgment Glidewell L.J., at pp. 147–148, cited the judgment of Lord Parker C.J. in *Nagy v. Weston* [1965] 1 W.L.R. 280, 284 in which Lord Parker C.J. said:

> "It is undoubtedly true—[counsel for the defendant] is quite right—that there must be proof that the use in question was an unreasonable use. Whether or not the user amounting to an obstruction is or is not an unreasonable use of the highway is a question of fact. It depends on all the circumstances, including the length of time the obstruction continues, the place where it occurs, the purpose for which it is done, and of course whether it does in fact cause an actual obstruction as opposed to a potential obstruction."

Glidewell L.J. also cited the judgment of Lord Denning M.R. in *Hubbard v. Pitt* [1976] Q.B. 142, 174–175 where a group of persons picketed the plaintiffs' offices by standing on the public footpath in front of the premises holding placards and distributing leaflets and Lord Denning M.R., after quoting the passage from the judgment of Lord Parker C.J. in *Nagy v. Weston* which Glidewell L.J. quoted, continued:

> "In the present case the police evidently thought there was no breach of this law. The presence of these half a dozen people on Saturday morning for three hours was not an unreasonable use of the highway. They did not interfere with the free passage of people to and fro. Of course, if there had been any fear of a breach of the peace, the police could have interfered: see *Duncan v. Jones* [1936] 1 K.B. 218. *But there was nothing of that kind.*"

Glidewell L.J. then stated, at p. 150:

> "In *Nagy v. Weston* itself, the activity being carried on, that is to say the sale of hot dogs in the street, could not in my view be said to be incidental to the right to pass and repass along the street. Clearly, the Divisional Court took the view that it was open to the magistrates to consider, as a question of fact, whether the activity was or was not reasonable. On the facts the magistrates had concluded that it was unreasonable (an unreasonable obstruction) but if they had concluded that it was reasonable then it is equally clear that in the view of the Divisional Court the offence would not have been made out. That is the way Tudor Evans J. approached the matter in the recent decision of *Cooper v. Metropolitan Police Commissioner* (1986) 82 Cr.App.R. 238, 242 and I respectfully agree with him. As counsel pointed out to us in argument, if that is not right, there are a variety of activities which quite commonly go on in the street which may well be the subject of prosecution under section 137. For instance, what is now relatively commonplace, at least in London and large cities, distributing advertising material or free periodicals outside stations, when people are arriving in the morning. Clearly, that is an obstruction; clearly, it is not incidental to passage up and down the street because the distributors are virtually stationary. The question must be: is it a reasonable use of the highway or not? In my judgment that is a question that arises. It may be decided that if the activity grows to an extent that it is unreasonable by reason of the space occupied or the duration of time for which it goes on that an offence would be committed, but it is a matter on the facts for the magistrates, in my view ... Some activities which commonly go on in the street are covered by statute, for instance, the holding of markets or street trading, and thus they are lawful activities because they are lawfully permitted within the meaning of the section. That is lawful authority. But many are not and the question thus is (to follow Lord Parker's dictum): have the prosecution proved in such cases that the defendant was obstructing the highway without lawful excuse? That question is to be answered by deciding whether the activity in which the defendant was engaged was or was not a reasonable user of the highway."

In his judgment Otton J. referred to the balance between the right to demonstrate and the need for peace and good order and stated, at p. 152:

> "On the analysis of the law, given by Glidewell L.J. and his suggested approach with which I totally agree, I consider this balance would be properly struck and that the 'freedom of protest on issues of public concern' would be given the recognition it deserves."

The importance of this decision, which in my opinion was correct, was that, in deciding whether there was a lawful excuse for a technical obstruction of the highway, the Divisional Court rejected the test applied by the Crown Court, which was that a use of the highway which was not incidental to passing along it could not give rise to a lawful excuse, and applied the test whether the use of the highway (even though not incidental to passage) was reasonable or not.

In my opinion the law would be left in an unsatisfactory state if your Lordships' House held that in this case the peaceful assembly on the highway, which caused no actual obstruction to persons passing along the highway, constituted a criminal trespass under section 14B of the Act of 1986 because the assembly was not incidental to passage along the highway, whilst the law recognised, as held in *Hirst v. Chief Constable of West Yorkshire*, that such an assembly may be a reasonable use of the highway and in consequence there is a lawful excuse under section 137 of the Act of 1980 in respect of a charge of wilfully obstructing the free passage along a highway.

The extension of the public's right to use the highway

In the judgments in *Harrison v. Duke of Rutland* [1893] 1 Q.B. 142 the words of Crompton J. in *Reg. v. Pratt*, 4 E. & B. 860, 868–869 were quoted:

> ". . . I take it to be clear law that, if a man use the land over which there is a right of way for any purpose, lawful or unlawful, other than that of passing and repassing, he is a trespasser."

In *Pratt's* case Erle J., at pp. 867–868, made a similar statement. But in *Harrison v. Duke of Rutland* Lord Esher M.R. stated the principle in less restrictive terms, at pp. 146–147:

> "Therefore, on the ground that the plaintiff was on the highway, the soil of which belonged to the Duke of Rutland, not for the purpose of using it in order to pass and repass, or for any reasonable or usual mode of using the highway as a highway, I think he was a trespasser. But I must observe that I think that, if the language of Erle J., and of Crompton J., in *Reg. v. Pratt*, were construed too largely, the effect might be to interfere with the universal usage as regards highways in this country in a way which would be mischievous, and would derogate from the reasonable exercise of the rights of the public. Construed too strictly, it might imply that the public could do absolutely nothing but pass or repass on the highway, and that to do anything else whatever upon it would be a trespass. I do not think that is so. Highways are, no doubt, dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser."

In their judgments in *Hickman v. Maisey* [1900] 1 Q.B. 752 A. L. Smith and Collins L.JJ. accepted that the right of the public to pass and repass on the highway was subject to some degree of extension. A. L. Smith L.J. stated, at pp. 755–756:

> "Many authorities, of which the well known case of *Dovaston v. Payne*, 2 H.Bl. 527 is one, show that prima facie the right of the public is merely to pass and repass along the highway; but I quite agree with what Lord Esher M.R. said in *Harrison v. Duke of Rutland*, though I think it is a slight extension of the rule as previously stated, namely,

that, though highways are dedicated prima facie for the purpose of passage, 'things are done upon them by everybody which are recognised as being rightly done and as constituting a reasonable and usual mode of using a highway as such;' and, 'if a person on a highway does not transgress such reasonable and usual mode of using it,' he will not be a trespasser; but, if he does 'acts other than the reasonable and ordinary user of a highway as such' he will be a trespasser. For instance, if a man, while using a highway for passage, sat down for a time to rest himself by the side of the road, to call that a trespass would be unreasonable. Similarly, to take a case suggested during the argument, if a man took a sketch from the highway, I should say that no reasonable person would treat that as an act of trespass. But I cannot agree with the contention of the defendant's counsel that the acts which this defendant did, not really for the purpose of using the highway as such, but for the purpose of carrying on his business as a racing tout to the detriment of the plaintiff by watching the trials of racehorses on the plaintiff's land, were within such an ordinary and reasonable user of the highway as I have mentioned."

And Collins L.J. stated, at pp. 757–758:

"Now primarily the purpose for which a highway is dedicated is that of passage, as is shown by *Dovaston v. Payne*; and, although in modern times a reasonable extension has been given to the use of the highway as such, the authorities show that the primary purpose of the dedication must always be kept in view. The right of the public to pass and repass on a highway is subject to all those reasonable extensions which may from time to time be recognised as necessary to its exercise in accordance with the enlarged notions of people in a country becoming more populous and highly civilised, but they must be such as are not inconsistent with the maintenance of the paramount idea that the right of the public is that of passage."

It can be contended that these passages in the judgments of Lord Esher M.R. and A. L. Smith and Collins L.JJ. only contemplate an extension of the rights of the public provided that the highway is used "as such," and that the extended use must be connected with using the highway for passing and repassing. But I consider that the passages are open to a broader construction and that they do not exclude a reasonable use of the highway beyond passing and repassing, provided always that the use is not inconsistent with the paramount purpose of a highway, which is for the use of the public to pass and repass. Therefore for your Lordships' House to uphold the defendants' argument would not constitute a reversal of a well established principle but rather would be an extension of the law in a way foreshadowed by earlier judgments. In *C. (A Minor) v. Director of Public Prosecutions* [1996] A.C. 1 this House was considering whether a long established rule of the criminal law should be set aside and I consider that the approach stated by Lord Lowry, at p. 28B–D, is not applicable to the present case.

Therefore, for the reasons which I have given, I am of opinion that the holding of a public assembly on a highway can constitute a reasonable

user of the highway and accordingly will not constitute a trespass and I would allow the appeal. But I desire to emphasise that my opinion that this appeal should be allowed is based on the finding of the Crown Court that the assembly in which the defendants took part on this particular highway, the A344, at this particular time, constituted a reasonable use of the highway. I would not hold that a peaceful and non-obstructive public assembly on a highway is always a reasonable user and is therefore not a trespass.

It is for the tribunal of fact to decide whether the user was reasonable. In *Hirst v. Chief Constable of West Yorkshire*, 85 Cr.App.R. 143, 150 Glidewell L.J. makes it clear that a reasonable activity in the street may become unreasonable by reason of the space occupied or the duration of time for which it goes on, "but it is a matter on the facts for the magistrates, in my view."

If members of the public took part in an assembly on a highway but the highway was, for example, a small, quiet country road or was a bridleway or a footpath, and the assembly interfered with the landowner's enjoyment of the land across which the highway ran or which it bordered, I think it would be open to the justices to hold that, notwithstanding the importance of the democratic right to hold a public assembly, nevertheless in the particular circumstances of the case the assembly was an unreasonable user of the highway and therefore constituted a trespass.

In conclusion I refer to one further matter. In setting out the facts the judgment of the Crown Court states:

> "At 5.45 p.m. [Inspector Mackie] and other officers saw a sizeable group (he said by that he meant one he estimated at about 20 people) scale the fence of the monument and enter it. The officers also saw that group escorted out again either by police or security officers without any arrests or violence."

And:

> "Of course the basis of Inspector Mackie's undisputedly reasonable and sensibly intended intervention was to prevent any such thing as an incursion into the monument such as had occurred an hour earlier in which there was no evidence that the appellants were involved."

I thought for a time in the course of the argument that the decision of the Crown Court might be erroneous because it appears that Inspector Mackie thought that the assembly of which the defendants were a part was about to commit an act of trespass by entering the monument, as had happened an hour earlier. I consider that there is an argument of some force that a reasonable user of the highway by an assembly may become an unreasonable user so that the non-trespassory assembly becomes a trespassory assembly if it appears that members of the assembly are about to commit unlawful acts. However, this point did not arise in the questions stated for the opinion of the Divisional Court and was not argued before the Divisional Court, and the point does not arise on the question stated for the opinion of your Lordships' House. Therefore it would not be right to decide the appeal on this point. Accordingly I express no concluded opinion on the point or on the circumstances in which a non-trespassory assembly may become a trespassory assembly.

For the reasons which I have given I would allow the appeal and would answer the certified question before your Lordships' House as follows. "No, if the tribunal of fact finds that the assembly was a reasonable user of the highway."

Appeal allowed. Order of Crown Court restored.
Costs of first appellant to be paid out of central funds in accordance with section 16 of the Prosecution of Offences Act 1985.

Solicitors: Philip Leach, Legal Department, Liberty; Douglas & Partners, Bristol; Crown Prosecution Service, London Branch 2, Central Casework.

M. G.

[PRIVY COUNCIL]

GILBERT AHNEE AND OTHERS . . . . . APPELLANTS

AND

DIRECTOR OF PUBLIC PROSECUTIONS . . . RESPONDENT

[APPEAL FROM THE SUPREME COURT OF MAURITIUS]

1999 Jan. 25, 26; March 17

Lord Steyn, Lord Jauncey of Tullichettle, Lord Hoffmann, Sir Iain Glidewell and Sir Andrew Leggatt

Mauritius—Supreme Court—Jurisdiction—Contempt of court—Newspaper article publicly scandalising court—Whether power to commit for contempt of court—Whether power contravening individual's constitutional rights—Whether constitutional meaning of "law" including common law—Ingredients of offence of scandalising court—Courts Ordinance 1945 (No. 5 of 1945), s. 15—Constitution of Mauritius (Laws of Mauritius, 1981 rev., vol. 1, p. 9), ss. 5(1), 10(1)(4), 12(1)(2)(b), 76(1)[1]*—Courts Act (Laws of Mauritius, 1996 rev., vol. 2), s. 15*[2]

[1] Constitution of Mauritius 1968, s. 5(1): see post, p. 301D.
S. 10: "(1) Where any person is charged with a criminal offence . . . the case shall be afforded a fair hearing . . . (4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence . . ."
S. 12(1)(2): see post, p. 301E–F.
S. 76(1): see post, p. 301G.
[2] Courts Act, s. 15: see post, p. 301B–C.
S. 15, as amended: see post, p. 302B–C.

No. C/2000/2892,
Neutral Citation Number: [2001] EWCA Civ 534

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday 10th April, 2001

B e f o r e:

LORD JUSTICE SCHIEMANN
LORD JUSTICE CHADWICK
AND
LORD JUSTICE MAY

- - - - - - -

REGINA

- v -

CAMBRIDGE UNIVERSITY
EX PARTE PERSAUD

JENNIFER PERSAUD

Appellant

-v-

CAMBRIDGE UNIVERSITY

Respondent

- - - - - - - - -

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Richard Gordon QC & Mr Gregory Jones (instructed by Messrs Teacher Stern Selby for the Applicant)
Mr Robert Jay QC (instructed by Messrs Mills & Reeve of Cambridge for the Respondent)

J U D G M E N T
As Approved by the Court

LORD JUSTICE CHADWICK :

1. This is an appeal against the order made on 21 July 2000 by Mr Justice Maurice Kay in proceedings for judicial review brought by Miss Jennifer Persaud against the University of Cambridge. The decisions of which the applicant sought review were (i) a decision of the Board of Graduate Studies of the University, taken on 26 January 1999 and communicated to her by letter dated 28 January 1999, not to reinstate her name to the Register of Graduate Students and (ii) decisions of the Degree Committee of the Faculty of Physics and Chemistry and the Board of Graduate Studies, taken respectively on 19 November 1999 and 7 December 1999 and each communicated to the applicant's solicitors by letter dated 17 January 2000, refusing to reverse that earlier decision. The judge dismissed the application for judicial review. Permission to appeal to this Court was granted by Lord Justice Laws on 5 October 2000.

The regulatory scheme for graduate students

2. The admission of graduate students to the University of Cambridge is governed by regulations promulgated by the University and administered by the Board of Graduate Studies. The constitution of the Board is described in a witness statement signed on 24 May 2000 by Mr Duncan McCallum, the Secretary to the Board:

> "The Board of Graduate Studies is a Board of the University, established by the University's statutes. The Board has general responsibility for, amongst other things, the University's arrangements for graduate students, as described in the University's Ordinances and the Regulations for Graduate Students and for the various qualifications required for admission as a Graduate Student. The Board's membership consists of a Vice-Chancellor's deputy, appointed by the Vice-Chancellor, as chairman, together with up to 13 other members, of whom eight are appointed by the University's Council and its General Board and up to five co-opted to membership by the Board. Members are typically senior members of the University's academic staff, almost invariably with considerable experience of supervising and examining graduate students. Members come from a wide range of subject areas, but they are not appointed to represent particular constituencies within the University."

3. Application for admission as a graduate student is made to the Board of Graduate Studies. The Secretary of the Board refers the application to the Degree Committee of the Faculty with which the proposed course of research or study appears to be most closely connected. If the Degree Committee agrees to recommend approval of the application, their recommendation is considered by the Board, who decides whether or not to approve the applicant for admission as a graduate student. If approved, the applicant is entered on the Register of Graduate Students.

4. So far as material in the present context, regulation 8 of the General Regulations for Admission as a Graduate Student requires that a Ph.D. student shall pursue a course of research approved by the Board and by the Degree Committee who recommended his or her admission under the direction of a Supervisor appointed by the Degree Committee and shall comply with any special conditions that the Degree Committee may lay down. The Degree Committee is responsible to the Board for the general supervision of each graduate student under their care. Regulation 10 is in these terms, so far as material:

"The Board shall have power to deprive any person of the status of Graduate Student:

...

(e) if the Degree Committee have satisfied the Board

(i) that he has not been working to their satisfaction

or

(ii) that he has not complied with the conditions laid down for him;

or

(iii) that, in their opinion, he is not likely to reach the standard of the M.Sc . or M.Litt. Degree, or M.Phil. Degree (two year course) or M.Phil Degree (one year course), or of any other qualification for which he might be registered as a candidate."

It is, to my mind at least, surprising – having regard to other provisions in the General Regulations - that regulation 10(e)(iii) does not refer expressly to the Ph.D. Degree; but it is said that there are historical reasons for this. It has been common ground that the phrase "any other qualification for which he might be registered as a candidate" is to be taken to include the Ph.D. Degree.

The admission of the appellant as a graduate student and her subsequent supervision

5. In 1992 the appellant obtained a BSc. Degree in Astronomy (with first class honours) from University College, London. Her particular field of study as an undergraduate student had been on the topic of active galactic nuclei. Upon graduation she applied for, and obtained, a place at the Institute of Astronomy, in the University of Cambridge, in order to undertake research leading to a Ph.D. Degree. As she put it in a witness statement made for the purposes of these proceedings and dated 9 March 2000:

"A Ph.D. (in Astrophysics/Astronomy) is an essential training in research and is required in order to pursue a career as a professional research astronomer in academia and this is exactly what I intended to do with my Ph.D."

She passed her first year examinations as a Ph.D. research student without difficulty. In August 1993 she was formally admitted to the Register of Graduate Students (with effect from October 1992) in order to undertake research in "Broad Emission Lines in Active Galactic Nuclei". It was expected that she would complete her research and proceed to her degree by September 1995.

6. The Institute of Astronomy at Cambridge is part of the Faculty of Physics and Chemistry. The Degree Committee of that Faculty (as appears from Mr McCallum's witness statement)

is comprised of senior members of the constituent departments within that Faculty – that is to say, the departments of Physics, Chemistry, Materials Science and Metallurgy, and Astronomy. That Degree Committee had general responsibility for the supervision of the appellant. Her individual supervisor, until October 1994, was Dr Andrew Robinson.

7. The appellant did not complete her research within the expected time. The position is described by the judge in these terms (at paragraphs 1 – 6 of his judgment):

> "For the first year she made normal progress. However in the second year things began to go wrong. According to the Applicant the problem stemmed from conflict with Dr Robinson. She considered that he had involved her in collaboration without her knowledge and was more interested in using her work for his own purposes. Dr Robinson, on the other hand, considered that she had made limited progress in the second year and had become increasingly uncommunicative. In the summer of 1994 he wrote to Mr Paul Astlin, the Secretary of the Institute of Astronomy, to express his concerns. In September 1994 Mr Astlin involved Dr Paul Hewett in the matter. There followed a somewhat drawn out series of discussions and communications with and about the Applicant. At one stage it was proposed that Dr Brian Boyle should replace Dr Robinson as supervisor but this was rejected by the Applicant. On 11 October 1994 Dr Hewett suggested a team of three supervisors, namely Dr Carswell, Dr Terlevich and Dr Hewett himself. The Applicant agreed to this and Dr Hewett was appointed as the official University supervisor.
>
> The change of supervisors was not a success. On 17 May 1995 Dr Hewett met with the Applicant to discuss a further lack of progress and on 26 May 1995 he wrote to Mr Duncan McCallum, Secretary to the Board of Graduate Studies, reporting a lack of progress and saying that the Applicant's contact with the three supervisors was 'sporadic at best'. For her part the Applicant is extremely critical of Dr Hewett's performance in his role as supervisor.
>
> By July 1995, Dr Hewett was expressing concern that requests he had made of the Applicant in May had not been fulfilled. On 7 July he wrote to her expressing 'disappointment and increasing . . . concern about the non-appearance of the written material that I requested you to provide'. He added:
>
> > 'It is not possible for me to supervise effectively someone who does not provide written work as requested or someone who does not communicate regularly when specifically asked to do so.'
>
> By this time, of course, the anticipated three year period of research was coming to an end and the question of further funding was an issue. On 11 September Professor Ellis, the Director of the Institute of Astronomy, wrote to the Applicant requesting information as to progress so as to address further funding. The Applicant did not reply to Professor Ellis until 1 March 1996. She blames a lack of supervisory guidance for the delay.
>
> On 1 May 1996 Professor Ellis wrote to the Applicant to say that Dr Carswell was now her supervisor with immediate effect and that the most important thing for the Applicant was to come in as soon as she could and start

interacting with Dr Carswell with a view to her completing her Ph. D. the following year. However this does not seem to have had the desired effect because on 29 November Dr Carswell sent the Applicant an e-mail saying that 'our contact has been so infrequent that I have no idea what you have done since about March. Can we at least set this to rights?' On 14 March 1997 he wrote to the Applicant referring to a review of her progress which was to be undertaken by 6 June 1997 at the latest. He told her what was required of her in that regard and that her continued registration depended on the outcome of the review.

The Applicant produced a report by 6 June 1997 which was reviewed by Professor Fabian and Dr Aragon. The Applicant was interviewed by them on 13 June. According to her they were sympathetic and constructive but according to Mr McCallum they reported on a lack of clear direction in her work and that it was not apparent to them where the research would lead. What is not in doubt is that the Applicant wrote to Professor Ellis on 16 June referring to various personal, health and academic problems in the previous fifteen months and adding that 'regrettably my level of productivity has been well below par as a result of all these difficulties'."

8. On 16 July 1997 the appellant was interviewed by Professor Ellis. In an e-mail sent to her on 21 July, Professor Ellis summarised the outcome of that interview:

> "I explained that this [Dr Carswell] was your third supervisor since you initially registered and that I am not realistically able to convince another member of staff to take you on at this late juncture.
>
> On the basis of your recent report, an assessment of your potential provided by Professor Fabian and Dr Aragon-Salamanca and discussion with other members of staff here, I am of the opinion that the work being done is unlikely to reach the standard of a Ph.D. thesis and that, in the circumstances, you should withdraw.
>
> Accordingly I will be sending a recommendation concerning your status as a registered Graduate Student to the Degree Committee of the Faculty of Physics and Chemistry which will be considered at their next meeting."

The October 1997 decision

9. On 22 July 1997 Professor Ellis wrote to Mr McCallum to recommend that the appellant be withdrawn from the Register of Graduate Students. His letter contains the following paragraphs:

> "As you know, Jennifer Persaud is currently registered as a Ph.D. student at the Institute of Astronomy but her former supervisor, Dr Carswell, asked to be relieved of her supervision on June 24th 1997.
>
> I recently reviewed the situation, taking into account (i) a scientific report we asked Ms Persaud to produce by June 1997 which demonstrates essentially no progress over the past 15 months, (ii) an independent assessment of her

> research potential which two of my staff conducted by interview taking the report into consideration, (iii) a prolonged discussion with Dr Carswell following his resignation as supervisor where he expressed a genuine desire to help the student but became exasperated because, despite repeated requests for her to come to his office, she rarely complied, and (iv) an interview with Ms Persaud which I held on July 18th.
>
> On the basis of the above, I have concluded that I would find it impossible to convince a new supervisor of the likelihood that Ms Persaud would ever produce a satisfactory thesis. . . ."

[The reference in that letter to an interview on 18 July 1997 is, I think, in error; the interview took place on 16 July 1997. But nothing turns on that.]

10. It is clear that Professor Ellis had informed the appellant, by the end of the interview, that he would be making a recommendation to the Board of Graduate Studies that her name should be removed from the Register of Graduate Students. On 18 July 1997 Dr Elizabeth Griffin, a former member of the Institute of Astronomy but by then at Oxford, wrote to Mr McCallum to extol the appellant's virtues in the most glowing terms. The following passage is indicative of Dr Griffin's support:

> "Her intelligence and suitability for research shone throughout her first year; she had been able to identify short-cuts in the analyses which other professionals carried out, and succeeded in devising original improvements that would enable her to calculate more realistic physical models than anyone previously had achieved; she was spoken of as a 'power-house' of intellectual ability and dynamism, and her supervisor's first-year report on her progress was described as 'excellent'.

11. In a letter to the appellant dated 18 August 1997, Mr McCallum, after referring to a telephone call in July 'regarding the timetable for formal consideration, by the Degree Committee for the Faculty of Physics and Chemistry and the Board of Graduate Studies, of your status as a graduate student', wrote:

> "I am now able to let you know that at their first meeting next term, the Degree Committee expect to have to consider a recommendation from the relevant authorities in the Institute of Astronomy that you no longer be permitted to continue on the Register of Graduate Students here. I feel quite sure that, in considering your case, the Degree Committee and the Board will wish to allow you the opportunity to put your views of your position in writing, so that they can give proper consideration to all aspects of your case. Accordingly, I write now to invite you to provide me, by the end of September 1997, with a written statement, setting out your own position. I will then arrange for this statement to be considered by the Degree Committee and, subsequently, by the Board."

12. The appellant's response to that invitation was to send Mr McCallum a long letter (extending over 26 pages) with a further 54 pages of supporting documentation. The letter, which is dated 30 September 1997, was written, as she said in the second paragraph, 'to present my side of the situation and to ask that I be allowed to remain on the Register of Graduate Students to complete my Ph.D.' The way in which she proposed that that should be achieved appears from the third paragraph of that letter:

> "I am very keen to complete my Ph.D. thesis and I now have a firm arrangement for continued supervision. Professor A. Boksenberg has agreed to be my nominal University Supervisor at Cambridge and I will be working with Dr P. Gondhalekar (Rutherford Appleton Laboratory) who is willing to supervise me in a set-up whereby I remain registered for my Ph.D. at the University of Cambridge whilst being based temporarily at the Rutherford Appleton Laboratory. It is estimated that I will complete my Ph.D. in two years. Professor Bokesenberg and Dr Gondhalekar will also be writing in support of this proposal."

13. The Board of Graduate Studies met on 28 October 1997 to consider the recommendation that the appellant's status as a graduate student be withdrawn. It appears from paragraph 53 of Mr McCallum's witness statement that the following documents were available for the Board to consider: (i) a letter from the secretary of the Degree Committee, with a brief history of the circumstances which had given rise to the recommendation, (ii) formal reports from the appellant's various supervisors, (iii) the appellant's letter of 30 September 1997 and (iv) letters from Professor Ellis, Dr Gondhalekar, Professor Boksenberg, Dr Mason (the appellant's College tutor), Dr Griffin and Dr Dworetsky (Acting Director of the University of London Observatory, who had supervised her as an undergraduate at University College London). The Board decided not to remove the appellant's name from the Register of Graduate Students. The proposal that the appellant complete her Ph.D. thesis at the Rutherford Appleton Laboratory under the supervision of Dr Gondhalekar was accepted in principle. On 30 October 1997 Mr McCallum wrote to the appellant:

> "The Degree Committee for the Faculty of Physics and Chemistry and the Board of Graduate Studies have now considered the question of your continuation as a Graduate Student. After very careful consideration of all relevant documentation, they have agreed that:
>
> (i) your name may remain on the Register of Graduate Students for, at this stage, a period of 6 months;
>
> (ii) you will be permitted to pursue your research at the Rutherford Appleton Laboratory under the supervision of Dr Gondhalekar;
>
> (iii) Professor Boksenberg will act as your contact with the Institute of Astronomy;
>
> (iv) Dr Gondhalekar will be asked to submit, in time for its consideration at the Degree Committee's meeting on 5 June 1998, a report on your attendance, progress and research potential; and
>
> (v) your continuation on the Register of Graduate Students will then be considered in the light of that report."

On 14 November 1997 the appellant acknowledged that letter and confirmed that she understood its contents.

14. I do not, myself, read the letter of 30 October 1997 as imposing conditions within the meaning of regulation 8 of the General Regulations, so as to bring a failure to comply within regulation 10(e)(ii). There is no requirement that she attend at the Rutherford Appleton

Laboratory on a daily basis (or on the basis of any other prescribed frequency or regularity). There is no requirement that she provide written work by any prescribed date. But the message was clear enough. The judge observed that she must have known "that she was walking an academic tightrope . . . she was in the last chance saloon." I would prefer to put it in less colourful terms. The appellant (as she was, herself, to acknowledge in her letter of 23 September 1998 - to which I refer below) can have been in no doubt, upon receipt of the letter of 30 October 1997, that her continued status as a graduate student of the University would be reviewed in June 1998; and that the result of that review was likely to be unfavourable unless Dr Gondhalekar reported positively upon three elements – that is to say, (i) attendance at the Rutherford Appleton Laboratory, (ii) progress in her approved field of research (Broad Emission Lines in Active Galactic Nuclei) and (iii) potential for a thesis of Ph.D standard on the conclusion of that research.

The July 1998 decision

15. The appellant had commenced work at the Rutherford Appleton Laboratory on 22 October 1997 - that is to say, a week or so before the decision of the Board of Graduate Studies had been communicated to her by the letter of 30 October 1997. But the new arrangements did not prove altogether satisfactory. She had no grant; she was living in London with her family; and commuting to the Rutherford Appleton Laboratory, which was near Didcot, presented considerable difficulties. The judge described the position at paragraphs 8, 9 and 10 of his judgment:

> "Initially [the Applicant] had contact with Dr Gondhalekar 'practically every day' but found his attitude 'very straining and discouraging' and considered he made 'unnecessary and unreasonable demands'. According to her she had a discussion with him on 19 December 1997 in which his attitude was unhelpful but when she complained to Professor Boksenberg he (the Professor) was encouraging. In January 1998 relations with Dr Gondhalekar appear to have deteriorated further, with the Applicant taking the view that he was requiring her to work for the benefit of his projects rather than towards the completion of her research.
>
> On 13 January 1998 the Applicant heard from a third party that Dr Gondhalekar was to retire at the end of February. She started to enquire about further supervisory possibilities. However, her visits to the laboratory had become infrequent. Dr Gondhalekar did indeed retire at the end of February and the Applicant met with him for the last time on 6 March. Her account is that he appeared happy with a summary which she had prepared in respect of her work in the previous November and December but that he would not be drawn into a scientific discussion about a 'draft plan for work and discussion', except that, in response to her persistence, he agreed that it was 'a good course of action'. She also sent copies of the same documents to Professor Boksenberg who thought they 'looked pretty good'.
>
> After the retirement of Dr Gondhalekar, the Applicant did not have an effective supervisor although she had intermittent contact with Professor Boksenberg whose role seems to have been more pastoral. She remained in London most of the time 'continuing to work on my research on my own, unsupervised' and using the facilities of Imperial College. In May 1998 she produced a report on her research and results."

16. On 17 June 1998 Dr Gondhalekar made a report to the Degree Committee, as had been envisaged at the time of the October 1997 decision. On 30 June 1998 he made a report in similar terms to the Board. Mr McCallum's account of events immediately thereafter is set out in paragraphs 57 to 60 of his witness statement:

> "On 3 July 1998 the Secretary to the Degree Committee reported to me and advised me that the Degree Committee had met on 3 July 1998 and considered the report from Dr Gondhalekar. The Degree Committee were of the view that the report described a pattern of interaction which also occurred between the Applicant and her previous supervisors. It concluded that no real progress had been made and therefore it unanimously agreed to recommend that the Applicant's name be withdrawn from the Register of Graduate Studies.
>
> Regulation 10 at page 5 of the Regulations for Graduate Students provides that the Board of Graduate Studies shall have the power to withdraw any person from the Register of Graduate Students if the Degree Committee has satisfied the Board of Graduate Studies that the student has not been working to its satisfaction.
>
> On 10 July 1998 the Board of Graduate Studies met and again had available the documents available at their previous meeting on 28 October 1997 (as described above), plus a copy of my letter dated 30 October 1997 to the Applicant, setting out the Board's decision, and a letter from the Secretary of the Degree Committee containing their recommendation that the Applicant be withdrawn from the Register of Graduate Students. I summarised the Board of Graduate Studies' previous consideration of the case which had taken place at their earlier meeting of 28 October 1997.
>
> The Board of Graduate Studies agreed to remove the Applicant's name from the Register of Graduate Students."

17. On 13 July 1998 Mr McCallum wrote to the appellant to advise her of the decision which had been reached on 10 July 1998. The letter was in these terms:

> "At their meeting on 10 July 1998, the Board of Graduate Studies considered a report by Dr Gondhalekar on your progress since you were permitted to work under his supervision, at the Rutherford Appleton Laboratory. The Board were reminded of their previous consideration of your case and of the importance to be attached to Dr Gondhalekar's report, as indicated in my earlier letter of 30 October 1997.
>
> Having noted that Dr Gondhalekar was not able to report positively on your progress over the whole of the period when you were supposed to be working with him and that you had apparently stopped coming to the Rutherford Appleton Laboratory from January 1998, the Board agreed, on the Degree Committee's recommendation, that your name be withdrawn from the Register of Graduate Students with immediate effect."

That letter has to be read in conjunction with Mr McCallum's letter of 30 October 1997. It had been made clear to the appellant, by the letter of 30 October 1997, that the result of the review which (as that letter had indicated) was to be carried out in June 1998 was likely to

be unfavourable unless Dr Gondhalekar had reported positively upon three elements – that is to say, (i) attendance at the Rutherford Appleton Laboratory, (ii) progress in her approved field of research (Broad Emission Lines in Active Galactic Nuclei) and (iii) potential for a thesis of Ph.D standard on the conclusion of that research. The letter of 13 July 1998 states, in terms, that Dr Gondhalekar has not been able to report positively on the first two of those elements – progress and attendance. The letter makes no reference (at least, no reference in express terms) to any report by Dr Gondhalekar on the third of those elements – potential for a thesis of Ph.D. standard.

The January 1999 decision

18. The appellant's response to the letter of 13 July 1998 was to inform Mr McCallum that she intended to appeal against the decision to withdraw her name from the Register of Graduate Students. On 22 July 1998 the Academic Affairs Officer of the Cambridge University Students Union wrote to Mr McCallum on the appellant's behalf to request sight of Dr Gondhalekar's report. The letter of 22 July 1998 asked, also, for "any information on all the points that the Degree Committee took into account in arriving at their recommendation". Receipt of the letter of 22 July 1998 was acknowledged, in the absence of Mr McCallum on leave, by a letter from the Board dated 7 August 1998. The Assistant Registrary (sic), Miss Katherine Brown, wrote that: "We will be in touch again when we are in a position to do so". There is nothing in the material before us to suggest that there was any further response to the request made in the letter of 22 July 1998. The appellant, at paragraph 75 of the witness statement which she signed on 9 March 2000, describes the position in these terms:

> "Miss Alix Langley, who succeeded Mr Colin Horswell as Academic Affairs Officer at CUSU, had tried to get through to Mr McCallum regarding the matter of the report several times by telephone in September 1998 but could not get access to Mr McCallum. She was finally able to speak to Mr McCallum on 11 September 1998 but he would make no specific comment on the matter of access to the report. There was in the end no reply about access to Dr Gondhalekar's report."

That description of the position has not been contradicted by anyone on behalf of the University.

19. The General Regulations for Admission as a Graduate Student make no provision for an appeal against a decision of the Board of Graduate Studies, under regulation 10, to deprive a person of the status of a graduate student – or, indeed, against any other decision of the Board. But the Board do not appear to have disabused the appellant as to the existence of a right to appeal; nor to have discouraged her in her attempt to appeal. She pursued that attempt by a long letter dated 23 September 1998. In the introductory paragraph she wrote:

> "I am writing now to present new information about my case and to appeal against the Board's decision. I was well aware of the conditions which the Board of Graduate Studies had set, as outlined in your letter of 30 October 1997, and that my continuation rested on progress in my Ph.D. research. I was making very sure that I would fulfil the Board's conditions and, as you will see in what follows, I abided by all the set conditions. The information contained in the parts of Dr Gondhalekar's report that have been reported to me is inaccurate. I am presenting new information here that will refute the inaccuracies of Dr Gondhalekar's report as they have been reported to me."

20. There follows, over the next fourteen pages, a detailed factual account of events (as the appellant saw them) which had taken place between her introduction to Dr Gondhalekar in August 1997 and his retirement from the Rutherford Appleton Laboratory at the end of February 1998. It appears from that account - and it is not, I think, in issue – that, until the middle of January 1998, the appellant travelled from her home in London to the laboratory at Didcot (at considerable personal inconvenience) on a more or less daily basis; but that, for a period of some two weeks in January 1998, she was unable to do so because she had contracted influenza. Thereafter there were some visits to Didcot at the end of January and one or two visits in February 1998. The appellant's contact with Dr Gondhalekar appears to have ended with a short meeting on 6 March 1998, in the course of which she handed to him a three page document (document "B.9") entitled "Draft Plan of Work for Discussion". She complained, in her letter of 23 September 1998, that Dr Gondhalekar had refused to discuss that document. She sent the document to Professor Boksenberg who (as she says) told her that it "looked pretty good". Thereafter she worked on her own at Imperial College London, with some contact with Professor Boksenberg. At page 16 of the letter there is a paragraph in these terms

> "In May 1998, entirely on my own initiative, I prepared a report on my research and my results. I had my report ready, but Dr Gondhalekar never contacted me to see my work or my report. However I continued working on my Ph.D. research."

That report is a seven page document (document "B.12") entitled "Summary" with a further seven pages of profiles and data.

21. Mr McCallum referred the appellant's letter of 23 September 1998 to the Degree Committee. In paragraphs 62 to 64 of his witness statement, he sets out his account of subsequent events:

> "On 20 November 1998 the Degree Committee agreed to obtain an academic opinion from a senior academic in the field within the Faculty who had not been involved in [the appellant's] supervision, on the progress reports (which were enclosures B9 and B12 of her letter dated 23 September 1998) which the appellant said that Dr Gondhalekar had not taken into account when reporting to the Degree Committee.
>
> On 15 January 1999 the Degree Committee received that opinion on the progress reports. The opinion had been written after consideration of the two documents which were enclosures B9 and B12 only. The senior academic reported that the enclosures B9 and B12 represented a very small amount of work, were the equivalent to the introduction for an undergraduate essay, that there was no evidence of significant effort, understanding or proposed development and they did not form a viable basis for any future research. The senior academic was categorical in recommending that the Applicant should not be permitted to continue as a research student.
>
> After considering this report the Degree Committee recommended a rejection of the Applicant's representations irrespective of the availability of other supervisors."

22. The Board of Graduate Studies met on 26 January 1999. The following documents were available for consideration by the Board: (i) the documents which had been before them at

their previous meetings on 28 October 1997 and 10 July 1998, (ii) the appellant's letter of 23 September 1998, (iii) a letter from the secretary of the Degree Committee setting out the decision taken in the light of the senior academic's opinion of January 1999 and (iv) that opinion. The Board decided that the appellant should not be reinstated. Mr McCallum communicated that decision in a letter dated 28 January 1999:

> "Both the Board and the Degree Committee noted that central to your appeal was your argument that in making his report to the Degree Committee in June 1998, Dr Gondhalekar had not taken into account your own report on your work (your enclosure B12), a report which you claimed that he had not read. The Degree Committee therefore agreed that an assessment of that report should be sought from a senior referee with sufficient knowledge of the field, but with no prior involvement with your case. That referee's report was quite categorical in its recommendation that you should not be permitted to continue as a Graduate student."

The December 1999 decision

23. In the meantime (from October 1998) the appellant had started work on a new research project, under the supervision of Dr Griffin, into "the Long-term Properties of Stellar Chromospheres". She had made reference to that possibility in her letter of 23 September 1998. On 2 February 1999 Dr Griffin wrote to the secretary of the Institute of Astronomy, at Cambridge, referring to the work that the appellant was doing under her supervision and seeking confirmation that oral assurances which (as she said) she had been given in September or October 1998 – to the effect that, notwithstanding the removal of the appellant from the Register of Graduate Students she could be reinstated when the time came for her to submit a thesis – would be honoured. That confirmation was not forthcoming. The reason, set out in a letter dated 4 February 1999, was that reinstatement could only be considered when the student had completed the research project for which he or she had originally been registered. It was said that the research project upon which the appellant had become engaged under the supervision of Dr Griffin was "completely different" from the project upon which she had been engaged at Cambridge or at the Rutherford Appleton Laboratory. That letter was followed by a letter, dated 10 February 1999, from Mr McCallum in which he informed Dr Griffin that the decisions set out in his letter of 28 January 1999 were final. Further efforts by Dr Griffin to re-open the possibility of reinstatement in the future did not bear fruit.

24. In or about May 1999 the appellant instructed solicitors. On 13 May 1999 those solicitors asked Mr McCallum for a copy of Dr Gondhalekar's report "by return". The response to that request is contained in a letter from Mr McCallum dated 11 June 1999. He wrote:

> "It is the policy of the Board of Graduate Studies that Supervisors' reports on student progress are confidential to the Board, the relevant Degree Committee, the Departmental authorities and the Supervisor. I am therefore unable to comply with your request."

The solicitors threatened judicial review proceedings. Mr McCallum wrote again, on 13 July 1999, enclosing a copy of the General Regulations. He went on to say this:

> "Regulation 8 indicates that Supervisors send progress reports to the Board of Graduate Studies and the Degree Committee concerned. It makes no provision for making copies of those reports available to a student.
>
> The Board's action in withdrawing Miss Persaud's name from the Register of Graduate studies was based on Regulation 10 of the same Regulations. There are no Regulations regarding an appeals procedure in a case of this kind. In accordance with their normal procedures, both the Board of Graduate Studies and the Degree Committee of the Faculty of Physics and Chemistry gave careful consideration to the representations which Miss Persaud made against the Board's decision. I refer you to my letter to Miss Persaud, dated 28 January 1999."

25. The solicitors responded promptly. In a letter dated 14 July 1999 they asserted that the failure of the Board to disclose Dr Gondhalekar's report and that of the independent referee - "whose identity was not even revealed to Miss Persaud"- breached the rules of natural justice and article 6 of the European Convention on Human Rights. They observed that:

> "Given the detailed nature of the issue before the Board, it was necessary for Persaud to know in detail the contents of both Dr Gondhalekar's report and that of the independent referee in order for her to be able to make proper representations in pursuit of her appeal to the Board."

26. Mr McCallum replied to the effect that the Board would consult further with the Degree Committee. That took some time. Despite numerous letters of reminder from the solicitors, it was not until 17 January 2000 that Mr McCallum felt able to inform the appellant's solicitors that the consultation had not led to a change of heart. He wrote:

> "The Degree Committee for the Faculty of Physics and Chemistry and the Board of Graduate Studies have now had an opportunity to reconsider their earlier decisions to (a) withdraw Miss Persaud's name from the Register of Graduate Students, and (b) decline her representations against that decision. I am asked to inform you that neither body was willing to reverse these decisions."

27. The question whether or not to reverse its decision had, in fact, been taken by the Board some five weeks before the date of that letter. The position is described at paragraphs 73 to 75 of Mr McCallum's witness statement:

> "On 19 November 1999, the Degree Committee reconsidered their earlier decisions to recommend withdrawal of the Applicant's name from the register of Graduate Students and to decline her representations against that decision. The Committee members unanimously agreed that they were still of the same mind.
>
> The Board of Graduate Studies met on 7 December 1999. They had available all the documentation which had been available at all their earlier meetings on this matter, together with subsequent correspondence with the Applicant's solicitors and a letter from the Secretary of the Degree Committee containing that body's most recent recommendation. I summarised their earlier consideration of this case.

> The Board of Graduate Studies reconsidered their earlier decisions to withdraw the Applicant's name from the Register of Graduate Students and to decline her representations. It considered the matter but was not willing to reverse the decisions."

These proceedings

28. Application for permission to apply for judicial review was made by a notice in Form 86A dated 1 March 2000. The application for permission was granted on 5 May 2000 by Mr Justice Turner. The substantive application came before Mr Justice Maurice Kay on 7 July 2000. His judgment, which is now reported at [2000] Ed. C.R. 635, was handed down on 21 July 2000. He dismissed the application and refused permission to appeal. As I have said, permission to appeal was granted by this Court on 5 October 2000.

29. Mr Justice Maurice Kay identified five grounds of challenge on the application before him: (i) lack of fairness (which he described as the principal ground of challenge); (ii) failure to give reasons for the decision to remove the appellant's name from the Register of Graduate Students; (iii) fetter of discretion, in that (it was said) the Board applied pre-existing policies rigidly without regard to the circumstances of the particular case; (iv) unlawful delegation, in that (it was said) the Board left the decision to the senior member of the faculty who had been consulted by the Degree Committee; and (v) conduct *ultra vires* the Board, in that the General Regulations do not provide for the Board to consult persons outside the Degree Committee. He rejected each of those grounds. The grounds which I have identified under (iii), (iv) and (v) – fetter of discretion, unlawful delegation and *ultra vires* conduct - are not pursued in this Court; and I need say no more about them. Nor is it now suggested that the provisions of article 6 of the Convention add anything, in this case, to the principles which would be applicable to the consideration of a challenge on grounds of lack of fairness under domestic law as it was before the coming into force of the Human Rights Act 1998.

30. The judge rejected the challenge based on lack of fairness for the reasons which he gave at paragraphs 21 to 23 of his judgment ([2000] Ed.C.R 635, 646B-647A) :

> "Whilst it is true that, in the decision letter referable to the decision taker in July 1998, reference was made to both a lack of progress and recent absences from the Rutherford Appleton Laboratory, and whilst it may seem that the former is a matter of academic judgment but the latter is less obviously so, the later decision of January 1999, the one under challenge, was clearly based on the lack of progress. At the heart of this matter is the reality that the Board of Graduate Studies resolved to remove the Applicant's name from the register because of the professional and academic advice it received and accepted about a lack of progress and the lack of a viable basis for future research – and this after six years had elapsed since her arrival in Cambridge.
> . . .
>
> In my judgment it was not unfair for the University authorities to decline to disclose the reports of Dr Gondhalekar and the senior member of the Faculty to the Applicant. Nor was it unfair (although in the circumstances it is a little surprising) that they refused to disclose the identity of the senior member of the Faculty whose opinion was sought and obtained. It is fanciful to suggest that for the degree Committee to decide that a particular colleague should be appointed to provide a qualified and independent opinion was to enter territory in which the choice was potentially subject to representations from

> the Applicant or to the appropriateness of his qualifications and independence.
>
> At all material times the Applicant must have known that she was walking an academic tightrope at least from October 1997. With apologies for the mixing of metaphors, she was in the last chance saloon. Her future depended on her satisfying the judgment of Dr Gondhalekar, the Degree Committee and the Board of Graduate Studies as to her progress. In their academic judgment, after obtaining appropriate advice and considering the lengthy representations which the Applicant was enabled to make, she was found wanting. I am entirely satisfied that that decision and its subsequent reconsideration complied with the requirements of fairness in the circumstances of this case. Put another way, the non-disclosures of which the Applicant complains were not unfair. There are sound and obvious reasons why reports to those who have to make academic judgments of this type should remain confidential, thus enabling the reporters to express themselves frankly in the knowledge that what they have to say will not be made available to the subjects of the reports."

31. The judge rejected, also, the challenge based on failure to give reasons. He said this, at paragraph 27 of his judgment ([2000] Ed.C.R. 647F-G):

> "I am prepared to assume without deciding that, at some stage, a legal duty [to give reasons] arose in the present case. However, even on this basis, the ground of challenge fails. The original decision under challenge was explained to her in the statement 'Dr Gondhalekar was not able to report positively on your progress over the whole period when you were supposed to be working with him.' This was effectively a statement that the decision had been taken by reference to Regulation 10(e)(i) and/or (ii)."

The issue on this appeal

32. In opening the appeal in this Court, Mr Gordon QC defined the issue succinctly - and, to my mind, helpfully – in these words:

> "The sole question for decision on the appeal is a narrow but important one. It is whether in a decision making process which has such profound effects upon a student such as [the appellant], it is open to Cambridge University to assert that the requirements of fairness start and end with allowing her to make representations as to why she should not be 'dismissed' from the University."

33. In stating the issue in that way, Mr Gordon assumes, correctly, two propositions of law which are not in doubt and which have been common ground in the arguments before this Court. The first is that in exercising its power to deprive the appellant of her status as a graduate student – a power conferred by regulation 10 of the General Regulations – the Board of Graduate Studies was under a public law duty to act fairly towards her. The second is that what the requirement of fairness demands, in any particular case, depends on the character of the decision making body, the nature of the decision which it has to make and the regulatory framework (if any) within which it is required to operate. Those propositions are too well established to require the citation of authority. But it is, I think, helpful to have in mind the observations of Lord Mustill in *Regina v Secretary of State for the Home*

Department, Ex parte Doody [1994] AC 531. In setting out the propositions to be derived from the authorities, he said this, at page 560E-G:

> "What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. . . . (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

34. In the present case the Board of Graduate Studies made four relevant decisions: (i) the October 1997 decision – to allow the appellant to remain on the Register of Graduate Students subject to review in June 1998 in the light of a report to be provided by Dr Gondhalekar; (ii) the July 1998 decision – to remove the appellant from the register, for the reasons given in the letter of 13 July 1998; (iii) the January 1999 decision – to reject the appellant's application for reinstatement, notwithstanding the representations which she had made in her letter dated 23 September 1998; and (iv) the December 1999 decision - to confirm the Board's earlier decisions to remove the appellant from the register (the July 1998 decision) and to reject her application for reinstatement (the December 1999 decision). It is only the January 1999 and December 1999 decisions that are the subject of challenge in these proceedings; but those decisions have to be examined in the context of the earlier decisions in October 1997 and July 1998.

35. The decision upon which these proceedings turn, as it seems to me, is that taken in January 1999. If the appellant was treated fairly in relation to that decision, then it is difficult to see how subsequent events could have made her treatment in relation to the December 1999 decision unfair. Conversely, if she were not treated fairly in relation to the January 1999 decision, then it cannot be said that anything that happened thereafter altered that position. If the January 1999 decision cannot stand on its own, it is not (in the circumstances of this case) validated by the confirmation in December 1999.

36. The context in which the January 1999 decision was made may be summarised as follows: (i) the power to deprive the appellant of her status as a graduate student was exercisable by the Board (in the circumstances of this case) if the Board were satisfied, on a report or recommendation from the Degree Committee, of one or more of the three matters set out under regulation 10(e) of the General Regulations; (ii) the power was discretionary – so that, notwithstanding that the Degree Committee satisfied the Board of one or more of the regulation 10(e) matters, the Board had to address its own collective mind to the question whether, in all the circumstances, deprivation of graduate status was an appropriate response to the Degree Committee's report or recommendation; (iii) the question (under regulation 10(e)(iii)) whether the appellant's research was likely to reach the standard required for the award of a Ph.D. Degree was peculiarly within the academic expertise of the Degree Committee, rather than the Board (none of whose members had expertise in the relevant discipline), so that the Board's role, in relation to that question, was necessarily limited to satisfying itself that the Degree Committee had reached its opinion on a basis which was fair to the appellant; (iv) if satisfied that the Degree Committee, acting fairly, had reached an opinion that the appellant's research was not likely to reach the standard required for the award of a Ph.D. Degree, it is difficult to see how the Board, in a proper exercise of its own discretion, could allow the appellant to continue with her research; (v) the material before

the Board in October 1997 had not persuaded the Board that deprivation of status was the appropriate response – this suggests, at the least, that the Board were not satisfied, at that stage, that the appellant's research provided no viable basis for a Ph.D. Degree; (vi) the basis upon which the appellant was allowed to continue with her research, with the status of a graduate student, following the October 1997 decision, would have led her to think that the three elements which were to be the subject of review in June 1998 were attendance, progress and research potential; and that the basis of that review would be a report by Dr Gondhalekar; (vii) when carrying out the review in July 1998, neither the Degree Committee nor the Board had given the appellant an opportunity to address whatever criticisms were made in the report that Dr Gondhalekar had made; (viii) the July 1998 decision to withdraw graduate status from the appellant had been made (so far as appears from the material which has been disclosed) on the basis of an unfavourable report from Dr Gondhalekar on the first two elements (attendance and progress); there is nothing in the material disclosed which suggests that Dr Gondhalekar had addressed the third element (research potential), nothing which suggests that either the Degree Committee or the Board addressed that element, and nothing which suggests that the Board took that element into account (one way or the other) in reaching the July 1998 decision; (ix) the appellant had been told (in the letter of 13 July 1998) that the decision had been made on the basis of an unfavourable report on the first two elements (attendance and progress); she had not been told that the viability of her research, or its potential for the award of a Ph.D Degree, was in question; (x) the appellant had been given an opportunity to make representations with the object of persuading the Board to reverse the July 1998 decision; but she had not been given any particulars of the factual basis upon which it was said that her attendance and progress were unsatisfactory; (xi) after receiving the appellant's representations (set out in her letter of 23 September 1998), the Degree Committee had decided, without informing her, to take a further opinion on her progress from an unnamed senior academic; (xii) the unnamed senior academic had reported unfavourably on the appellant's progress; but, perhaps more significantly, he had reported, without having discussed the matter with the appellant, or (so far as appears from the disclosed material) with anyone else, that there was no viable basis for any future research; in that he had gone beyond the matters which had appeared to be in question when the appellant had been given such opportunity as she had to address the basis on which the July 1998 decision had been taken.

37. The question for the Court is whether, in that context, the Board acted fairly towards the appellant when making its decision in January 1999 to reject her application for reinstatement as a graduate student. In my view that question must be answered in the negative. There are, to my mind, three factors which compel that answer.

38. First, the question whether or not the appellant had met Dr Gondhalekar's requirements as to attendance at the Rutherford Appleton Laboratory was an issue of fact. She had provided a detailed account of her attendance at the laboratory. If the Board were minded to reject that account as factually inaccurate, then fairness required that they had to put that possibility to her so that she could meet it. If they accepted the account as factually accurate, then fairness required that they had to put to her the criticism that her attendance did not meet Dr Gondhalekar's reasonable requirements, specifying what those requirements were.

39. Second, the July 1998 decision that the appellant had made no sufficient progress in her research, based as it was on Dr Gondhalekar's report, had to be revisited once the appellant had alleged (as she did in her letter of 23 September 1998) that Dr Gondhalekar had not read the material she had sought to put before him. The question what progress had she made was, as it seems to me, a question of fact. On that question she had taken the initiative of

supplying document for consideration. The question whether that progress was sufficient in the circumstances is a question partly of fact and partly of academic judgment. Fairness required that the appellant be told who (if not Dr Gondhalekar) was to make the academic judgment upon her work. In circumstances in which the appellant's record of past difficulties in relating to the four members of the department who had been involved in her supervision – and given the strongly antipathetic view which had been formed by the head of the department, Professor Ellis – it was not enough, in my view, for the Degree Committee and the Board to refer simply to "a senior academic in the field within the Faculty who had not been involved in [the appellant's] supervision" or to "a senior referee with sufficient knowledge of the field but with no prior involvement with your case". The appellant was given no opportunity to raise any question as to the partiality, or perceived partiality, of the person who was to make a judgment upon her work; nor to raise any question as to his or her expertise in the particular field of her research. That is not to suggest that there is any reason to think that the unnamed senior academic was other than scrupulously impartial and abundantly qualified. That is not the question; the question is whether, in the very special circumstances of this case, fairness required that the appellant should have the opportunity to raise any concern that she might have as to qualities of impartiality and expertise which were so obviously necessary in the person by whom her work was to be judged. In my view fairness did require that.

40. Third, the senior academic appears to have put in question a matter of which the appellant had never been given warning; that is to say whether her research subject had potential to merit the award of a Ph.D Degree. It must have been accepted that her research had such potential when she was admitted to the Register of Graduate Students in 1993; it must have been thought that it still had such potential when she was allowed to continue following the October 1997 decision; and there is nothing to suggest that the potential value of her research had been called in question by Dr Gondhalekar's report. In those circumstances fairness required that she be warned that the decision to refuse her application for re-instatement was to be taken on the basis of this new, unfavourable, appraisal by an unnamed senior academic. Further, for the reasons that I have already given, fairness required that, in this context also, she be given the opportunity to raise any concerns that she might have as to the impartiality and expertise of her academic judge. And, for my part, I am not persuaded that a fair judgment could be made on the question whether research which had once been accepted as having the potential to merit the award of a Ph.D. Degree had lost that potential could be made without some understanding, after discussion with the research student, of what had gone wrong.

41. I would accept that there is no principle of fairness which requires, as a general rule, that a person should be entitled to challenge, or make representations with a view to changing, a purely academic judgment on his or her work or potential. But each case must be examined on its own facts. On a true analysis, this case is not, as it seems to me, a challenge to academic judgment; it is a challenge to the process by which it was determined that she should not be reinstated to the Register of Graduate Students because the course of research for which she had been admitted had ceased to be viable. I am satisfied that that process failed to measure up to the standard of fairness required of the University.

42. I would allow the appeal and quash the January 1999 decision. So far as necessary I would quash the December 1999 decision also.

43. That leaves in place the July 1998 decision. It was in order to give effect to that decision that the appellant was removed from the Register of Graduate Students. That decision is not, itself, the subject of direct challenge in these proceedings; although there is an indirect

challenge to that decision, in that the Court is asked, by order of *mandamus*, to require the Board of Graduate Studies to reconsider the January 1999 decision not to reinstate her.

44. I am not, at present, persuaded that it would be appropriate to make an order of *mandamus* in this case. The jurisdiction to do so is undoubted; but it is a matter for the discretion of the Court whether that jurisdiction should be exercised in any particular case. It is, I think, necessary to ask whether an order requiring the Board of Graduate Studies to reconsider the January 1999 decision could now serve any useful purpose. That is a question upon which we have not been addressed. The position (as it appears from the material before us) is that the appellant is no longer engaged in the approved course of research for which she was registered as a Ph.D. student. She is engaged (so far as I am aware) on a "completely different" course of research under the supervision of Dr Griffin at Oxford. My present view is that, if the Board of Graduate Studies were now asked to consider whether to reinstate her graduate status, it would have to refuse to do so on the basis that she is no longer pursuing the approved course of research for which she was registered. It has not been suggested that the Board could be required to register (or reinstate) her as a graduate student in respect of some course of research which has never been approved by the Degree Committee; nor that the Degree Committee could be required to approve her current course of research. If the appellant seeks to pursue a claim for *mandamus*, I would think it right to invite further submissions (and, perhaps, some further evidential material) on the question whether such an order could or would now serve any useful purpose.

45. For those reasons I would allow the appeal, but (at this stage) only to the extent indicated.

LORD JUSTICE MAY:

46. I agree.

LORD JUSTICE SCHIEMANN:

47. I also agree.

ORDER: Appeal allowed in part, with costs.

(Order does not form part of approved Judgment)

Case No: CO/4285/00 + C0/4472/01, Neutral Citation Number: [2002] EWHC 1382 (Admin)
IN THE HIGH COURT OF JUSTICE
IN THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

Friday 5th July, 2002

B e f o r e:

THE HONOURABLE MR JUSTICE SCOTT BAKER

– – – – – – –

DR GILLIAN ROSEMARY EVANS

Claimant

– v –

THE UNIVERSITY OF CAMBRIDGE

Defendant

– – – – – – – – –

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

DR GILLIAN ROSEMARY EVANS IN PERSON
MR GERARD CLARKE (instructed by CLIFFORD CHANCE) for the DEFENDANT

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J U D G M E N T
As Approved by the Court

1. Dr Evans is a lecturer in history at Cambridge University. She has a long running dispute with the University about her failure to obtain promotion. She complains about various aspects of the promotion system and believes that she should have been promoted to professor.

2. There are before the court two sets of proceedings. In the first, CO/4285/2000, she challenges the General Board's Promotions Committee's decision of 17 October 2000 and the General Board's decision of 25 October 2000 not to recommend her for promotion as well as the Appeals Committee's decision of 11 December 2000 to reject her appeal against the General Board's decision. In the second, CO/4472/2001, she challenges the General Board's decision of 10 October 2001 not to propose the creation for her of a personal professorship. The proceedings were stayed pending further consideration of Dr Evans for promotion. Also, the University has tried to resolve Dr Evans grievances internally but has been unable to do so. At one stage Sir Brian Neill became involved as a mediator.

3. When the matters became before Burton J. on paper he gave various directions including one for an oral hearing on notice. The case came before me on 9 May 2002. After hearing argument for most of the day I granted permission but limited to the issue of whether or not the challenged decisions are amenable to judicial review. It seemed to me that this issue lies at the heart of the case and if resolved against Dr Evans would dispose of the case. I gave her the opportunity to lodge any further submission on this issue in writing by 20 May 2002 and gave the Defendant the opportunity of replying in writing on any points of law. Both parties have availed themselves of these opportunities. I further directed that the grant or otherwise of permission on any of the other issues should await the outcome of my decision.

4. Oxford and Cambridge Universities derive their powers from the Oxford and Cambridge Act 1923. They have statutory power to make their own statutes subject to the approval of the Privy Council, and also their own ordinances. They are different from other universities. They have no visitor.

5. A similar application was made by Dr Evans in 1998. She sought leave to bring proceedings for judicial review of a decision of the Promotions Appeals Committee on 2 March 1998, claiming she had been the subject of a miscarriage of justice on a number of grounds. Turner J, in refusing permission (see CO/×./1998 unreported) pointed out that there had for a considerable period been a running dispute between Dr Evans and the University on the basis that she felt her qualifications entitled her to serious consideration for promotion to the position of professor. She had brought proceedings in the employment tribunal and the county court. Turner J. dealt with the various substantive complaints deciding that none of them had any merit before concluding:

> "Quite apart from the specific grounds put forward by the applicant, which themselves lack intrinsic merit, generally, the applicant has failed to satisfy me there is in her application to challenge the decision of the Appeals Committee, any sufficient element of public law to justify the grant of leave. The essence of the dispute between the applicant and the University lies in its role as an employer and her position as an employee. That relationship is governed by the ordinary rules of the law of contract. If and to the extent that the applicant wishes to claim that her employer has acted unfairly towards her, that is capable of resolution as a breach of her private law rights. The mere fact that certain aspects of the government of the University do fall within the field of public law if, by way of example, its decisions have been reached by ignoring well known public law principles, then public law can be successfully invoked. But that is a long way from anything from which the applicant seeks to ventilate in regard to her own promotion and the activities of the Appeals Committee."

The Promotions Process

6. As I understand the process it is as follows. First, candidates are assessed by faculties under published criteria; next, the Promotions Committee of the General Board sits in sub−committees to deal with groups of disciplines. Each candidate is evaluated with two or three sentences of reasons. The third stage is for the whole

of the General Board's Promotions Committee to come together. It tries to achieve consistency across the disciplines. This meeting takes a day and in the present case some 129 candidates were assessed against seven criteria. Finally the General Board ratifies the Committee's decision and there is a right of appeal to the Appeals Committee. Dr Evans makes various points about the fairness of the procedure, absence of reasons and so forth but it is unnecessary to go into these at this juncture.

7. The Second challenge complains that the University's General Board did not propose the creation for her of a personal professorship. Here again numerous grounds are advanced including reasons, unlawful delegation of powers by the General Board, breach of Article 6 of the European Convention on Human Rights and Fundamental Freedoms, failure to divulge who considered her application for promotion, breach of legitimate expectation and breach of statutory duty under the Data Protection Act 1998. Again, at this stage I need go into no further detail.

8. Dr Evan's case is that she is not just a discontented employee of the University (although in my view she is certainly that). She goes much further claiming that what the University has been doing is unlawful. She has been campaigning for many years for a complete overhaul and reform of the promotion process, which in her view is out of date and not geared to ensuring that the best qualified candidates are promoted. For example, she says there is no indication how the General Board could satisfy itself from the materials put to it. It should be able to see what it is approving and why rather then merely acting as a rubber stamp. Candidates are given nothing to show how to do better or why they have failed; and they should be.

9. Dr Evans points to the fact that she is an officer holder within the University, a university lecturer in the Faculty of History. She draws attention to the continuity of the office and to the fact she cannot be dismissed. The promotion procedures are ordinances of the University.

10. The demarcation between public law disputes which the Administrative Court will entertain and private law disputes which it will not is not always capable of precise definition. The question to be asked in the present case is whether the decision−makers were exercising public law or private law functions. In this regard the prime focus is not so much on the status and nature of the body making the decision as on the particular function that it is exercising. Where that function relates to employment, cases that have came before the courts have usually fallen on the private law side of the line for the no doubt obvious reason that there are other remedies of a statutory or contractual nature.

11. The indisputable fact is that Dr Evans is an employee of the University. She has a contract of employment with the University, one that incorporates the University's own rules made through ordinances. If the University is in breach of contract through failing to comply with its own rules her remedy is to claim breach of contract. She also has rights giving access to an employment tribunal.

12. Dr Evans, as I have said, makes much of being an officer holder, claiming that this fact gives rise to the availability of public law remedies. But, as Mr Clarke for the University points out, there is a distinction between being an office holder within the University and holding a public office. In this case being an office holder within the University means no more than being an employee within the University.

13. If the University's submission is wrong then the consequences would be to open up judicial review to every disgruntled academic employee at Oxford and Cambridge universities. I cannot believe that to be right. Dr Evans has to attach any claim for judicial review to an impeachable public law decision. In looking at the decision to see what function the decision−makers in this case were performing, the answer seems to me to be clear that they were ones of an employment nature rather than public ones.

14. Dr Evan's second complaint that the General Board did not propose the creation for her of a personal professorship seems to me to emphasise the personal character of this dispute. She is not claiming appointment to an established chair, rather that one should be created for her. I do not regard this as significantly different from an employee in a business who complains that he has not been promoted to a post that should have been tailor made for him.

The Authorities

15. I turn therefore to look and see how the observations of Turner J. in 1998 accord with authority. There is some dispute as to the extent, if any to which the public/private law point was argued before him. In R v Panel on Take−Overs and Mergers ex parte Datafin PLC [1987] 1QB 815 the Court of Appeal had to consider whether decisions of the Take−Over Panel were amenable to judicial review. It concluded that they were. If there is a public duty the court will police it. Lord Donaldson M.R said at 835G:

> "No one could have been in the least surprised if the panel had been initiated and operated under the direct authority of statute law, since it operates wholly in the public domain. Its jurisdiction extends throughout the United Kingdom. Its code and rulings apply equally to all who wish to make take−over bids or promote mergers, whether or not they are members of bodies represented on the panel. Its lack of a direct statutory base is a complete anomaly, judged by the experience of other comparable markets world wide."

The Court looked closely at the underlying circumstances of what the Take− Over panel was doing. This was of much greater relevance than the source of its power.

16. R v Secretary of State for the Home Department ex parte Benwell [1985] 1QB 554 was a case where a prison officer obtained judicial review of a decision to dismiss him for a breach of the code of discipline for prison officers. But he had entered the prison service as a person holding the office of constable and not under a contract of employment. Accordingly, he had no private law rights that could be enforced in civil proceedings. In the course of his judgment Hodgson J cited with apparent approval Purchas L.J in R v East Berkshire Health Authority ex parte Walsh [1985] QB 152, 176B:

> "There is a danger of confusing the rights with their appropriate remedies enjoyed by an employee arising out of a private contract of employment with the performance by a public body of the duties imposed upon it as part of the statutory terms under which it exercises its powers. The former are appropriate for private remedies inter parties whether by action in the High Court or in the appropriate statutory tribunal, whilst the latter are subject to the supervisory powers of the court under R.S.C. Ord 53."

Walsh was distinguishable because the disciplinary procedures in that case were incorporated into the contract of service which deprived the procedures and compliance with them of any possible public law character. So in the present case promotion is something to be determined according to Dr Evan's terms of service.

17. University Council of The Vidyodaya University of Ceylon v Linus Silva [1965] 1W.L.R 77 was a Privy Council decision. The University had summarily terminated the Vice−Chancellor's appointment without him being informed of the nature of the allegations against him or being afforded an opportunity of being heard in his own defence. It was held that he was not shown to be in any special position other than a servant of the University and that where there was an ordinary contractual relationship of master and servant the latter could not obtain an order of certiorari if the master had terminated the contract. Lord Morris of Borth−y−Guest said at 90 C:

> "The circumstances that the University was established by statute and is regulated by the statutory enactments contained in the Act does not involve that contracts of employment which are made with teachers and which are subject to the provisions of section 18(e) are other than ordinary contracts of master and servant."

18. That decision was referred to by Lord Wilberforce in Malloch v Aberdeen Corporation [1971] 1W.L.R 1578 where the House of Lords decided by three to two that teachers in Scotland had in general a right to be heard before they were dismissed. He said at 1596F:

"On the other hand, there are some cases where the distinction has been lost sight of, and where the mere allocation of the label - master and servant - has been thought decisive against an administrative law remedy.

One such, which I refer to because it may be thought to have some relevance here is Vidyodaya University Council v Silva [1965] 1W.L.R. 77, concerned with a university professor, who was dismissed without a hearing. He succeeded before the Supreme Court of Ceylon in obtaining an order for certiorari to quash the decision of the University, but that judgment was set aside by the Privy Council on the ground that the relation was that of master and servant to which the remedy of certiorari had no application. It would not be necessary or appropriate to disagree with the procedural or even the factual basis on which this decision rests, but I must confess that I could not follow it in this country in so far as it involves a denial of any remedy of administrative law to analogous employments. Statutory provisions similar to those on which the employment rested would tend to show, to my mind, in England or in Scotland, that it was one of a sufficiently public character, or one partaking sufficiently of the nature of an office, to attract appropriate remedies of administrative law."

19. Dr Evans cited McLaren v The Home Office [1990] I.R.L.R. 338 where the Court of Appeal held that the first instance judge had wrongly taken the view that the relationship between a prison officer and the Home Office was a matter of public law rather than private law and that any claim had to be raised by way of an application for judicial review. Woolf L.J, as he then was, said at paragraph 38 that in resolving the issue whether the prison officer was required to bring his claim by way of judicial review the following principles had to be borne in mind:

"1. In relation to his personal claims against an employer, an employee of a public body is normally in exactly the same situation as other employees. If he has a cause of action and he wishes to assert or establish his rights in relation to his employment he can bring proceeding for damages, a declaration or an injunction (except in relation to the Crown) in the High Court or the County Court in the ordinary way. The fact that a person is employed by the Crown may limit his rights against the Crown but otherwise his position is very much the same as any other employees. However, he may, instead of having an ordinary master and servant relationship with the Crown, hold office under the Crown and may have been appointed to that office as a result of the Crown exercising a prerogative power for, as in this case, a statutory power. If he holds such an appointment then it will almost invariably be terminable at will and may be subject to other imitations but whatever rights the employees has will be enforceable normally by an ordinary action. Not only will it not be necessary for him to seek relief by way of judicial review, it will normally be inappropriate for him to do so××..

2. There can however be situations where an employee of a public body can seek judicial review and obtain a remedy which would not be available to an employee in the private sector. This will arise where there exists some disciplinary or other body established under the prerogative or by statute to which the employer or the employee is entitled or required to refer disputes affecting their relationship. The procedure of judicial review can then be appropriate because it has always been part of the role of the court in public law proceedings to supervise inferior tribunals and the court in reviewing disciplinary proceedings is performing a similar role. As long as the 'tribunal' or other body has a sufficient public law element, which it almost invariable will have if the employer is the Crown and it is not domestic or wholly informal its proceedings and determination can be an appropriate subject for judicial review××.

3. In addition if an employee of the Crown or other public body is adversely affected by a decision of general application by his employer, but he contends that that decision is flawed on what I loosely describe as *Wednesbury* grounds, he can be entitled to challenge that decision by a way of judicial review××..

4. There can be situations where although there are disciplinary procedures which are applicable they are of a purely domestic nature and therefore, albeit that their

> decisions might affect the public, the process of judicial review will not be available××."

It is to be noted that in *McLaren's* case the employment dispute was regarded as a private law matter despite the fact that the claimant prison officer worked in a public institution.

20. Dr Evans also relied on Clark v University of Lincolnshire and Humberside (C.A. unreported 19 April 2000). The examiners had failed an examination for plagiarism. The Court of Appeal declined to strike out the claimant's claim for breach of contract merely because an application for judicial review would have been more applicable. *Clark* , however, was not concerned with an employment situation but with the failure of an examination paper, a function that plainly in my judgment crosses the public law boundary.

21. R v The British Broadcasting Corporation ex parte Lavelle [1983] 1W.L.R 23 is a decision that illustrates the caution of the courts in permitting what are really employment issues to embark into the public law field. That case was incidentally one of the decisions cited by Woolf L.J. in *McLaren* as an example of his fourth principle. An employee of the BBC was refused judicial review of the decision to dismiss her. Woolf J (as he then was) said at 39B:

> "××.it seems to me that while the court must have jurisdiction to intervene to prevent a serious injustice occurring it will only do so in very clear cases in which the applicant can show that there is a real danger and not merely a notional danger that there would be a miscarriage of justice in the criminal proceedings if the court did not intervene."

22. The final authority to which it is necessary for me to refer is The Queen on the application of Galligan v The Chancellor, Masters and Scholars of the University of Oxford (unreported 22 November 1991). In that case it was conceded that the dispute was amenable to judicial review and so the question was never in issue. The decision under review was very different from those in the present case and, as I said at paragraph 52 of the judgment, the court should be very slow to intervene in a matter arising out of an employment dispute and involving the management of the University.

23. In my judgment the principle to be derived from the authorities and to be applied in a case such as the present is that the court has to look closely at the functions of the body whose decision is being questioned and if they are of a private or employment rather than a public nature there will ordinarily be no basis for the Administrative Court to entertain the dispute. The fact that the University has public functions and that its powers derive from statute will, in the circumstances, be neither here nor there. It is true that many employment cases turn on issues of dismissal whilst here the issue is promotion. But this is still, in my judgment essentially an employment or contractual dispute. The fact that Dr Evans is employed by Cambridge University rather than any other employer such as a school or a business does not make this a public law dispute. There is a useful analogy in the case of R (Heather) v Leonard Cheshire Foundation [2002] E.W.C.A Civ 366 where the background elements of regulations and funding did not make the foundation a public authority for the purposes of the Human Rights 1998.

24. I cannot leave this case without expressing admiration for the research and erudition of Dr Evans in the preparation of her argument both written and oral. Furthermore, she has presented her argument with skill and moderation. In the end, however, I have come to the conclusion as did Turner J. 1998 that her case is in truth a private law dispute and not amenable to the jurisdiction of the Administrative Court. The University has given an undertaking that it will not argue in any breach of contract claim that its promotion procedures are not contractual, but I do not wish to say anything to encourage Dr Evans to prolong her dispute with the University by taking yet further proceedings. That, however, is entirely a matter for her. In the result, this claim for judicial review fails and it is unnecessary for me to go into any of the other matters raised at the application for permission.

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MR JUSTICE SCOTT BAKER: For the reasons given in the judgment that has been handed down the judicial review fails.

MR CLARKE: My Lord, as my Lord can see Dr Evans is not here this morning, and it does not appear that she intends to be present; she sent an email to somebody at the university about an hour ago from which, unless she sent it from a lap−top, it appears that she is in Cambridge this morning. So she is not going to come.

MR JUSTICE SCOTT BAKER: Yes.

MR CLARKE: My Lord, I invite the court to order that Dr Evans pay the costs of both applications, which have been dismissed now on a substantive basis. I do not invite my Lord to assess those costs, not least because Dr Evans is not here to make any submissions about that, but I would invite the court to accept the principle, ordinary principle, that this has now been a substantive judicial review upon which Dr Evans has failed at the public law threshold.

MR JUSTICE SCOTT BAKER: Yes.

MR CLARK: My Lord, even if you had only been dealing with it on permission, and if my Lord had refused permission, I would say it is one of those cases where an oral hearing with both parties represented, it was appropriate for the respondent to have its costs. But we have gone beyond that stage now and we are now, I would submit, in the ordinary position where the unsuccessful party should pay the costs.

Now, in fact, it may well be that the party would be able to come to some agreement about the amount of costs hereafter and it will not need to go to a full assessment, but in the absence of Dr Evans here to make any observations about that, I simply invite my Lord to make the order in principle, and the assessment can follow on for a detailed assessment in the usual way?

MR JUSTICE SCOTT BAKER: Yes. I am just wondering whether it might be desirable to say that the order should not be drawn up for seven days in order to give her an opportunity to make any further representations that she wants to on costs?

MR CLARKE: I do not anticipate that there would be a problem, my Lord. My only observation, I suppose, would be that she has known of the judgment since it was issued in draft the day before yesterday. She has known what the result was going to be this morning.

MR JUSTICE SCOTT BAKER: She has, I think, written something saying that she did not want to pay the costs.

MR CLARKE: We have not seen anything ourselves from Dr Evans.

MR JUSTICE SCOTT BAKER: Well there is a request for leave to appeal. What she says is this, this has been faxed through: "The Court of Appeal found against the university in the applicant's application for leave to appeal over costs in October 1999. The judgment was critical of the university's extravagance in running up costs beyond what was

reasonable and proportionate. The judge will have noticed that two senior solicitors from Clifford Chance were present throughout the day's hearing on 9th May. If the respondent appears to seek costs at the handing down of the judgment, the applicant asks for a hearing to be set and for reasonable time to obtain the advice of a costs draughtsman so that she may be in a position to put forward properly−founded arguments about the size of the university's bill."

MR CLARKE: My Lord, what appears to me from that is that Dr Evans does not invite the court not to make any order for costs, but she might simply take issue as to the quantum. In those circumstances, my Lord, I would suggest that the appropriate order is an order for costs to be assessed, and that should not be made subject to any further period of challenge. But that, of course, Dr Evans would have every opportunity on the assessment to make all appropriate points.

The Court of Appeal matter she was referring to, my Lord, was simply a county court case where a costs order was made favourably to the university, and all that happened there was that Dr Evans obtained leave to appeal in respect of the costs order. The matter did not go any further because it was resolved by agreement between the parties.

But, my Lord, in the circumstances Dr Evans has effectively signalled to the court her intention to argue on quantum.

MR JUSTICE SCOTT BAKER: That seems pretty clear and she is not, I think, taking issue, according to this document, with the principle.

MR CLARKE: Yes, and I would suggest that, my Lord, rather than saying that this order should be left open or not drawn for any period of time, my Lord should make the order. The order then goes−− obviously the costs then go for assessment. If the parties cannot agree the matter then the costs judge will have to deal with it and, of course, Dr Evans can take such advice on costs as it is appropriate and make such submissions as she wishes.

MR JUSTICE SCOTT BAKER: Yes, very well, I shall make an order for costs and direct that there is to be a detailed assessment.

MR CLARKE:: My Lord, I am grateful.

MR JUSTICE SCOTT BAKER: Now, as far as her request for permission to appeal, what she says is this: "In view of the immense importance to academic staff at universities of this question of access to public law remedies and its considerable significance as a public interest issue, the applicant seeks permission to appeal. The applicant takes the opportunity to mention that at the time of sending this, on the morning of 5th July, she has received no notice from the respondent that it intends to be present in court for the handing down of the judgment to seek costs. She has had no schedule of the respondent's costs in this matter at any time. She repeats her request to be allowed a hearing if the respondent seeks an award of costs."

MR CLARKE: Well it seems we are going back on to that ground, my Lord, but I would suggest that really does not alter the position as to costs, that is a leave to appeal matter. I would simply say that what my Lord has done is really decided this case as applying well−established principles as to the public/private law divide insofar as it concerns employment disputes, and my Lord has averted to a number of leading cases on that. Although it might be thought to be of importance to Dr Evans, it is not really a case of pressing public interest or general public interest, in my submission. Nor is it a case which establishes any new legal frontier. My Lord has, as I indicated, applied the well−established to principles to the facts of this case and it is not a matter upon which leave to appeal should be granted, certainly not by this court. If Dr Evans wishes to take it further, then perhaps she will try the Court of Appeal.

MR JUSTICE SCOTT BAKER: I am going to refuse permission to appeal. It seems to me that there has already been far too much litigation in relation to this matter and I am not prepared to do anything to encourage it.

As far as the costs are concerned, again, it appears from these two documents that the issue is as to quantum. In the circumstances the order will be made as I indicated.

MR CLARKE: I am most grateful, my Lord.

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APPLEBY v UNITED KINGDOM

(Environmental campaigners prevented from distributing leaflets in privately owned shopping centre)

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

APPLICATION NO.44306/98

(The *President*, Judge Pellonpää; *Judges* Bratza, Palm, Stráznická, Maruste, Pavlovschi, Garlicki)

(2003) 37 E.H.R.R. 38

May 6, 2003

H1 The first three applicants had established an environmental group, Washington First Forum (the fourth applicant), to campaign against a plan to build on the only public playing field near Washington town centre. They set about collecting signatures for a petition to persuade the council to reject the project. They tried to set up stands in the Galleries, a privately owned shopping mall in Washington. However, they were prevented from doing so by security guards employed by the company which owned the Galleries. Although the manager of one of the shops in the mall allowed the applicants to set up stands in his store in March 1998, this permission was not granted the following month when they wished to collect signatures for a further petition. The manager of the Galleries informed the applicants that permission had been refused because the private owner took a strictly neutral stance on all political and religious issues. Relying on Arts 10 and 11 of the Convention, the applicants complained that they had been prevented from meeting in their town centre to share information and ideas about the proposed building plans. They also complained under Art.13 that they had no effective remedy under domestic law.

H2 **Held:**

(1) by six votes to one that there had been no violation of Art.10;

(2) by six votes to one that there had been no violation of Art.11;

(3) unanimously that there had been no violation of Art.13.

1. Freedom of assembly and association: positive obligation; fair balance; access to private property (Art.10).

H3 (a) The freedom of expression is one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere but may require positive measures of protection, even in the sphere of relations between individuals. [39]

H4 (b) 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 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. [40]

H5 (c) The Government do not bear any direct responsibility for the restriction of the applicants' freedom of expression. No element of State responsibility can be derived from the fact that a public development corporation transferred the property to Postel (a private company) or that this was done with ministerial permission. The issue is whether the Government have failed in any positive obligation to protect the exercise of Convention rights from interference by the private owner of the shopping centre. [41]

H6 (d) The nature of the Convention right at stake is an important consideration. The applicants wanted to draw the attention of fellow citizens to their opposition to the plans to develop playing fields and to deprive their children of green areas to play in. This was a topic of public interest and contributed to the debate about the exercise of local government powers. However, while freedom of expression is an important right it is not unlimited. Nor is it the only Convention right at stake. Regard must also be had to the property rights of the owner of the shopping centre under Art.1 of Protocol No.1 [42]–[43].

H7 (e) Although United States cases illustrate an increasing trend in accommodating freedom of expression to privately owned property open to the public, the United States Supreme Court has refrained from holding that there is a federal constitutional right of free speech in a privately owned shopping mall. It cannot be said that there is as yet any emerging consensus that could assist the examination of the case under Art.10. [46]

H8 (f) Despite the importance of freedom of expression, Art.10 does not bestow any freedom of forum for the exercise of the right. While demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even to all publicly owned property. However, where the bar on access to property has the effect of preventing any effective exercise of freedom of expression or the essence of the right is destroyed, the State may have a positive obligation to protect the enjoyment of Convention rights by regulating property rights. [47]

H9 (g) The restriction on the applicants' ability to communicate their views was limited to the entrance areas and passageways of the new town centre. It did not prevent them from obtaining individual permission from businesses or from distributing their leaflets on the paths into the area. It also remained open to them to campaign in the old town centre and to employ alternative means. Consequently, they cannot claim that the private company's refusal effectively prevented them from communicating their views to their fellow citizens and therefore exercising their freedom of expression in a meaningful manner. [48]

H10 (h) Balancing the rights in issue and having regard to the nature and scope of the restriction, the Government did not fail in any positive obligation to protect the

applicants' freedom of expression. Accordingly, there was no violation of Art.10. [49]–[50]

2. Freedom of association (Art.11).

H11 Largely identical considerations arise under Art.11. For the same reasons, there was no failure to protect the applicants' freedom of assembly. [52]

3. Right to an effective remedy: Human Rights Act 1998 (Art.13).

H12 (a) Article 13 cannot be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting States a requirement to incorporate the Convention. [56]

H13 (b) Since October 2, 2000 when the Human Rights Act 1998 took effect, the applicants could have raised their complaints before the domestic courts, which would have had a range of possible redress available to them. Accordingly, there is no breach of Art.13. [56]

H14 **The following cases are referred to in the Court's judgment:**

1. *Fuentes Bobo v Spain*: (2001) 31 E.H.R.R. 50.
2. *James v United Kingdom* (A/98): (1986) 8 E.H.R.R. 123.
3. *Osman v United Kingdom*: (2000) 29 E.H.R.R. 245.
4. *Özgür Gündem v Turkey*: (2001) 31 E.H.R.R. 49.
5. *Rees v United Kingdom* (A/106): (1987) 9 E.H.R.R. 56.

H15 **The following domestic cases are referred to in the Court's judgment:**

6. *Batchelder v Allied Stores Int'l N.E.* 2d 590 (Mass. 1983).
7. *Bock v Westminster Mall Co*, 819 P.2d 55 (Colo. 1991).
8. *Charleston Joint Venture v McPherson*, 417 S.E.2d 544 (SC 1992).
9. *Cin Properties Ltd v Rawlins* [1995] 2 E.G.L.R. 130.
10. *Citizens for Ethical Gov't v Gwinnet Place Assoc.*, 392 S.E.2d 8 (Ga. 1990).
11. *Cologne v Westfarms Assocs*, 469 1.2d 1201 (Conn. 1984).
12. *Committee for Cth of Canada v Canada* [1991] 1 SCR 139.
13. *Eastwood Mall v Slanco*, 626 N.E.2d 59 (Ohio 1994).
14. *Fiesta Mall Venture v Mecham Recall Comm.*, 767 P.2d 719 (Ariz. Ct. App. 1989).
15. *Hague v Committee for Industrial Organisation*, 307 US 496 (1939).
16. *Harrison v Carswell*, 62 D.L.R. (3d) 68.
17. *Hudgens v Nlrb*, 424 US 507 (1976).
18. *Jacobs v Major*, 407 N.W.2d 832 (Wis. 1987).
19. *Jamestown v Beneda*, 477 N.W. 2d (N.D. 1991).
20. *Lloyd Corp v Tanner*, 47 U.S. 551, 92 S. Ct. 2219, 33 L.Ed. 2d 131 (1972).
21. *Lloyd Corp v Whiffen*, 849 P.2d 446, 453–54 (Or. 1993).
22. *Marsh v Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L.Ed. 265 (1946).

23. *Pruneyard Shopping Center v Robbins*, 447 US 74, 64 L.Ed. 2d 741, 100 S Ct. 2035 (1980).
24. *R. v Layton*, 38 CCC(3d) 550 (1986) (Provincial Court, Judicial District of York, Ontario).
25. *Southcenter Joint Venture v National Democratic Policy Comm.*, 780 P.2d 1282 (Wash. 1989).
26. *State v Schmit* (1980) N.J. 423A 2d 615
27. *State v Shack*, 277 1.2d 369 (N.J. 1971).
28. *State of Minnesota v Wicklund*, April 7, 1998 (Minnesota Court of Appeals).
29. *State of North Carolina v Felmet*, 273 S.E.2d 708 N.C. 1981).
30. *Streetwatch v National Railroad Passenger Corp*, 875 F. Supp. 1055 (S.D.N.Y. 1995).
31. *Uston v Resorts International*, 445 A.2d 370 (N.J. 1982).
32. *Western PA Socialist Workers 1982 Campaign v Connecticut Gen. Life Ins. Co*, 515 1.2d 1331 (Pa 1986).
33. *Woodland v Michigan Citizens Lobby*, 378 N.W.2d 337 (Mich. 1985).

THE FACTS

I. The circumstances of the case

10 The first, second and third applicants were born in 1952, 1966 and 1947 respectively and live in Washington in Tyne and Wear, where the fourth applicant, an environmental group set up by the applicants, is also based.

11 The new town centre of Washington is known as the Galleries and is located within an area now owned by Postel Properties Limited ("Postel"), a private company. This town centre was originally built by the Washington Development Corporation ("the Corporation"), a body set up by the government of the United Kingdom pursuant to an Act of Parliament to build the "new" centre. The centre was sold to Postel on December 30, 1987.

12 The Galleries, as owned by Postel at the relevant time, comprised a shopping mall (with two hypermarkets and major shops), the surrounding car parks with spaces for approximately 3,000 cars and walkways. Public services were also available in this vicinity. However, the freehold of the careers' office and the public library was owned by the Council, the social services office and health centre were leased to the Council by the Secretary of State and the freehold of the police station was held on behalf of Northumbria Police Authority. There was a post office and the offices of the housing department, leased to the Council by Postel, within the Galleries.

13 In about September 1997, the Council gave outline planning permission to the City of Sunderland College ("the College") to build on part of the Princess Anne Park in Washington, known as the Arena. The Arena is the only playing field in the vicinity of Washington town centre which is available for use by the local community. The first to third applicants, together with other concerned residents, formed the fourth applicant to campaign against the College's proposal and to persuade the Council not to grant the College permission to build on the field.

14 On or about March 14, 1998, the first applicant, together with her husband and son, set up two stands in the entrance of the shopping mall in the Galleries,

displaying posters alerting the public to the likely loss of the open space and seeking signatures to present to the Council on behalf of Washington First Forum. Security guards employed by Postel would not allow the first applicant or her assistants to continue to collect signatures on any land or premises owned by Postel. The applicants had to remove their stands and stop collecting signatures.

15 The manager of one of the hypermarkets gave the applicants permission to set up stands within that store in March 1998, allowing them to transmit their message and collect signatures, albeit from a reduced number of persons. However this permission was not granted in April 1998 when the applicants wished to collect signatures for a further petition.

16 On April 10, 1998 the third applicant, as acting chair of Washington First Forum, wrote to the manager of the Galleries to ask for permission to set up a stall and to canvass views from the public either in the mall or in the adjacent car parks and offered to make a payment to be able to do so. On April 14, 1998 the manager of the Galleries replied and refused access. The letter stated:

> ". . . the Galleries is unique in as much as although it is the Town Centre, it is also privately owned.
>
> The owner's stance on all political and religious issues, is one of strict neutrality and I am charged with applying this philosophy.
>
> I am therefore obliged to refuse permission for you to carry out a petition within the Galleries or the adjacent car parks".

17 On April 19, 1998, the third applicant wrote again to the manager of the Galleries asking him to reconsider his decision. The applicants have received no response to this letter.

18 The fourth applicant has continued to seek access to the public by setting up stalls by the side of the road on public footpaths and visiting the old town centre at Concord, which however is visited by a much smaller percentage of the residents of Washington.

19 The deadline for letters of representation to the Council regarding the building works was May 1, 1998. The applicants submitted the 3,200 letters of representation they had obtained on April 30, 1998.

20 The applicant has provided a list of organisations which have been allowed to carry out collections, set up stalls and displays within the Galleries, including the Salvation Army (collection before Christmas), local school choirs (carol singing and collection before Christmas), Stop Smoking Campaign (advertising display handing out nicotine patches), Blood Transfusion Service (blood collection), Royal British Legion (collection for Armistice Day), various photographers (advertising and taking photographs) and British Gas (staffed advertising display).

21 From January 31 to March 6, 2001, Sunderland Council ran a consultation campaign "Your Council, Your Choice" informing the local residents of three leadership choices for the future of the Council and were allowed to use the Galleries for this purpose. This was a statutory consultation exercise under s.25 of the Local Government Act 2000, which required local authorities to draw up proposals for the operation of "executive arrangements" and consult local electors before sending them to the Secretary of State. Some 8,500 people were reported as responding to the survey issued.

II. Relevant domestic law and practice

22 At common law, a private property owner may, in certain circumstances, be presumed to have extended an implied invitation to members of the public to come onto his land for lawful purposes. This covers commercial premises, such as shops, theatres and restaurants as well as private premises (for example there is a presumption that a house owner authorises people to come up the path to his front door to deliver letters or newspapers or for political canvassing). Any implied invitation may be revoked at will. A private person's ability to eject people from his land is generally unfettered and he does not have to justify his conduct or comply with any test of reasonableness.

23 In the case of *Cin Properties Ltd v Rawlins*,[1] where the applicants (young men) were barred from a shopping centre in Wellingborough as the private company owner CIN considered that their behaviour was a nuisance, the Court of Appeal held that CIN had the right to determine any licence which the applicants might have had to enter the Centre. In giving judgment, Lord Phillips found that the local authority had not entered into any walkways agreement with the company within the meaning of s.18(1) of the Highways Act 1971[2] which would have dedicated the walkways or footpaths as public rights of way and which would have given the local council the power to issue bye-laws regulating use of those rights of way. Nor was there any basis for finding an equitable licence. He also considered case law from North America concerning the applicants' arguments for the finding of some kind of public right:

> "Of more obvious relevance are two North American cases. In *Uston v Resorts International Inc* (1982) N.J. 445A.2D 370, the Supreme Court of New Jersey laid down as a general proposition that when property owners open their premises—in that case a gaming casino—to the general public in pursuit of their own property interests, they have no right to exclude people unreasonably but, on the contrary, have a duty not to act in an arbitrary or discriminatory manner towards persons who come on their premises. However, that decision was based upon a previous decision of the same court in *State v Schmid* (1980) N.J. 423A 2d 615, which clearly turned upon the constitutional freedoms of the First Amendment. The general proposition cited above has no application in English law.
>
> The case of *Harrison v Carswell* (1975) 62 D.L.R. (3d.) 68 in the Supreme Court of Canada, concerned the right of an employee of a tenant in a shopping centre to picket her employer in the centre, against the wishes of the owner of the centre. The majority of the Supreme Court held that she had no such right and that the owner of the centre had sufficient control or possession of the common areas to enable it to invoke the remedy of trespass. However, Laskin C.J.C., in a strong dissenting judgment held that since a shopping centre was freely accessible to the public, the public did not enter under a revocable licence subject only to the owner's whim. He said that the case involved a search for an appropriate legal framework for new social facts and:

[1] *Cin Properties Ltd v Rawlins* [1995] 2 E.G.L.R. 130.
[2] Later replaced by s.35 of the Highways Act 1980.

> 'If it was necessary to categorise the legal situation which, in my view, arises upon the opening of a shopping centre, with public areas of the kind I have mentioned (at least where the opening is not accompanied by an announced limitation on the classes of public entrants), I would say that the members of the public are privileged visitors whose privilege is revocable only upon misbehaviour (and I need not spell out here what this embraces) or by reason of unlawful activity. Such a view reconciles both the interests of the shopping centre owner and of members of the public, doing violence to neither and recognising the mutual or reciprocal commercial interests of shopping centre owner, business tenants and members of the public upon which the shopping centre is based'.
>
> I have already said that this was a dissenting judgment. Nevertheless counsel [for the applicants] submitted that we should apply it in the present case. I accept that courts may have to be ready to adapt the law to new social facts where necessary. However there is no such necessity where Parliament has already made adequate provision for the new social facts in question as it has here by s.18 of the Highways Act 1971 and s.35 of the Highways Act 1980. (*Harrison v Carswell* makes no mention of any similar legislation in Canada.) Where Parliament has legislated and the Council, as representing the public, chooses not to invoke the machinery which the statute provides, it is not for the courts to intervene.
>
> I would allow this appeal . . . on the basis that CIN, had the right, subject only to the issue under s.20 of the Race Relations Act 1976, to determine any licence the [applicants] may have had to enter the Centre".

III. Cases from other jurisdictions

24 The parties have referred to case law from the United States and Canada.

United States

25 The First Amendment to the Federal Constitution protects freedom of speech and peaceful assembly.

26 The United States Supreme Court has accepted a general right of access to certain types of public places, such as streets and parks, known as "public fora" for the exercise of free speech rights.[3] In *Marsh v Alabama*,[4] the Supreme Court also held that a privately owned corporate town (a company town) having all the characteristics of other municipalities was subject to the First Amendment rights of free speech and peaceable assembly. It has found that the First Amendment does not require access to privately owned properties, such as shopping centres, on the basis that there has to be "State action" (a degree of State involvement) for the amendment to apply.[5]

27 The US Supreme Court has taken the position that the First Amendment does not prevent a private shopping centre owner from prohibiting distribution on its

[3] *Hague v Committee for Industrial Organisation*, 307 US 496 (1939).
[4] *Marsh v Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L.Ed. 265 (1946).
[5] *e.g. Hudgens v Nlrb*, 424 US 507 (1976).

premises of leaflets unrelated to its own operations.[6] This did not however prevent state constitutional provisions from adopting more expansive liberties than the Federal Constitution to permit individuals reasonably to exercise free speech and petition rights on the property of a privately owned shopping centre to which the public was invited and this did not violate the property rights of the shopping centre owner so long as any restriction did not amount to taking without compensation or contravene any other federal constitutional provisions.[7]

28 Some State courts have found that a right of access to shopping centres could be derived from provisions in their State constitutions according to which individuals could initiate legislation by gathering a certain number of signatures in a petition or individuals could stand for office by gathering a certain number of signatures.[8] Some cases found State obligations arising due to State involvement, for example, *Bock v Westminster Mall Co*[9] (the shopping centre was a State actor because of financial participation of public authorities in the development of the shopping centre and the active presence of government agencies in the common areas of the shopping centre) and *Jamestown v Beneda*[10] (where the shopping centre was owned by a public body, though leased to a private developer).

29 Other cases cited as indicating a right to reasonable access to property under State private law were *State v Shack*[11] where the court ruled that under New Jersey property law ownership of real property did not include the right to bar access to governmental services available to migrant workers, in this case a publicly funded non-profit lawyer attempting to advise migrant workers; *Uston v Resorts International*,[12] a New Jersey case concerning casinos where the court held that when property owners open their premises to the general public in pursuit of their own property interests they have no right to exclude people unreasonably (though it was acknowledged that the private law of most states did not require a right of reasonable access to privately owned property)[13]; *Streetwatch v National Railroad Passenger Corp*[14] concerning the ejection of homeless people from a railway station.

[6] *Lloyd Corp v Tanner*, 47 U.S. 551, 92 S. Ct. 2219, 33 L.Ed. 2d 131 (1972).
[7] *Pruneyard Shopping Center v Robbins*, 447 US 74, 64 L.Ed. 2d 741, 100 S Ct. 2035 (1980).
[8] *e.g. Batchelder v Allied Stores Int'l* N.E. 2d 590 (Mass. 1983), *Lloyd Corp v Whiffenl*, 849 P.2d 446, 453–54 (Or. 1993), *Southcenter Joint Venture v National Democratic Policy Comm.*, 780 P.2d 1282 (Wash. 1989).
[9] *Bock v Westminster Mall Co*, 819 P.2d 55 (Colo. 1991).
[10] *Jamestown v Beneda*, 477 N.W. 2d (N.D. 1991).
[11] *State v Shack*, 277 1.2d 369 (N.J. 1971).
[12] *Uston v Resorts International*, 445 A.2d 370 (N.J. 1982).
[13] *ibid.* p.374.
[14] *Streetwatch v National Railroad Passenger Corp*, 875 F. Supp. 1055 (S.D.N.Y. 1995).

30 State courts which ruled that free speech provisions in their State constitutions did not apply to privately owned shopping centre included Arizona[15]; Connecticut[16]; Georgia[17]; Michigan[18]; Minnesota[19]; North Carolina[20]; Ohio[21]; Pennsylvania[22]; South Carolina[23]; Washington[24]; Wisconsin.[25]

Canada

31 Prior to the entry into force of the Canadian Charter of Rights and Freedoms, the Canadian Supreme Court had taken the view that the owner of a shopping centre could exclude protesters.[26] After the Charter entered into force, a lower court held that the right to free speech applied in privately owned shopping centres.[27] However an individual judge of the Canadian Supreme Court has since expressed the opposite view, stating *obiter* that the Charter does not confer a right to use private property as a forum of expression.[28]

JUDGMENT

I. Alleged violation of Article 10 of the Convention

32 Article 10 of the Convention provides as relevant:

> "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. . . .
>
> 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".

A. The parties' submissions

1. The applicants

33 The applicants submitted that the State was directly responsible for the interference with their freedom of expression and assembly as it was a public entity

[15] *Fiesta Mall Venture v Mecham Recall Comm.*, 767 P.2d 719 (Ariz. Ct. App. 1989).
[16] *Cologne v Westfarms Assocs*, 469 1.2d 1201 (Conn. 1984).
[17] *Citizens for Ethical Gov't v Gwinnet Place Assoc*, 392 S.E.2d 8 (Ga. 1990).
[18] *Woodland v Michigan Citizens Lobby*, 378 N.W.2d 337 (Mich. 1985).
[19] *State of Minnesota v Wicklund*, April 7, 1998 (Minnesota Court of Appeals).
[20] *State of North Carolina v Felmet*, 273 S.E.2d 708 (N.C. 1981).
[21] *Eastwood Mall v Slanco*, 626 N.E.2d 59 (Ohio 1994).
[22] *Western PA Socialist Workers 1982 Campaign v Connecticut Gen. Life Ins Co*, 515 1.2d 1331 (Pa 1986).
[23] *Charleston Joint Venture v McPherson*, 417 S.E.2d 544 (SC 1992).
[24] *South Center Joint Venture v National Democratic Policy Comm*, 780 P.2d 1282 (Wash. 1989).
[25] *Jacobs v Major*, 407 N.W.2d 832 (Wis. 1987).
[26] *Harrison v Carswell*, 62 D.L.R. (3d) 68.
[27] *R. v Layton*, 38 CCC(3d) 550 (1986) (Provincial Court, Judicial District of York, Ontario).
[28] McLachlin J., *Committee for Cth of Canada v Canada* [1991] 1 SCR 139, p. 128.

that built the Galleries on public land and a minister who approved the transfer into private ownership. The local authority could have required that the purchaser enter into a walkways agreement which would have extended bye-law protection to access ways but did not do so.

34 The applicants also argued that the State owed a positive obligation to secure the exercise of their rights within the Galleries. As the information and ideas which they wished to communicate were of a political nature, their expression was entitled to the greatest level of protection. Access to the town centre was essential for the exercise of those rights as it was the most effective way of communicating their ideas to the population, as was shown by the fact that the local authority itself used the Galleries to advocate a political proposal regarding the reorganisation of local government. The applicants however had been refused permission to use the Galleries for expression opposing local government action, showing that the private owner was not neutral in its decisions as to who should be given permission. The finding of an obligation would impose no significant financial burden on the State as it was merely under a duty to put in place a legal framework which provided effective protection for their rights of freedom of expression and peaceful assembly by balancing those rights against the rights of the property owner as already existed in a number of areas. They considered that no proper balance has been struck as protection was given to property owners who wielded an absolute discretion as to access to their land and no regard was given to individuals seeking to exercise their individual rights.

35 The applicants submitted that it was for the State to decide how to remedy this shortcoming and that any purported definitional problems and difficulties of application could be resolved by carefully drafted legislation. A definition of "quasi-public" land could be proposed that excluded, for example, theatres. They also referred to case law from other jurisdictions (in particular the United States) where concepts of reasonable access or limitations on arbitrary exclusion powers of landowners were being developed, *inter alia*, in the context of shopping malls and university campuses, which gave an indication of how the State could approach the perceived problems.

2. The Government

36 The Government submitted that at the relevant time the town centre was owned by a private company Postel and that it was Postel, in the exercise of its rights as property owner, which refused the applicants' permission to use the Galleries for their activities. They argued that the Government in those circumstances could not be regarded as bearing direct responsibility for any interference with the applicants' exercise of their rights. The fact that the local authority had previously owned the land was irrelevant.

37 In so far as the applicants claimed that the State's positive obligation to secure their rights is engaged, the Government acknowledged that positive obligations were capable of arising under Arts 10 and 11. However, such obligations did not arise in the present case having regard to a number of factors. The alleged breach did not have a serious impact on the applicants who had many other opportunities to exercise their rights and used them to obtain thousands of signatures on their

petition as a result. The burden imposed on the State by finding a positive obligation would also be a heavy one. Local authorities when selling land were not under any duty to enter into walkways agreements to render access areas subject to regulation by bye-law. The State's ability to comply by entering into such agreements when selling State-owned land would depend entirely on obtaining the co-operation of the private sector purchaser who might reasonably not want to allow any form of canvassing on his land and might feel that customers to commercial services would be deterred by political canvassers, religious activists, animal rights campaigners and so on.

38 Furthermore a fair balance had been struck between the competing interests in this case. The applicants in their view only looked at one side of the balancing exercise, whereas legitimate objections could be taken by property owners if they were required to allow people to exercise their freedom of expression or assembly on their land, when means to exercise those rights were widely available on genuinely public land and in the media. As the facts of this case illustrated, the applicants could canvass support in public places, on the streets, in squares and on common land, they could canvass from door to door or by post, and they could write letters to the newspapers or appear on radio and television. The Government argued that it was not for the Court to prescribe the necessary content of domestic law by imposing some ill defined concept of "quasi-public" land to which a test of reasonable access should be applied. That no problems arose from the balance struck in this case was shown by the fact that no serious controversy had arisen to date. The cases from the United States and Canada referred to by the applicants were not relevant as they dealt with different legal provisions and different factual situations, and in any event, did not show any predominant trend in requiring special regimes to attach to "quasi-public" land.

B. The Court's assessment

1. General principles

39 The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals,[29] where the Turkish Government were found to be under a positive obligation to take investigative and protective measures where the "pro-PKK" newspaper and its journalists and staff had been victim to a campaign of violence and intimidation; also *Fuentes Bobo v Spain*,[30] concerning the obligation on the State to protect freedom of expression in the employment context.

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

[29] See *Özgür Gündem v Turkey*: (2001) 31 E.H.R.R. 49, paras [42]–[46].
[30] *Fuentes Bobo v Spain*: (2001) 31 E.H.R.R. 50, para.[38].

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.[31]

2. Application in the present case

41 In this case, the applicants were stopped from setting up a stand and distributing leaflets in the Galleries by Postel, the private company, which owned the shopping centre. The Court does not find that the Government bear any direct responsibility for this restriction in the applicants' freedom of expression. It is not persuaded that any element of State responsibility can be derived from the fact that a public development corporation transferred the property to Postel or that this was done with ministerial permission. The issue to be determined is whether the Government have failed in any positive obligation to protect the exercise of the applicants' Art.10 rights from interference by others, in this case, the owner of the Galleries.

42 The nature of the Convention right at stake is an important consideration.

43 The Court recalls that the applicants wished to draw attention of fellow citizens to their opposition to the plans of their locally elected representatives to develop playing fields and to deprive their children of green areas to play in. This was a topic of public interest and contributed to debate about the exercise of local government powers. However, while freedom of expression is an important right, it is not unlimited. Nor is it the only Convention right at stake. Regard must also be had to the property rights of the owner of the shopping centre under Art.1 of Protocol No.1.

44 The Court has noted the applicants' arguments and the references in the US cases, which draw attention to the way in which shopping centres, though their purpose is primarily the pursuit of private commercial interests, are designed increasingly to serve as gathering places and events centres, with multiple activities concentrated within their boundaries. Frequently, individuals are not merely invited to shop but encouraged to linger and participate in activities covering a broad spectrum from entertainment to community, educational and charitable events. Such shopping centres can assume the characteristics of the traditional town centre and indeed, in this case, the Galleries is labelled on maps as the town centre and either contains, or is in close proximity to, public services and facilities. As a result, the applicants argued that the shopping centre must be regarded as a "quasi-public" space in which individuals can claim the right to exercise freedom of expression in a reasonable manner.

45 The Government have disputed the usefulness or coherence of employing definitions of "quasi-public" spaces and pointed to the difficulties which would ensue if places open to the public, such as theatres or museums, were required to permit people freedom of access for purposes other than the cultural activities on offer.

[31] See, among other authorities, *Rees v United Kingdom* (A/106): (1987) 9 E.H.R.R. 56, and *Osman v United Kingdom*: (2000) 29 E.H.R.R. 245, para.[116].

46 The Court would observe that, though the cases from the United States in particular illustrate an interesting trend in accommodating freedom of expression to privately owned property open to the public, the US Supreme Court has refrained from holding that there is a federal constitutional right of free speech in a privately owned shopping mall. Authorities from the individual states show a variety of approaches to the public and private law issues that have arisen in widely differing factual situations. It cannot be said that there is as yet any emerging consensus that could assist the Court in its examination in this case concerning Art.10 of the Convention.

47 That provision, notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (Government offices and ministries, for instance). Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights. The corporate town, where the entire municipality was controlled by a private body, might be an example.[32]

48 In the present case, the restriction on the applicants' ability to communicate their views was limited to the entrance areas and passageways of the Galleries. It did not prevent them from obtaining individual permission from businesses within the Galleries (the manager of a hypermarket granted permission for a stand within his store on one occasion) or from distributing their leaflets on the public access paths into the area. It also remained open to them to campaign in the old town centre and to employ alternative means, such as calling door to door or seeking exposure in the local press, radio and television. The applicants do not deny that these other methods were available to them. Their argument, essentially, is that the easiest and most effective method of reaching people was in using the Galleries, as shown by the local authority's own information campaign.[33] The Court does not consider however that the applicants can claim that they were, as a result of the refusal of the private company, Postel, effectively prevented from communicating their views to their fellow citizens. Some 3,200 people submitted letters in their support. Whether more would have done so if the stand had remained in the Galleries is speculation which is insufficient to support an argument that the applicants were unable otherwise to exercise their freedom of expression in a meaningful manner.

49 Balancing therefore the rights in issue and having regard to the nature and scope of the restriction in this case, the Court does not find that the Government failed in any positive obligation to protect the applicants' freedom of expression.

50 Consequently, there has been no violation of Art.10 of the Convention.

[32] See *Marsh v Alabama*, cited at para.[26] above.
[33] See para.[21].

II. Alleged violation of Article 11 of the Convention

51 Article 11 of the Convention provides as relevant:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others . . .
>
> 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".

52 The Court finds largely identical considerations arise under this provision as examined above under Art.10 of the Convention. For the same reasons, it also finds no failure to protect the applicants' freedom of assembly and accordingly, no violation of Art.11 of the Convention.

III. Alleged violation of Article 13 of the Convention

53 Article 13 of the Convention provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

54 The applicants submitted that they have no remedy for the complaints, which disclosed arguable claims of violations of provisions of the Convention. Domestic law provided at that time no remedy to test whether any interference with their rights was unlawful. The case law of the English courts indicated that the owner of a shopping centre can give a bad reason, or no reason at all, for the exclusion of individuals from its land. No judicial review would lie against the decision of such a private body.

55 The Government accepted that, if contrary to their arguments, the State's positive obligations were engaged and that there was an unjustified interference under Arts 10 or 11, there was no remedy available to the applicants under domestic law.

56 The case law of the Convention institutions indicates, however, that Art.13 cannot be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting States a requirement to incorporate the Convention.[34] In so far therefore as no remedy existed in domestic law prior to October 2, 2000 when the Human Rights Act 1998 took effect, the applicants' complaints fall foul of this principle. Following that date, it would have been possible for the applicants to raise their complaints before the domestic courts, which would have had a range of possible redress available to them.

57 The Court finds in the circumstances no breach of Art.13 of the Convention in the present case.

[34] See the *James v United Kingdom* (A/98): (1986) 8 E.H.R.R. 123, para.[86].

For these reasons, THE COURT

1. *Holds* by six votes to one that there has been no violation of Art.10 of the Convention;
2. *Holds* by six votes to one that there has been no violation of Art.11 of the Convention;
3. *Holds* unanimously that there has been no violation of Art.13 of the Convention.

Partly Dissenting Opinion of Judge Maruste

O-I1[35] To my regret I am unable to share the finding of the majority of the Chamber that the applicants' rights under Arts 10 and 11 were not infringed. In my view, the property rights of the owners of the shopping mall were unnecessarily given priority over the applicants' freedom of expression and assembly.

O-I2 The case raises the important issue of the State's positive obligations in a modern liberal State where many traditionally state owned services like post, transport, energy, health and community services and others have been or could be privatised. In this situation should private owners' property rights prevail over other rights or does the State still have some responsibility to secure the right balance between private and public interests?

O-I3 The new town centre was planned and built originally by a body set up by the government.[36] At a later stage the shopping centre was privatised. The area was huge, with many shops and hypermarkets, and also included car parks and walkways. Because of its central nature several important public services like the public library, the social services office, the health centre and even the police station were also located in or adjacent to the centre. Through specific actions and decisions the public authorities and public money were involved and there was an active presence of public agencies in the vicinity. That means that the public authorities also bore some responsibility for decisions about the nature of the area and access to and use of it.

O-I4 There is no doubt that the area in its functional nature and essence is a forum publicum or "quasi-public" space, as argued by the applicants and clearly recognised also by the Chamber.[37] The place as such is not something which has belonged to the owners for ages. This was a new creation where public interests and money were and still are involved. That is why the situation is clearly distinguishable from the "my home is my castle" type of situation.

O-I5 Although the applicants were not complaining about unequal treatment, it is evident that they had justified expectations of being able to use the area as a public gathering area and to have access to the public and its services on an equal footing with other groups including local government[38] who had used the place for similar purposes without restrictions.

O-I6 The applicants sought access to the public to discuss with them a topic of a public, not private, nature and to contribute to the debate about the exercise of local

[35] Paragraph numbers added by publisher.
[36] See para.[11].
[37] See para.[44].
[38] See paras [20] and [34].

government powers; in other words, for entirely lawful purposes. They acted as others did, without disturbing the public peace or interfering with business by other unacceptable or disruptive methods.In these circumstances it is hard to agree with the Chamber's finding that the Government bear no direct responsibility for the restrictions applied to the applicants. In a strict and formal sense that is true. But it does not mean that there were no indirect responsibilities. It cannot be the case that through privatisation the public authorities can divest themselves of any responsibility to protect rights and freedoms other than property rights. They still bear responsibility for deciding how the forum created by them is to be used and for ensuring that public interests and individuals' rights are respected. It is in the public interest to permit reasonable exercise of individual rights and freedoms, including the freedoms of speech and assembly on the property of a privately owned shopping centre, and not to make some public services and institutions inaccessible to the public and participants in demonstrations. The Court has consistently held that if there is a conflict between rights and freedoms, the freedom of expression takes precedence. But in this case it appears to be the other way round—property rights prevailed over freedom of speech.

O-I7 Of course, it would clearly be too far reaching to say that no limitations can be put on the exercise of rights and freedoms on private grounds or premises. They should be exercised in a manner consistent with respect for owners' rights too. And that is exactly what the Chamber did not take into account in this case. The public authorities did not carry out a balancing exercise and did not regulate how the privately owned forum publicum was to be used in the public interest. The old traditional rule that the private owner has an unfettered right to eject people from his land and premises without giving any justification and without any test of reasonableness being applied is no longer fully adapted to contemporary conditions and society. Consequently, the State failed to discharge its positive obligations under Arts 10 and 11.

House of Lords

Aston Cantlow and Wilmcote with Billesley Parochial Church Council *v* Wallbank and another

[2003] UKHL 37

2003 March 3, 4, 5; June 26

Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Hobhouse of Woodborough, Lord Scott of Foscote and Lord Rodger of Earlsferry

Ecclesiastical law — Lay rector — Repairs to chancel — Obligation at common law to repair chancel — Parochial church council's statutory power to recover cost of repairs from lay rector — Whether infringing lay rector's Convention right to peaceful enjoyment of possessions — Whether unlawful discrimination in enjoyment of Convention right — Whether parochial church council "public authority" — Whether entitled to enforce liability against lay rector — Chancel Repairs Act 1932 (22 Geo 5, c 20), ss 1, 2 — Human Rights Act 1998 (c 42), s 6, Sch 1, Pt I, art 14, Pt II, art 1

The defendants were the freehold owners of former rectorial land and consequently, as lay rectors or lay impropriators, they were liable at common law to repair the chancel of their parish church. In September 1994 the plaintiff, the parochial church council, served the first defendant with a notice under section 2(1) of the Chancel Repairs Act 1932[1] calling upon her to repair the chancel. She disputed the liability, and the plaintiff subsequently brought proceedings against the defendants, pursuant to section 2(2) of the 1932 Act, to recover the cost of chancel repairs. On a preliminary issue the judge held that the defendants were liable for the cost of the repairs. The Court of Appeal allowed the defendants' appeal and held that the plaintiff could not recover the cost of chancel repairs from the defendants on the grounds that a parochial church council was a public authority for the purposes of section 6 of the Human Rights Act 1998[2] since it had powers unavailable to private individuals to determine how others should act, that therefore it could not act in a manner which was incompatible with the defendants' rights under the Convention for the Protection of Human Rights and Fundamental Freedoms, and that the defendants' liability to defray the cost of chancel repairs was an indiscriminate form of taxation and amounted to an infringement of their right to peaceful enjoyment of

[1] Chancel Repairs Act 1932, s 2: "(1) Where a chancel is in need of repair, the responsible authority may serve upon any person, who appears to them to be liable to repair the chancel, a notice in the prescribed form . . . stating in general terms the grounds on which that person is alleged to be liable as aforesaid, and the extent of the disrepair, and calling upon him to put the chancel in proper repair. (2) At any time after the expiration of a period of one month from the date when the notice to repair was served, the responsible authority may, if the chancel has not been put in proper repair, bring proceedings against the person on whom the notice was served to recover the sum required to put the chancel in proper repair . . ."

[2] Human Rights Act 1998, s 6: "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right. (2) Subsection (1) does not apply to an act if (a) as a result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions. (3) In this section 'public authority' includes . . . (b) any person certain of whose functions are functions of a public nature . . . (5) In relation to a particular act, a person is not a public authority by virtue only of subsection 3(b) if the nature of the act is private."

Sch 1, Pt I, art 14: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Sch 1, Pt II, art 1: see post, para 66.

A their possessions guaranteed by article 1 of the First Protocol to the Convention and unlawful discrimination as between landowners contrary to article 14.

On appeal by the plaintiff—

Held, allowing the appeal, (1) that a "public authority" for the purposes of section 6 of the 1998 Act could be either a core public authority which exercised functions which were broadly governmental so that they were all functions of a public nature, or a hybrid public authority some of whose functions were of a public
B nature; that although the Church of England, as the established church, had special links with central government and performed certain public functions, it was essentially a religious organisation and not a governmental organisation, and parochial church councils were part of the means whereby the Church promoted its religious mission and discharged financial responsibilities in respect of parish churches; that the functions of parochial church councils were primarily concerned with pastoral and administrative matters within the parish and were not wholly of a
C public nature, and therefore they were not core public authorities under section 6(1); that (Lord Scott of Foscote dissenting) the fact that the public had certain rights in relation to their parish church was not sufficient to characterise the actions of a parochial church council in maintaining the fabric of the parish church as being of a public nature, so that when the plaintiff took steps to enforce the defendants' liability for the repair of the chancel, it was not performing a function of a public nature, which rendered it a hybrid public authority under section 6(3)(b); that the
D defendants' chancel repair liability was a private law liability arising out of the ownership of land, and the enforcement of that liability by the plaintiffs was an act of a private nature and therefore excluded by section 6(5) from coming within the ambit of section 6(3)(b); that (per Lord Nicholls of Birkenhead, Lord Hobhouse of Woodborough, Lord Scott of Foscote and Lord Rodger of Earlsferry) in seeking to enforce the defendants' chancel repair liability the plaintiff was acting under primary legislation, namely section 2 of the 1932 Act, and was consequently within the exception in section 6(2)(b) of the 1998 Act; that therefore, there were no grounds
E upon which the plaintiff could be regarded as a public authority within section 6 of the 1998 Act; and that, accordingly, it had no obligation to act compatibly with Convention rights (post, paras 7, 9, 12–14, 16, 17, 19, 58–64, 86–89, 93, 129, 137, 153, 154, 156–166, 169–173).

(2) That (per Lord Hope of Craighead, Lord Hobhouse of Woodborough and Lord Scott of Foscote) a person's right to peaceful enjoyment of his possessions did not extend to the grant of relief from liabilities incurred under the civil law; that the
F defendants had acquired the rectorial property with full knowledge of the potential liability for chancel repair that the acquisition would carry with it; that it was a burden which ran with rectorial land and was similar to any other burden which ran with the land; and that the defendants were not therefore being discriminated against as compared with other owners of rectorial land, nor were they being subjected to an arbitrary form of taxation or being interfered with in the peaceful enjoyment of their possessions contrary to article 14 of, and article 1 of the First Protocol to, the
G Convention (post paras 71–75, 91, 92, 133–136).

Decision of the Court of Appeal [2001] EWCA Civ 713; [2002] Ch 51; [2001] 3 WLR 1323; [2001] 3 All ER 393 reversed.

The following cases are referred to in the opinions of their Lordships:

Ayuntamiento de Mula v Spain Reports of Judgments and Decisions 2001-I, p 531

Barnes, In re; Simpson v Barnes (Note) [1930] 2 Ch 80

H *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585; [1955] 3 WLR 154; [1955] 2 All ER 607

Doughty v Rolls-Royce plc [1992] 1 CMLR 1045, CA

Ely (Bishop of) v Gibbons (1833) 4 Hagg Ecc 156

European Coal and Steel Community v Acciaierie e ferriere Busseni SpA (Case C-221/88) [1990] ECR I-495, ECJ

Foster v British Gas plc (Case C-188/89) [1991] 1 QB 405; [1991] 2 WLR 258; [1990] 3 All ER 897; [1990] ECR I-3313, ECJ; [1991] 2 AC 306; [1991] 2 WLR 1075; [1991] 2 All ER 705, HL(E)
General Assembly of the Free Church of Scotland v Lord Overtoun [1904] AC 515, HL(Sc)
Gilbert v Corpn of Trinity House (1886) 17 QBD 795, DC
Hautanemi v Sweden (1996) 22 EHRR CD 155
Holy Monasteries v Greece (1994) 20 EHRR 1
Hong Kong Polytechnic University v Next Magazine Publishing Ltd [1996] 2 HKLR 260
James v United Kingdom (1986) 8 EHRR 123
Johnston v Chief Constable of the Royal Ulster Constabulary (Case 222/84) [1987] QB 129; [1986] 3 WLR 1038; [1986] 3 All ER 135; [1986] ECR 1651, ECJ
Marckx v Belgium (1979) 2 EHRR 330
Marshall v Graham [1907] 2 KB 112, DC
Pepper v Hart [1993] AC 593; [1992] 3 WLR 1032; [1993] 1 All ER 42, HL(E)
R v Benjafield [2002] UKHL 2; [2003] 1 AC 1099; [2002] 2 WLR 235; [2002] 1 All ER 815, HL(E)
R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex p Wachmann [1992] 1 WLR 1036; [1993] 2 All ER 249
R v Kansal (No 2) [2001] UKHL 62; [2002] 2 AC 69; [2001] 3 WLR 1562; [2002] 1 All ER 257, HL(E)
R v Lambert [2001] UKHL 37; [2002] 2 AC 545; [2001] 3 WLR 206; [2001] 3 All ER 577, HL(E)
Representative Body of the Church in Wales v Tithe Redemption Commission [1944] AC 228, HL(E)
Rothenthurm Commune v Switzerland (1988) 59 DR 251
Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35
Wainwright v Home Office [2001] EWCA Civ 2081; [2002] QB 1334; [2002] 3 WLR 405, CA
Walwyn v Awberry (1677) 2 Mod 254
Wickhambrook Parochial Church Council v Croxford [1935] 2 KB 417, CA
Young, James and Webster v United Kingdom (1981) 4 EHRR 38

The following additional cases were cited in argument:

Håkansson and Sturesson v Sweden (1990) 13 EHRR 1
Hentrich v France (1994) 18 EHRR 440
Kjeldsen v Denmark (1976) 1 EHRR 711
Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595; [2002] QB 48; [2001] 3 WLR 183; [2001 4 All ER 604, CA
R v Bolsover District Council, Ex p Pepper [2001] LGR 43
R (Heather) v Leonard Cheshire Foundation [2002] EWCA Civ 366; [2002] 2 All ER 936, CA
R (Molinaro) v Kensington and Chelsea Royal London Borough Council [2001] EWHC Admin 896; [2002] LGR 336
Sunday Times v United Kingdom (1979) 2 EHRR 245
Wandsworth London Borough Council v Michalak [2002] EWCA Civ 271; [2003] 1 WLR 617; [2002] 4 All ER 1136, CA

APPEAL from the Court of Appeal

By leave of the House of Lords granted on 11 February 2002 (Lord Hutton, Lord Hobhouse of Woodborough and Lord Millett) the plaintiff, the Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire, appealed from a decision of the Court of Appeal (Sir Andrew Morritt V-C, Robert Walker and Sedley LJJ) on 17 May 2001 allowing an appeal by the defendants, Gail Wallbank and Andrew

A David Wallbank, from a decision of Ferris J who on 28 March 2000 ruled on a preliminary issue that by virtue of being freehold owners of Glebe Farm, Aston Cantlow, the defendants were lay rectors of the church of St John the Baptist, Aston Cantlow, and were therefore personally liable for the repair of the chancel of the church as set out in a notice served by the plaintiff on the first defendant on 12 September 1994, to recover the sum of £95,260·84, the estimated cost of the repair.

B The facts are stated in the opinions of their Lordships.

Charles George QC and *Mark Hill* for the plaintiff. The lay rector's duty to repair the chancel is the corollary of his right to receive the tithes of the parish. It is the quid pro quo for the grant to him or his predecessor by the Crown, usually at the time of the Reformation, of the tithes, with or without
C glebe land. Where, as in the present case, land has been allotted to him under an inclosure award in lieu of his right to the tithes, the duty to repair becomes the corollary of the right to the land so allotted. The fact that the tithe has ceased to be payable is irrelevant. [Reference was made to *Representative Body of the Church in Wales v Tithe Redemption Commission* [1944] AC 228.]

The Court of Appeal's decision constituted a windfall for the defendants
D in that it let them off their liability and led to their unjust enrichment. That was not the intention of the Human Rights Act 1998.

The parochial church council ("PCC") was not a core public authority for the purpose of section 6 of the 1998 Act. Core authorities are those bodies, whether national or local, through which the state performs its function of administering and protecting its citizens. All the acts of a core
E authority must be compatible with Convention rights. If the PCC is a core authority it will never be possible for it to bring a complaint under the Act because it cannot be a victim. [Reference was made to *Rothenthurm Commune v Switzerland* (1988) 59 DR 251; *Ayuntamiento de Mula v Spain* Reports of Judgments and Decisions 2001-I, p 531; *Hautanemi v Sweden* (1996) 22 EHRR CD 155 and *Holy Monasteries v Greece* (1994) 20 EHRR 1.]

F The mere fact that the Church of England is the established church cannot be enough to make a PCC a core public authority. The Church of England is not a department of state and it has no juridical personality. Its ecclesiastical courts are the only parts of the Church of England which are core authorities.

Unlike other public authorities a PCC receives no public funding. The
G majority of the funding for the Church comes from its worshipping communities. The members of the PCC are volunteers and there is no provision for payment of attendance allowances to which members of public authorities are normally entitled. The functions of the PCC are essentially private, pastoral and spiritual and include co-operation with the minister in promoting the pastoral, evangelistic, social and ecumenical mission of the Church. Its functions clearly show that a PCC is not a core
H public authority.

Section 6 of the 1998 Act draws a distinction between core public authorities and hybrid authorities whose acts must be compatible with Convention rights unless the nature of the act is private. The dividing line between hybrid public authorities and bodies which are not public

authorities at all is a fine one. [Reference was made to *Poplar Housing and Regeneration Community Association v Donoghue* [2002] QB 48; *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936; *R v Bolsover District Council, Ex p Pepper* [2001] LGR 43 and *R (Molinaro) v Kensington and Chelsea London Borough Council* [2002] LGR 336.]

Although there are occasions when church representatives stand in the place of the state in the exercise of public functions such as marriage, education, care of churchyards and the issue of burial certificates, a PCC's functions relate exclusively to pastoral matters. The functions and powers of PCCs when properly analysed fall short of what is required to constitute all PCCs as hybrid authorities if they have no churchyards and the benefit of chancel repair liability. It is improbable that Parliament intended that some PCCs but not others should be hybrid public authorities. There is no indication that Parliament intended that PCCs should be public authorities at all.

If it is held that the PCC is not a core public authority but is a hybrid authority, then the taking of proceedings by the PCC against a lay impropriator for recovery of the costs of chancel repairs is a private act for the purposes of section 6(5) of the 1998 Act. The primary duty of the lay rector is to maintain the chancel in repair. That is not a function of a public nature within the meaning of section 6(3)(b) of the 1998 Act. One of the functions of the PCC is the maintenance of the fabric of the parish church. That is not a function of a public nature within the meaning of section 6(3)(b) and in exercising it the PCC is not acting as a public authority.

Where the lay rector has not effected the necessary chancel repairs himself the PCC may effect them and recover the costs of doing so by the statutory procedure introduced by the Chancel Repairs Act 1932. In recovering the cost by that procedure the PCC is enforcing a private law obligation which rests on the owner of rectorial land. The liability to repair the chancel runs with the land and is enforceable against the owner for the time being of the land personally. The PCC's act in serving a repair notice was a private act whereby it was performing the private function of having the church repaired. The fact that liability attaches to the ownership of particular land and is unrelated to church membership confirms that enforcement is a private act.

There was no interference with the defendants' property under article 1 of the First Protocol to the Convention The defendants came knowingly into ownership of land which they knew was subject to a certain liability, namely, the liability to repair the chancel of the parish church. In using a mechanism that was open to it to enforce that liability the PCC was not imposing a tax as the Court of Appeal concluded. It is necessary to look at the particular case and not at the generality of the situation. [Reference was made to *James v United Kingdom* (1986) 8 EHRR 123; *Håkansson and Sturesson v Sweden* (1990) 13 EHRR 1 and *Sunday Times v United Kingdom* (1979) 2 EHRR 245.]

A landowner who has an obligation cannot, when called upon to honour the obligation, rely upon the prohibition of discrimination in article 14 of the Convention. [Reference was made to *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617.] The defendants' land already had a burden and the defendants never had unencumbered land when they became lay rectors. The relevant class of comparator would not be landowners

A generally but other landowners subject to incumbrances including chancel repair liabilities. In such a case there would be no discrimination or different treatment of the defendants from the chosen comparator. There was no discrimination which related to a personal characteristic and the fact of being a lay rector is not such a characteristic. [Reference was made to *Kjeldsen v Denmark* (1976) 1 EHRR 711.]

B Even if the PCC was a public authority for the purposes of the 1998 Act, section 6(1) of the 1998 Act does not apply because the PCC was acting under the compulsion of primary legislation. As a result of the provisions of the 1932 Act the PCC could not have acted differently and is entitled to rely on section 6(2)(a) and/or (b) of the 1998 Act.

Proceedings under the 1932 Act are not discretionary and there are two requirements: to serve a notice of repair and, in default, to sue for the new C statutory debt. A PCC is a charity. It has a duty and not a discretion to bring in outstanding funds. It has no power to waive debts. If the PCC did not follow the procedures set out in the 1932 Act it would be in breach of its statutory duty, and its members would be in breach of their duties as charity trustees and liable to be held to account by the Charity Commissioners.

D *Michael Beloff QC* and *Ian Partridge* for the defendants. The PCC is a core public authority for the purposes of section 6(1) of the 1998 Act. A public authority is not defined in the Act but is left to the courts to define. "Public" in its ordinary and natural meaning is the antithesis of private. It is to be assumed at least that the legislature wished to impose domestic law obligations upon certain bodies so that if those bodies complied with their E obligations the United Kingdom would not be liable to suit before the European Court of Human Rights. [Reference was made to *Foster v British Gas plc* [1991] 1 QB 405; [1991] 2 AC 306.]

Consideration of whether or not a PCC is a public authority requires consideration of its nature, the source of its existence, powers and duties and the nature of the functions which it carries out. The approach adopted by the Court of Appeal was correct.

F The Church of England, as the church by law established, is a public authority. It enjoys a unique position and is regulated by Acts of Parliament. The sovereign appoints its bishops and deans. Archbishops and certain bishops sit ex officio in the House of Lords. The Church of England's status as the established church distinguishes it from other religious bodies. The public have rights in regard to the Church of England in matters such as G baptism, marriage and burial.

The PCC is an integral part of the Church of England. It is the administrative organ of the parish, which is the basic building block of the church. The PCC is a body corporate with perpetual succession and in effect created by statute. It has powers outside those concerning purely religious matters and beyond those which result from the normal rules applicable between individuals, including statutory power to enforce the chancel repair H liability. When the PCC exercises its functions in promoting the mission of the established church, it is acting in the public interest and is performing a public function. The PCC is therefore part of the fabric of the state and satisfies the public authority test. *Hautanemi v Sweden* 22 EHRR CD 155 and *Holy Monasteries v Greece* 20 EHRR 1 are not decisions which assist

the plaintiff and the latter case suggests that an established church is a public authority.

If it is held that the PCC is not a core public authority but is a hybrid authority, then the taking of proceedings against a lay impropriator, pursuant to the 1932 Act, for the recovery of the cost of chancel repairs is not a "private" act for the purposes of section 6(5) of the 1998 Act. There is no element of mutuality or mutual governance between impropriator and the church in relation to modern repair liability. The enforcement is a function of the PCC supported by statute. The relationship between the plaintiff and defendants arises independently of the volition of either of them. There is a public interest in the repair of historic churches and enforcement of the liability is thus a public function.

The rule of common law which established the liability of the defendants to repair applies to individuals whether or not they are members of the church. It lacks any juridical basis and is wholly capricious. The liability is enforced by a body established by the state by statute, and empowered by the state by statute to enforce the liability. Such an act of enforcement is a public act.

The PCC's action in serving a notice under the 1932 Act on the defendants was unlawful under the 1998 Act by reason of article 1 of the First Protocol to the Convention, read either alone or in conjunction with article 14.

The word "possessions" in article 1 of the First Protocol is to be broadly construed and includes money, which is the possession the defendants have been deprived of. The assumption inherent in Article 1 is that the payment of taxes or other contributions is a deprivation of possessions. Therefore the defendants have been deprived of the peaceful enjoyment of their possessions.

Although it is proper and in the public interest to repair ancient churches, the burden of chancel repairs falls disproportionately on the defendants. It is objectionable that liability can be imposed on those, inter alias, who are not churchgoers, who are not Christians and who do not live in the parish. The chancel repair liability is personal and unlimited and can easily be disproportionate to the value of the land. Therefore the enforcement of the liability to defray the cost of chancel repairs is an unlawful interference with the defendants' personal property rights. [Reference was made to *Håkansson and Sturesson v Sweden* 13 EHRR 1 and *Hentrich v France* (1994) 18 EHRR 440.)

The enforcement of the liability also amounts to discrimination in the enjoyment of a Convention right under article 14. The appropriate class of comparator is that of landowners in England at large or in the parish, and there is no objective or reasonable justification for treating the defendants differently. [Reference was made to *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417.]

There was no compulsion of primary legislation which obliged the PCC to act as it did so as to bring it within section 6(2) of the 1998 Act. The liability of the lay rector exists only at common law. The 1932 Act imposes no duty to serve notice or commence proceedings against the defendants or anyone who appears to be liable to repair the chancel.

George QC replied.

A Their Lordships took time for consideration.

26 June. **LORD NICHOLLS OF BIRKENHEAD**

1 My Lords, I have had the advantage of reading in draft the speeches of all your Lordships. I too would allow this appeal. On some of the issues your Lordships have expressed different views. I shall state my own views without repeating the facts.

B **2** This case concerns one of the more arcane and unsatisfactory areas of property law: the liability of a lay rector, or lay impropriator, for the repair of the chancel of a church. The very language is redolent of a society long disappeared. The anachronistic, even capricious, nature of this ancient liability was recognised some years ago by the Law Commission in its report on Property Law: Liability for Chancel Repairs (1985) Law Com No 152.
C The commission said "this relic of the past" is "no longer acceptable". The commission recommended its phased abolition.

3 In these proceedings Mr and Mrs Wallbank admitted that, apart from the Human Rights Act 1998, they have no defence to the claim made against them by the Parochial Church Council of the parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire. The House was not asked to consider whether *Wickhambrook Parochial Church Council v Croxford*
D [1935] 2 KB 417 was correctly decided.

4 At first sight the Human Rights Act 1998 might seem to have nothing to do with the present case. The events giving rise to the litigation occurred, and the decision of Ferris J was given, before the Act came into force. But the decision of the Court of Appeal [2002] Ch 51 was based on the provisions of the Human Rights Act, and this decision has wide
E financial implications for the Church of England, going far beyond the outcome of this particular case. The decision affects numerous parochial church councils and perhaps as many as one third of all parish churches. The Church of England needs to know whether, as the Court of Appeal held, it is unlawful now for a parochial church council to enforce a lay rector's obligation to meet the cost of chancel repairs. Accordingly, in order to obtain the decision of the House on this point, the plaintiff
F parochial church council conceded that the Human Rights Act 1998 applies in this case. This concession having been made by the plaintiff, no argument was addressed to your Lordships' House on the question of law thus conceded. I express no view on this question.

5 Assuming the Human Rights Act 1998 is applicable in this case, the overall question is whether the plaintiff's prosecution of proceedings against
G Mr and Mrs Wallbank is rendered unlawful by section 6 of the Act as an act by a public authority which is incompatible with a Convention right. In answering this question the initial step is to consider whether the plaintiff is "a public authority".

6 The expression "public authority" is not defined in the Act, nor is it a recognised term of art in English law, that is, an expression with a specific recognised meaning. The word "public" is a term of uncertain import, used
H with many different shades of meaning: public policy, public rights of way, public property, public authority (in the Public Authorities Protection Act 1893 (56 & 57 Vict c 61)), public nuisance, public house, public school, public company. So in the present case the statutory context is all important. As to that, the broad purpose sought to be achieved by section 6(1) is not in

doubt. The purpose is that those bodies for whose acts the state is answerable before the European Court of Human Rights shall in future be subject to a domestic law obligation not to act incompatibly with Convention rights. If they act in breach of this legal obligation victims may henceforth obtain redress from the courts of this country. In future victims should not need to travel to Strasbourg.

7 Conformably with this purpose, the phrase "a public authority" in section 6(1) is essentially a reference to a body whose nature is governmental in a broad sense of that expression. It is in respect of organisations of this nature that the government is answerable under the European Convention on Human Rights. Hence, under the Human Rights Act 1998 a body of this nature is required to act compatibly with Convention rights in everything it does. The most obvious examples are government departments, local authorities, the police and the armed forces. Behind the instinctive classification of these organisations as bodies whose nature is governmental lie factors such as the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution: see the valuable article by Professor Dawn Oliver, "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act": [2000] PL 476.

8 A further, general point should be noted. One consequence of being a "core" public authority, namely, an authority falling within section 6 without reference to section 6(3), is that the body in question does not itself enjoy Convention rights. It is difficult to see how a core public authority could ever claim to be a victim of an infringement of a Convention rights. A core public authority seems inherently incapable of satisfying the Convention description of a victim: "any person, *non-governmental organisation* or group of individuals" (article 34, with emphasis added). Only victims of an unlawful act may bring proceedings under section 7 of the Human Rights Act 1998, and the Convention description of a victim has been incorporated into the Act, by section 7(7). This feature, that a core public authority is incapable of having Convention rights of its own, is a matter to be borne in mind when considering whether or not a particular body is a core public authority. In itself this feature throws some light on how the expression "public authority" should be understood and applied. It must always be relevant to consider whether Parliament can have been intended that the body in question should have no Convention rights.

9 In a modern developed state governmental functions extend far beyond maintenance of law and order and defence of the realm. Further, the manner in which wide ranging governmental functions are discharged varies considerably. In the interests of efficiency and economy, and for other reasons, functions of a governmental nature are frequently discharged by non-governmental bodies. Sometimes this will be a consequence of privatisation, sometimes not. One obvious example is the running of prisons by commercial organisations. Another is the discharge of regulatory functions by organisations in the private sector, for instance, the Law Society. Section 6(3)(b) gathers this type of case into the embrace of section 6 by including within the phrase "public authority" any person whose functions include "functions of a public nature". This extension of the expression "public authority" does not apply to a person if the nature of the act in question is "private".

A **10** Again, the statute does not amplify what the expression "public" and its counterpart "private" mean in this context. But, here also, given the statutory context already mentioned and the repetition of the description "public", essentially the contrast being drawn is between functions of a governmental nature and functions, or acts, which are not of that nature. I stress, however, that this is no more than a useful guide. The phrase used in the Act is public function, not governmental function.

B **11** Unlike a core public authority, a "hybrid" public authority, exercising both public functions and non-public functions, is not absolutely disabled from having Convention rights. A hybrid public authority is not a public authority in respect of an act of a private nature. Here again, as with section 6(1), this feature throws some light on the approach to be adopted when interpreting section 6(3)(b). Giving a generously wide scope to the C expression "public function" in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values without depriving the bodies in question of the ability themselves to rely on Convention rights when necessary.

12 What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental D functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.

13 Turning to the facts in the present case, I do not think parochial E church councils are "core" public authorities. Historically the Church of England has discharged an important and influential role in the life of this country. As the established church it still has special links with central government. But the Church of England remains essentially a religious organisation. This is so even though some of the emanations of the church discharge functions which may qualify as governmental. Church schools and the conduct of marriage services are two instances. The legislative F powers of the General Synod of the Church of England are another. This should not be regarded as infecting the Church of England as a whole, or its emanations in general, with the character of a governmental organisation.

14 As to parochial church councils, their constitution and functions lend no support to the view that they should be characterised as G governmental organisations or, more precisely, in the language of the statute, public authorities. Parochial church councils are established as corporate bodies under a church measure, now the Parochial Church Councils (Powers) Measure 1956. For historical reasons this unique form of legislation, having the same force as a statute, is the way the Church of England governs its affairs. But the essential role of a parochial church council is to provide a formal means, prescribed by the Church of England, H whereby ex officio and elected members of the local church promote the mission of the Church and discharge financial responsibilities in respect of their own parish church, including responsibilities regarding maintenance of the fabric of the building. This smacks of a church body engaged in self-governance and promotion of its affairs. This is far removed from the type

of body whose acts engage the responsibility of the state under the European Convention. A

15 The contrary conclusion, that the church authorities in general and parochial church councils in particular are "core" public authorities, would mean these bodies are not capable of being victims within the meaning of the Human Rights Act 1998. Accordingly they are not able to complain of infringements of Convention rights. That would be an extraordinary conclusion. The Human Rights Act goes out of its way, in section 13, to single out for express mention the exercise by religious organisations of the Convention right of freedom of thought, conscience and religion. One would expect that these and other Convention rights would be enjoyed by the Church of England as much as other religious bodies. B

16 I turn next to consider whether a parochial church council is a hybrid public authority. For this purpose it is not necessary to analyse each of the functions of a parochial church council and see if any of them is a public function. What matters is whether the particular act done by the plaintiff council of which complaint is made is a private act as contrasted with the discharge of a public function. The impugned act is enforcement of Mr and Mrs Wallbank's liability, as lay rectors, for the repair of the chancel of the church of St John the Baptist at Aston Cantlow. As I see it, the only respect in which there is any "public" involvement is that parishioners have certain rights to attend church services and in respect of marriage and burial services. To that extent the state of repair of the church building may be said to affect rights of the public. But I do not think this suffices to characterise actions taken by the parochial church council for the repair of the church as "public". If a parochial church council enters into a contract with a builder for the repair of the chancel arch, that could be hardly be described as a public act. Likewise when a parochial church council enforces, in accordance with the provisions of the Chancel Repairs Act 1932, a burdensome incident attached to the ownership of certain pieces of land: there is nothing particularly "public" about this. This is no more a public act than is the enforcement of a restrictive covenant of which church land has the benefit. C D E F

17 For these reasons this appeal succeeds. A parochial church council is not a core public authority, nor does it become such by virtue of section 6(3)(b) when enforcing a lay rector's liability for chancel repairs. Accordingly the Human Rights Act 1998 affords lay rectors no relief from their liabilities. This conclusion should not be allowed to detract from the force of the recommendations, already mentioned, of the Law Commission. The need for reform has not lessened with the passage of time. G

18 On this footing the other issues raised in this case do not call for decision. I prefer to express no view on the application of article 1 of the First Protocol to the Convention or, more specifically, on the compatibility of the Chancel Repairs Act 1932 with Mr and Mrs Wallbank's Convention right under that article. The latter was not the subject of discrete argument.

19 I add only that even if section 6(1) is applicable in this type of case, and even if the provisions of the 1932 Act are incompatible with Mr and Mrs Wallbank's Convention rights under article 1 of the First Protocol, even so the plaintiff council would not be acting unlawfully in enforcing Mr and Mrs Wallbank's liability as lay rectors. Like sections 3(2) H

A and 4(6), section 6(2) of the Human Rights Act 1998 is concerned to preserve the primacy, and legitimacy, of primary legislation. This is one of the basic principles of the Human Rights Act. As noted in *Grosz, Beatson & Duffy, Human Rights: The 1998 Act and the European Convention* (2000), p 72, a public authority is not obliged to neutralise primary legislation by treating it as a dead letter. If a statutory provision cannot be rendered
B Convention compliant by application of section 3(1), it remains lawful for a public authority, despite the incompatibility, to act so as to "give effect to" that provision: section 6(2)(b). Here, section 2 of the Chancel Repairs Act 1932 provides that if the defendant would have been liable to be admonished to repair the chancel by the appropriate ecclesiastical court, the court shall give judgment for the cost of putting the chancel in repair. When a parochial church council acts pursuant to that provision it is acting within
C the scope of the exception set out in section 6(2)(b).

LORD HOPE OF CRAIGHEAD

20 My Lords, the village of Aston Cantlow lies about three miles to the north west of Stratford-upon-Avon. It has a long history. The parish church, St John the Baptist, stands on an ancient Saxon site. Two images of its exterior can be seen on the website Pictorial Images of Warwickshire,
D www.genuki.org.uk/big/eng/WAR/images. It is the church where Shakespeare's mother, Mary Arden, who lived at Wilmcote within the parish, married John Shakespeare. The earliest part of the present structure is the chancel which has been there since the late 13th century. It was built in the decorated style and contains a fine example of the use of flowing tracery: *Pevsner & Wedgewood*, *The Buildings of England: Warwickshire* (1965),
E pp 19, 75. As time went on the condition of the structure began to deteriorate, and it is now in need of repair. It has been in that state since at least 1990.

21 In January 1995, when this action began, it was estimated that the cost of the repairs to the chancel was £95,260·84. By that date the Parochial Church Council ("the PCC") had served a notice under the Chancel Repairs Act 1932 in the prescribed form on Mrs Wallbank in her capacity as lay
F rector calling upon her to repair the chancel. She disputed liability, so the PCC brought proceedings against her under section 2(2) of the Act. When the notice was served on 12 September 1994 it was thought that Mrs Wallbank was the sole freehold owner of Glebe Farm. In fact, as a result of her conveyance of the farm into their joint names in 1990, she is its joint owner together with Mr Wallbank. So a further notice was served on
G 23 January 1996 on both Mr and Mrs Wallbank and an application was made for Mr Wallbank to be joined as a defendant in the proceedings. Several years have gone by. The dispute between the parties has still not been resolved. The cost of the repairs must now greatly exceed the amount of the original estimate.

22 On 17 February 2000 Ferris J heard argument on the question whether the liability of the lay rector to repair the chancel or otherwise to
H meet the cost of the repairs was unenforceable by reason of the Human Rights Act 1998 or otherwise. He had been asked to determine this question as a preliminary issue. On 28 March 2000 he answered the question in the negative. At the end of his judgment he observed that it had been posed in terms which would only be appropriate if the Act was already in force. The

only provisions which were in force then were sections 18, 20 and 21(5): section 22(2). By the time of the hearing in the Court of Appeal on 19 March 2001 the position had changed. The remaining provisions of the Act were brought into force on 2 October 2000: the Human Rights Act 1998 (Commencement No 2) Order 2000 (SI 2000/1851). Mr and Mrs Wallbank were allowed to amend their notice of appeal so that the issues which they wished to raise could be properly pleaded. On 17 May 2001, the Court of Appeal [2002] Ch 51 held that the PCC was a public authority for the purposes of section 6 of the Act. The court also held that the PCC's action in serving the notice on Mr and Mrs Wallbank was unlawful by reason of article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, read either alone or with article 14 of the Convention.

23 The circumstances in which Mr and Mrs Wallbank are said to be liable for the cost of the repair have been helpfully described by my noble and learned friend, Lord Scott of Foscote. I gratefully adopt what he has said about them. It is clear from his account that the liability of the lay impropriator to pay the cost of repairing the chancel has been part of ecclesiastical law for many centuries. As Wynn-Parry J explained in *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585, 593, it rests on the maxim, which has long been recognised, that he who has the profits of the benefice should bear the burden. But the questions about the scope and effect of the Human Rights Act 1998 which your Lordships have been asked to decide in this appeal, and on which I wish to concentrate, are of current interest and very considerable public importance. They raise issues whose significance extends far beyond the boundaries of the parish of Aston Cantlow.

24 The principal human rights issues which arise are (a) whether Mr and Mrs Wallbank can rely upon an alleged violation of their Convention rights as a ground of appeal when both the act complained of and the decision which went against them at first instance took place before 2 October 2000 ("the retrospectivity issue"), (b) whether the PCC is a public authority for the purposes of section 6(1) of the Act ("the public authority issue") and (c) whether the act of the PCC in serving the notice under the Chancel Repairs Act 1932 on Mr and Mrs Wallbank was incompatible with their rights under article 1 of the First Protocol read either alone or in conjunction with article 14 of the Convention ("the incompatibility issue").

The retrospectivity issue

25 When the case came before the Court of Appeal the PCC conceded that it was open to Mr and Mrs Wallbank to raise the question whether its act in serving the notice was unlawful under section 6(1) of the Human Rights Act 1998 by virtue of sections 7(1)(b) and 22(4) of the Act, notwithstanding that service of the notice predated the coming into force of those sections. The Court of Appeal accepted this concession, which they considered it to have been rightly made: [2002] Ch 51, 56, para 7. Those were, of course, early days in the life of the Act. *R v Lambert* [2002] 2 AC 545, *R v Kansal (No 2)* [2002] 2 AC 69 and *R v Benjafield* [2003] 1 AC 1099 had yet to come before your Lordships' House. In the light of what was said in those cases about the issue of retrospectivity the PCC gave notice in the Statement of Facts and Issues of its intention to apply for leave to dispute the

A issue in the course of the hearing of this appeal. But in the PCC's written case it is stated that this contention is no longer being pursued. In the result, although the parties were told at the outset of the hearing that it should not be assumed that the House would necessarily proceed on the basis of this concession, the issue was not the subject of argument.

26 I have, nevertheless, given some thought to the question whether it would be appropriate to examine the issue whether the service of the notice B was incompatible with Mr and Mrs Wallbank's Convention rights. The question whether, and if so in what circumstances, effect should be given to the Human Rights Act 1998 where relevant events occurred before it came into force is far from easy. So I should like to take a moment or two to explain why I have come to the conclusion that the concession was properly made and that in this case Mr and Mrs Wallbank are entitled to claim in C these proceedings that the PCC has acted in a way that is made unlawful by section 6(1) of the Act.

27 As Lord Woolf CJ observed in *Wainwright v Home Office* [2002] QB 1334, 1344G para 22, there has been considerable uncertainty as to whether the Human Rights Act 1998 can apply retrospectively in situations where the conduct complained of occurred before the Act came into force. The position which we have reached so far can, I think, be summarised in D this way.

28 The only provision in the Act which gives retrospective effect to any of its provisions is section 22(4). It directs attention exclusively to that part of the Act which deals with the acts of public authorities: see sections 6 to 9. It has been said that its effect is to enable the Act to be used defensively against public authorities with retrospective effect but not offensively: see E the annotations to the Act by the late Peter Duffy QC in *Current Law Statutes*, vol 3 (1998). Section 22(4) states that section 7(1)(b) applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place, but that otherwise subsection (1)(b) does not apply to an act taking place before the coming into force of section 7. Section 7(1)(b) enables a person who claims that a public authority has acted in a way which is made unlawful by section 6(1) to rely on his Convention F rights in proceedings brought by or at the instigation of the public authority. Section 6(2)(a) provides that section 6(1) does not apply if as a result of one or more provisions of primary legislation the authority could not have acted differently.

29 It has been held that acts of courts or tribunals which took place before 2 October 2000 which they were required to make by primary G legislation and were made according to the meaning which was to be given to the legislation at that time are not affected by section 22(4): see *R v Kansal (No 2)* [2002] 2 AC 69, 112, para 84; *Wainwright v Home Office* [2002] QB 1334, 1346–1347, paras 29–36. Section 3(2) states that the obligation in section 3(1) to interpret legislation in a way that is compatible with Convention rights applies to primary and secondary legislation whenever enacted. But the interpretative obligation in section 3(1) cannot be applied H to invalidate a decision which was good at the time when it was made by changing retrospectively the meaning which the court or tribunal previously gave to that legislation. The same view has been taken where the claim relates to acts of public authorities other than courts or tribunals. Here too it has been held that the Act cannot be relied upon retrospectively by

introducing a right of privacy to make unlawful conduct which was lawful at the time when it took place: *Wainwright v Home Office* [2002] QB 1334, 1347G–H, para 40.

30 In this case the act which section 6(1) is said to have made unlawful is the enforcement by the PCC of the liability for the cost of the repairs to the chancel. It is the enforcement of that liability that is said to be an unlawful interference with the personal property rights of Mr and Mrs Wallbank contrary to article 1 of the First Protocol. Service by the PCC of the notice on Mr and Mrs Wallbank under section 2(1) of the Chancel Repairs Act 1932 took place in September 1994, well before the coming into effect of the Human Rights Act 1998. But the service of the notice under that subsection was just the first step in the taking of proceedings under the 1932 Act to enforce the liability to repair. If, as has happened here, the chancel is not put in proper repair within a period of one month from the date when the notice to repair was served proceedings must be taken by the responsible authority to recover the sum required to put the chancel in proper repair by means of an order of the court: section 2(2). The final step in the process is the giving by the court of judgment for the responsible authority for such sum as appears to it to represent the cost of putting the chancel in proper repair: section 2(3). The arguments before Ferris J and in the Court of Appeal arose out a direction that there should be trial of preliminary issues. The question which is before your Lordships relates to one of those issues. The proceedings are, in that sense, still at the preliminary stage. The stage of giving judgment under section 2(3) has not yet been reached.

31 If the only act of the PCC which was in issue in this case had been the service of the notice on Mr and Mrs Wallbank it would have difficult, in the light of what was decided in *R v Lambert* [2002] 2 AC 545 and *R v Kansal (No 2)* [2002] 2 AC 69, to say that that act, which was lawful at the time when the notice was served and was still lawful when the preliminary issue was decided by Ferris J at first instance, had become unlawful following the coming into effect of the Human Rights Act 1998. But the proceedings to give effect to that notice are still on foot. In this situation there is, in my opinion, no issue of retrospectivity. Mr and Mrs Wallbank do not need to rely on section 22(4). It is sufficient for their purpose to say that they wish to rely on their Convention right in the proceedings which the PCC are still taking against them with a view to having the notice enforced. This is something that they are entitled to do under section 7(1)(b).

32 It should be emphasised that the situation which I have outlined avoids the problems which were discussed in *R v Lambert* and *R v Kansal (No 2)* about extending section 22(4) to appeals. We are, of course, dealing in this case with an appeal against the decision of a court or tribunal: see section 7(6)(a). But the fact is that the appeal relates to a preliminary issue only. This means that the court has yet to reach the stage in these proceedings when effect can be given to the notice which the PCC have served. That still lies in the future. Section 7(6)(a) states that the expression "legal proceedings" in section 7(1)(b) includes "proceedings brought by or at the instigation of a public authority." The preliminary issue has been examined as part of these proceedings.

33 The question whether the proceedings of which an examination of the preliminary issue forms part are "legal proceedings" as so defined brings

A me to the next issue, which is whether the PCC is a public authority for the purposes of section 6(1) of the Act.

The public authority issue

(a) Introduction

34 Section 6(1) provides that it is unlawful for a public authority to act
B in a way which is incompatible with a Convention right. The expression "public authority" is not fully defined anywhere in the Human Rights Act 1998. What the Act does instead is to address itself to some particular issues. In all other respects the expression has been left to bear its ordinary meaning according to the context in which it is used. Section 6(3) provides:

> "In this section 'public authority' includes—(a) a court or tribunal, and
C (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament."

Section 6(5) provides: "In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private."

D **35** It is clear from these provisions that, for the purposes of this Act, public authorities fall into two distinct types or categories. Courts and tribunals, which are expressly included in the definition, can perhaps be said to constitute a third category but they can be left on one side for present purposes. The first category comprises those persons or bodies which are obviously public or "standard" public authorities: *Clayton & Tomlinson*,
E *The Law of Human Rights* (2000), vol 1, para 5.08. They were referred to in the course of the argument as "core" public authorities. It appears to have been thought that no further description was needed as they obviously have the character of public authorities. In the Notes on Clauses which are quoted in *Clayton & Tomlinson*, para 5.06, it was explained that the legislation proceeds on the basis that some authorities are so obviously public authorities that it is not necessary to define them expressly. In other
F words, they are public authorities through and through. So section 6(5) does not apply to them. The second category comprises persons or bodies some of whose functions are of a public nature. They are described in *Clayton & Tomlinson* as "functional" public authorities and were referred to in the argument as "hybrid" public authorities. Section 6(5) applies to them, so in their case a distinction must be drawn between their public functions and the
G acts which they perform which are of a private nature.

36 Skilfully drawn though these provisions are, they leave a great deal of open ground. There is room for doubt and for argument. It has been left to the courts to resolve these issues when they arise. It is plain that the Court of Appeal were being invited to enter into largely uncharted territory. As a result of their efforts we are better equipped as we set out on the same journey. We have the benefit of their decision and of the criticisms that have
H been made of it. We must now see where all this leads us. First, it is necessary to examine what they did.

37 The Court of Appeal declined, rightly in my opinion, to look to Hansard for assistance: [2002] Ch 51, 61D, para 29. They rejected the argument that there was an ambiguity which brought this case within the

scope of the limited exception which was described in *Pepper v Hart* [1993] AC 593. It is true that various attempts were made by ministers in both Houses to explain their approach to the application of the Bill to what it described as public authorities. That was understandable, as some concern was expressed about the implications of this aspect of the legislation. But it is not the ministers' words, uttered as they were on behalf of the executive, that must be referred to in order to understand what Parliament intended. It is the words used by Parliament that must be examined in order to understand and apply the legislation that it has enacted.

38 The Court of Appeal were invited to hold that the test of what is a public authority for the purposes of section 6 was function-based. They rejected this proposition too. As Sir Andrew Morritt V-C delivering the judgment of the court pointed out, this may well be determinative as regards the "hybrid" class of public authorities as defined by section 6(3)(b). But it does not follow that it governs the principal category of "core" public authorities: [2002] Ch 51, 62B, para 33. In the following paragraph he said that for this reason the decided cases on the amenability of bodies to judicial review, while plainly relevant, will not necessarily be determinative of a body's membership either of the principal or hybrid class of public authority. He noted that the authorities on judicial review, as they now stand, draw a conceptual line between functions of public governance and functions of mutual governance. He said that there was no surviving element of mutuality or mutual governance as between the impropriator and the Church in the lay rector's modern liability for chancel repairs.

39 Sir Andrew Morritt V-C set out the conclusions of the Court of Appeal on the public authority issue, at p 63, para 35:

> "In our judgment it is inescapable, in these circumstances, that a PCC is a public authority. It is an authority in the sense that it possesses powers which private individuals do not possess to determine how others should act. Thus, in particular, its notice to repair has statutory force. It is public in the sense that it is created and empowered by law; that it forms part of the church by law established; and that its functions include the enforcement through the courts of a common law liability to maintain its chancels resting upon persons who need not be members of the church. If this were to be incorrect, the PCC would nevertheless, and for the same reasons, be a legal person whose functions, chancel repairs among them, are functions of a public nature. It follows on either basis by virtue of section 6 that its acts, to be lawful, must be compatible with the rights set out in Schedule 1 to the Human Rights Act 1998."

40 The Court of Appeal, in reaching the conclusion that the PCC is a "core" public authority, appears to have proceeded in this way: (1) the PCC is an authority because it possesses powers which private individuals do not possess to enforce the lay rector's liability; and (2) it is public because it is created and empowered by law, it forms part of the Church of England as the established church and its functions include the enforcement of the liability on persons who need not be members of the church. By a similar process of reasoning the Court of Appeal concluded that the PCC is in any event a person some of whose functions, including chancel repairs, are functions of a public nature. In their view the fact that the PCC has the power and duty to enforce the obligation on persons with whom it has no other relationship

showed that it has the character of a public authority, or at least that it is performing a function of a public nature when it is enforcing this liability: see also para 36.

41 This approach has the obvious merit of concentrating on the words of the statute. The words "public" and "authority" in section 6(1), "functions of a public nature" in section 6(3)(b) and "private" in section 6(5) are, of course, important. The word "public" suggests that there some persons which may be described as authorities that are nevertheless private and not public. The word "authority" suggests that the person has regulatory or coercive powers given to it by statute or by the common law. The combination of these two words in the single unqualified phrase "public authority" suggests that it is the nature of the person itself, not the functions which it may perform, that is determinative. Section 6(1) does not distinguish between public and private functions. It assumes that everything that a "core" public authority does is a public function. It applies to everything that a person does in that capacity. This suggests that some care needs to be taken to limit this category to cases where it is clear that this over-arching treatment is appropriate. The phrase "functions of a public nature" in section 6(3), on the other hand, does not make that assumption. It requires a distinction to be drawn between functions which are public and those which are private. It has a much wider reach, and it is sensitive to the facts of each case. It is the function that the person is performing that is determinative of the question whether it is, for the purposes of that case, a "hybrid" public authority. The question whether section 6(5) applies to a particular act depends on the nature of the act which is in question in each case.

42 The absence of a more precise definition of the expression "public authority" for the purposes of section 6(1) of the Human Rights Act 1998 may be contrasted with the way that expression is used in the devolution legislation for Scotland and Northern Ireland. Sections 88–90 of the Scotland Act 1998 deal with what that Act calls "cross-border public authorities". "Scottish public authorities" are dealt with in Part III of Schedule 5. Definitions of these expressions are provided in section 88(5), which requires "cross-border authorities" to be specified by Order in Council and in section 126(1) which states that "Scottish public authority" means any public body, public office or holder of such an office whose functions are exercisable only in or as regards Scotland. A list of public bodies was appended to the White Paper, Scotland's Parliament (1997) (Cm 3658): see also the note to section 88 of the 1998 Act in *Current Law Statutes*. It included three nationalised industries, a group of tribunals, three statutory water authorities, health bodies and a large number of miscellaneous executive and advisory bodies. Sections 75 and 76 of the Northern Ireland Act 1998 impose a duty on public authorities to promote equality of opportunity and prohibit discrimination in the carrying out of their functions. The expression "public authority" for the purposes of each of these sections is defined in a way that appears to leave no room for doubt as to which departments, corporations or other bodies are included: see sections 75(3), 76(7).

43 The Court of Appeal did not explore the significance of the distinction which is drawn in section 6 between "core" and "hybrid" public authorities. In their view the PCC, for the same reasons, fell into either

category: p 63D–E, para 35. But the width that can be given to the "hybrid" category suggests that the purpose of the legislation would not be impeded if the scope to be given to the concept of a "core" public authority were to be narrowed considerably from that indicated by the Court of Appeal.

44 There is one vital step that is missing from the Court of Appeal's analysis. It is not mentioned expressly in the Human Rights Act 1998, but it is crucial to a proper understanding of the balance which sections 6 to 9 of the Act seek to strike between the position of public authorities on the one hand and private persons on the other. The purpose of these sections is to provide a remedial structure in domestic law for the rights guaranteed by the Convention. It is the obligation of states which have ratified the Convention to secure to everyone within their jurisdiction the rights and freedoms which it protects: *Young, James and Webster v United Kingdom* (1981) 4 EHRR 38, para 49. The source of this obligation is article 13. It was omitted from the articles mentioned in section 1(1) which defines the meaning of the expression "the Convention rights", as the purpose of sections 6 to 9 was to fulfil the obligation which it sets out. But it provides the background against which one must examine the scheme which these sections provide.

45 The principle upon which the scheme proceeds is that actions by public authorities are unlawful if they are in breach of Convention rights: section 6(1). Effect is given to that principle in section 7. It enables anyone who is a victim of an act made unlawful by section 6(1) to obtain a remedy. The extent to which the scheme derives its inspiration from the Convention is revealed by the definition of the word "victim" which is set out in section 7(7). It provides:

> "For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act."

Article 34 of the Convention is in these terms:

> "The court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

46 The reference to non-governmental organisations in article 34 provides an important guide as to the nature of those persons who, for the purposes of section 6(1) of the Act and the remedial scheme which flows from it, are to be taken to be public authorities. Non-governmental organisations have the right of individual application to the European Court of Human Rights as victims if their Convention rights have been violated. If the scheme to give effect to article 13 is to be followed through, they must be entitled to obtain a remedy for a violation of their Convention rights under section 7 in respect of acts made unlawful by section 6.

47 The test as to whether a person or body is or is not a "core" public authority for the purposes of section 6(1) is not capable of being defined precisely. But it can at least be said that a distinction should be drawn between those persons who, in Convention terms, are governmental

A organisations on the one hand and those who are non-governmental organisations on the other. A person who would be regarded as a non-governmental organisation within the meaning of article 34 ought not to be regarded as a "core" public authority for the purposes of section 6. That would deprive it of the rights enjoyed by the victims of acts which are incompatible with Convention rights that are made unlawful by section 6(1). B Dawn Oliver, "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act" [2000] PL 476, 491–493 has observed that this would have serious implications. It would undermine the protections against state control which are the hallmarks of a liberal democracy.

48 In *Rothenthurm Commune v Switzerland* (1988) 59 DR 251 the Commission held that local government organisations such as the applicant C commune which exercise public functions are clearly "governmental organisations" as opposed to "non-governmental organisations" within the meaning of article 25 (now article 34) of the Convention, with the result that the commune which was complaining that proceedings for the expropriation of land for a military training area were in breach of their rights under article 6(1) could not bring an application under that article. In D *Ayuntamiento de Mula v Spain*, Reports of Judgments and Decisions 2000-I, p 53 the European Court held that under the settled case law of the Convention institutions local government organisations are public law bodies which perform official duties assigned to them by the Constitution and by substantive law and are therefore quite clearly governmental organisations. It added this comment:

E > "In that connection, the court reiterates that in international law the expression 'governmental organisations' cannot be held to refer only to the Government or the central organs of the State. When powers are distributed along decentralised lines, it refers to any national authority which exercises public functions."

49 The phrase "public functions" in this context is thus clearly linked to F the functions and powers, whether centralised or distributed, of government. This point was developed more fully in *Holy Monasteries v Greece* (1995) 20 EHRR 1. The Government of Greece argued that the applicant monasteries, which were challenging legislation which provided for the transfer of a large part of the monastic property to the Greek state, were not non-governmental organisations within the meaning of article 25 (now 34) of the Convention. It was pointed out that the G monasteries were hierarchically integrated into the organic structure of the Greek Orthodox Church, that legal personality was attributed to the Church and its constituent parts in public law and that the Church and its institutions, which played a direct and active part in public administration, took administrative decisions whose lawfulness was subject to judicial review by the Supreme Administrative court like those of any other public H authority. Rejecting this argument, the court said in para 49:

> "Like the Commission in its admissibility decision, the court notes at the outset that the applicant monasteries do not exercise governmental powers. Section 39(1) of the Charter of the Greek Church describes the monasteries as ascetic religious institutions. Their objectives—essentially

ecclesiastical and spiritual ones, but also cultural and social ones in some cases—are not such as to enable them to be classed with governmental organisations established for public administration purposes. From the classification as public law entities it may be inferred only that the legislature—on account of the special links between the monasteries and the State—wished to afford them the same legal protection vis-à-vis third parties as was accorded to other public law entities. Furthermore, the monastery councils' only power consists in making rules concerning the organisation and furtherance of spiritual life and the internal administration of each monastery."

50 The phrase "governmental organisations established for public administration purposes" in the third sentence of the passage which I have quoted from the *Holy Monasteries* case is significant. It indicates that test of whether a person or body is a "non-governmental organisations" within the meaning of article 34 of the Convention is whether it was established with a view to public administration as part of the process of government. That too was the approach which was taken by the Commission in *Hautanemi v Sweden* (1996) 22 EHRR CD 156. At the relevant time the Church of Sweden and its member parishes were to be regarded as corporations of public law in the domestic legal order. It was held nevertheless that the applicant parish was a victim within the meaning of what was then article 25, on the ground that the Church and its member parishes could not be considered to have been exercising governmental powers and the parish was a non-governmental organisation.

51 It can be seen from what was said in these cases that the Convention institutions have developed their own jurisprudence as to the meaning which is to be given to the expression "non-governmental organisation" in article 34. We must take that jurisprudence into account in determining any question which has arisen in connection with a Convention right: Human Rights Act 1998, section 2(1).

52 The Court of Appeal left this jurisprudence out of account. They looked instead for guidance to cases about the amenability of bodies to judicial review, although they recognised that they were not necessarily determinative: p 62D–E, para 34. But, as Professor Oliver has pointed out in her commentary on the decision of the Court of Appeal in this case, "Chancel repairs and the Human Rights Act" [2001] PL 651, the decided cases on the amenability of bodies to judicial review have been made for purposes which have nothing to do with the liability of the state in international law. They cannot be regarded as determinative of a body's membership of the class of "core" public authorities: see also *Grosz, Beatson & Duffy, Human Rights: The 1998 Act and the European Convention* (2000), p 61, para 4-04. Nor can they be regarded as determinative of the question whether a body falls within the "hybrid" class. That is not to say that the case law on judicial review may not provide some assistance as to what does, and what does not, constitute a "function of a public nature" within the meaning of section 6(3)(b). It may well be helpful. But the domestic case law must be examined in the light of the jurisprudence of the Strasbourg Court as to those bodies which engage the responsibility of the State for the purposes of the Convention.

A **53** At first sight there is a close link between the question whether a person is a non-governmental organisation for the purposes of article 34 and the question whether a person is a public authority against which the doctrine of the direct effect of directives operates under Community law: see article 249 EC. Both concepts lie at the heart of the obligations of the State under international law. Individual applications for a violation of Convention rights may be received under article 34 from "any person, B non-governmental organisation or group of individuals". Direct effect exists only against the member state concerned "and other public authorities": *European Coal and Steel Community v Acciaierie e ferriere Busseni SpA* (Case C-221/88) [1990] ECR I-495, para 23; *Brent, Directives: Rights and Remedies in English and Community Law* (2001), para 15.11.

C **54** The types of organisations and bodies against whom the provisions of a directive could be relied on were discussed in *Foster v British Gas plc* (Case C-188/89) [1991] 1 QB 405. The court noted in para 18 that it had been held in a series of cases that provisions of a directive could be relied on against organisations and bodies which were subject to the authority or control of the state or had special powers beyond those which result from the normal rules applicable to relations between individuals. Reference was D made to a number of its decisions to illustrate this point. Its conclusions were set out in para 20:

> "It follows from the foregoing that a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond those which result from the E normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon."

55 This is a broad definition of the concept by which such bodies have come to be referred to as "emanations of the State": e g *Johnston v Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1987] QB 129, F 154, para 56. It has been described as a starting point: *Doughty v Rolls-Royce plc* [1992] 1 CMLR 1045, 1058, per Mustill LJ. As *Brent*, para 15.11, note 101, points out, the phrase "emanation of the State" is an English legal concept derived from *Gilbert v Corpn of Trinity House* (1886) 17 QBD 795 which was later criticised by the courts as inappropriate and undefined. Whatever its value may be in the context of Community law, however, it G would be neither safe nor helpful to use this concept as a shorthand way of describing the test that must be applied to determine whether a person or body is a non-governmental organisation for the purposes of article 34 of the Convention. There is no right of individual application to the European Court of Justice in EC law. The phrase "non-governmental organisation" has an autonomous meaning in Convention law.

H *(b) Is the PCC a public authority?*

56 The general functions and powers of parochial church councils in the Church of England are set out in the Parochial Church Councils (Powers) Measure 1956. That was a measure passed by the National Assembly of the Church of England under the powers which were conferred on the National

Assembly by the Church of England Assembly (Powers) Act 1919. The National Assembly was renamed and reconstituted as the General Synod of the Church of England by the Synodical Government Measure 1969. Section 7 of the 1969 Measure provides that the rules contained in Schedule 3, which may be cited as the Church Representation Rules, are to have effect for the purpose of providing for the constitution and proceedings of diocesan and deanery synods and making further provision for the synodical government of the church. Part II of the Church Representation Rules provides for the holding of annual parochial church meetings at which parochial representatives of the laity to the parochial church council and the deanery synod are to take place. Rule 14 sets out the membership of the parochial church council. It includes the clergy, churchwardens, any persons on the roll of the parish who are members of any deanery or diocesan synod or the General Synod, elected representatives of the laity and co-opted members.

57 Section 2(1) of the Parochial Church Councils (Powers) Measure 1956 provides that it shall be the duty of the minister, as defined in rule 44(1) of the Church Representation Rules, and the parochial church council to consult together on matters of general concern and importance to the parish. Section 2(2) states that the functions of parochial church councils shall include, among other things, co-operation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical and the consideration and discussion of matters concerning the Church of England or any other matters of religious or public interest other than the declaration of the doctrine of the Church on any question. Among the powers, duties and liabilities vested in parochial church councils by section 4 are those relating to the financial affairs of the church and the care, maintenance and preservation of its fabric. Section 2 of the Chancel Repairs Act 1932 provides that, where a chancel is in need of repair, proceedings to enforce the liability to repair are to be taken by the responsible authority. Section 4(1) of the Act provides that the expression "responsible authority" in relation to a chancel means the parochial church council of the parish in which the chancel is situate.

58 There is no doubt that parochial church councils are an essential part of the administration, on the authority of the General Synod, of the affairs of the Church of England. The parish itself has been described as the basic building block of the Church and the PCC as the central forum for decision-making and discussion in relation to parish affairs: *Hill*, *Ecclesiastical Law*, 2nd ed (2001), pp 48 and 74, paras 3.11 and 3.74. It is constituted by section 3 of the Parochial Church Councils (Powers) Measure 1956 as a body corporate. It has statutory powers which it may exercise under section 2 of the Chancel Repairs Act 1932 against any person who appears to it to be liable to repair the chancel, irrespective of whether that person is resident in the parish and is a member of the Church of England. In that context, perhaps, it may be said in a very loose sense to be a public rather than a private body.

59 But none of these characteristics indicate that it is a governmental organisation, as that phrase is understood in the context of article 34 of the Convention. It plainly has nothing whatever to do with the process of either central or local government. It is not accountable to the general public for what it does. It receives no public funding, apart from occasional grants

A from English Heritage for the preservation of its historic buildings. In that respect it is in a position which is no different from that of any private individual. The statutory powers which it has been given by the Chancel Repairs Act 1932 are not exercisable against the public generally or any class or group of persons which forms part of it. The purpose of that Act, as its long title indicates, was to abolish proceedings in ecclesiastical courts for enforcing the liability to repair. The only person against whom the liability B may be enforced is the person who, in that obscure phrase, "would, but for the provisions of this Act, have been liable to be admonished to repair the chancel by the appropriate ecclesiastical court in a cause of office promoted against him in that court on the date when the notice was served": see section 2(3); *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, 429, per Lord Hanworth MR.

C **60** Then there is the fact that the PCC is part of the Church of England. The Court of Appeal said that it exemplifies the special status of the church of which it forms part: [2002] Ch 51, 61, para 32. The fact that it forms part of the church by law established showed, it was said, that the PCC is a public authority: p 63, para 35. The implication of these observations is that other bodies such as diocesan and deanery synods and the General Synod itself fall into the same category. In my opinion however the legal framework of the D Church of England as a church by law established does not lead to this conclusion.

61 The Church of England as a whole has no legal status or personality. There is no Act of Parliament that purports to establish it as the Church of England: *Sir Lewis Dibden*, *Establishment in England: Essays on Church and State* (1932), p 111. What establishment in law means is that the state E has incorporated its law into the law of the realm as a branch of its general law. In *Marshall v Graham* [1907] 2 KB 112, 126 Phillimore J said:

> "A Church which is established is not thereby made a department of the state. The process of establishment means that the state has accepted the Church as the religious body in its opinion truly teaching the Christian faith, and given to it a certain legal position, and to its decrees, if rendered F under certain legal conditions, certain civil sanctions."

The Church of England is identified with the state in other ways, the monarch being head of each: see *Doe*, *The Legal Framework of the Church of England* (1996), p 9. It has regulatory functions within its own sphere, but it cannot be said to be part of government. The state has not surrendered or delegated any of its functions or powers to the Church. None of the G functions that the Church of England performs would have to be performed in its place by the state if the Church were to abdicate its responsibility: see *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex p Wachmann* [1992] 1 WLR 1036, 1042A, per Simon Brown J. The relationship which the state has with the Church of England is one of recognition, not of the devolution to it of any of the H powers or functions of government.

62 The decisions of the Strasbourg Court in *Holy Monasteries v Greece* 20 EHRR 1 and *Hautanemi v Sweden* 22 EHRR CD 156 support this approach. It is also worth noting that, while the two main churches in Germany (Roman Catholic and Lutheran) have public legal personality and are public authorities bound by the provisions of article 19(4) of the German

Constitution (Grundgesetz) or Basic Law which guarantees recourse to the court should any person's basic rights be violated by public authority, they are in general considered to be "non-governmental organisations" within the meaning of article 34 of the Convention. As such, they are entitled to avail themselves of, for example, the right to protection of property under article 1 of the First Protocol: *Frowein and Peukert*, *Kommentar zur Europäishen Menschenrechtskonvention*, 2nd ed (1996), art 25, para 16. *Maunz and Dürig*, *Kommentar zum Grundgesetz* (looseleaf), art 33, para 38 explain the position in this way:

> "Keine hoheitsrechtlichen Befugnisse nehmen die Amtsträger der Kirchen wahr, soweit sie nicht kraft staatlicher Ermächtigung (etwa in Kirchensteurangelegenheiten) tätig werden; die Kirchen sind, auch soweit sie öffentlich-rechtlichen Status haben, nicht Bestandteile der staatlichen Organisation."

[Church officeholders do not exercise sovereign power so long as they are not acting by virtue of state empowerment (for example, in matters concerning church taxes); the churches do not, even though they have public law status, form an integral part of the organisation of the state.] This reflects the view of the German Constitutional Court in its 1965 decision (BVerwGE 18, 385) that measures taken by a church relating to purely internal matters which do not reach out into the sphere of the state do not constitute acts of sovereign power. The churches are not, as we would put it, "core" public authorities although they may be regarded as "hybrid" public authorities for certain purposes.

63 For these reasons I would hold that the PCC is not a "core" public authority. As for the question whether it is a "hybrid" public authority, I would prefer not to deal with it in the abstract. The answer must depend on the facts of each case. The issue with which your Lordships are concerned in this case relates to the functions of the PCC in the enforcement of a liability to effect repairs to the chancel. Section 6(5) of the Human Rights Act 1998 provides that a person is not a public authority by virtue only of subsection (3) if the nature of the act which is alleged to be unlawful is private. The Court of Appeal said that the function of chancel repairs is of a public nature: [2002] Ch 51, 63, para 35. But the liability of the lay rector to repair the chancel is a burden which arises as a matter of private law from the ownership of glebe land.

64 It is true, as Wynn-Parry J observed in *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585, 593, that the burden is imposed for the benefit of the parishioners. It may be said that, as the church is a historic building which is open to the public, it is in the public interest that these repairs should be carried out. It is also true that the liability to repair the chancel rests on persons who need not be members of the church and that there is, as the Court of Appeal observed, at p 63B, para 34, no surviving element of mutuality or mutual governance between the church and the impropriator. But none of these factors leads to the conclusion that the PCC's act in seeking to enforce the lay rector's liability on behalf of the parishioners is a public rather than a private act. The nature of the act is to be found in the nature of the obligation which the PCC is seeking to enforce. It is seeking to enforce a civil debt. The function which it is performing has nothing to do with the responsibilities which are owed to the public by the State. I would

hold that section 6(5) applies, and that in relation to this act the PCC is not for the purposes of section 6(1) a public authority.

The incompatibility issue

65 This issue does not arise if, as I would hold, the PCC is not for present purposes a public authority. But I should like to offer these brief comments on it, as I do not agree with the Court of Appeal's finding that Mr and Mrs Wallbank's right to peaceful enjoyment of their possessions under article 1 of the First Protocol, read either alone or with article 14 of the Convention, has been violated: [2002] Ch 51, paras 38–46.

66 Article 1 of the First Protocol provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Article 14 of the Convention prohibits discrimination in the enjoyment of the rights and freedoms which the Convention sets forth.

67 Article 1 of the First Protocol contains three distinct rules: see *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, para 61; *James v United Kingdom* (1986) 8 EHRR 123, para 37. The first rule is set out in the first sentence, which is of a general nature and enunciates the principle of the peaceful enjoyment of property. It then deals with two forms of interference with a person's possessions by the state: deprivation of possessions which it subjects to certain conditions, and control of the use of property in accordance with the general interest. In each case a balance must be struck between the rights of the individual and the public interest to determine whether the interference was justified. These rules are not unconnected as, before considering whether the first rule has been complied with, the court must first determine whether the last two rules are applicable. As it was put in *James*, para 37, the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property. They should be construed in the light of the general principle enunciated in the first rule.

68 The Court of Appeal appear to have overlooked this guidance. They did not address the question whether Mr and Mrs Wallbank were being deprived of their possessions according to the second rule, and they did not deal with the question whether there was an interference with the first rule. They held that the liability to defray the cost of chancel repairs was levy upon the personal funds of Mr and Mrs Wallbank, that this was a form of taxation within the third rule in the second paragraph of article 1, and that it was arbitrary and disproportionate. They rejected the PCC's argument the source of the liability was their ownership of Glebe Farm. They held that there was in this case an outside intervention by the general law which made ownership of the land a fiscal liability: para 40.

69 Ferris J said in his judgment that, if the law relating to chancel repairs was as understood it to be (which he described as "the supposed rule"), it did not involve a deprivation of possessions. As he put it, at para 23:

> "The argument for Mr and Mrs Wallbank seems to assume that the starting point is that they are to be regarded as the owners of Glebe Farm free from incumbrances or other burdensome incidents attached to the ownership of the land. But this is not in fact correct if the supposed rule represents the law. The liability to repair the chancel is, on that basis, one of the incidents of ownership of that part of Glebe Farm which consists of land allotted under the inclosure award in lieu of tithe or other rectorial property. It is, of course, an unusual incident because it does not amount to a charge on the land, is not limited to the value of the land and imposes a personal liability on the owner of the land. But in principle I do not find it possible to distinguish it from the liability which would attach to the owner of land which is purchased subject to a mortgage, restrictive covenant or other incumbrance created by a predecessor in title."

He said that the case was quite different from that in which there was some kind of outside intervention in the form of taxation, compulsory purchase or control over the way in which the property can be used.

70 I prefer Ferris J's analysis to that of the Court of Appeal. The principle which we must follow was described in *James v United Kingdom* 8 EHRR 123, para 36. We must confine our attention, as far as possible, to the concrete case which is before us. It must not be directed to the impact of the law relating the enforcement of the chancel repair liability in the abstract, but to its impact as it affects Mr and Mrs Wallbank.

71 How then does the liability arise? It cannot be considered in isolation from the obligation that gives rise to it. That is the obligation which rests on the owner of rectorial land, not as a result any outside intervention with the possession of the land by the state but as a matter of private law. The conveyance of Glebe Farm to Mrs Wallbank's parents in 1970 described the land as subject to the liability for the repair of the chancel mentioned in previous conveyances. Their deeds of gift to Mrs Wallbank in 1974 and 1986 also referred to the chancel repair liability. This is a burden on the land, just like any other burden that runs with the lands. It is, and has been at all times, within the scope of the property right which she acquired and among the various factors to be taken into account in determining its value. She could have divested herself of it at any time by disposing of the land to which it was attached. The enforcement of the liability under the general law is an incident of the property right which is now vested jointly in Mr and Mrs Wallbank. It is not, as the Court of Appeal said (para 40), an outside intervention by way of a form of taxation.

72 I recognise that Mr and Mrs Wallbank may well need to draw on their personal funds to discharge the liability. But they are not being deprived of their possessions or being controlled in the use of their property, as those expressions must be understood in the light of the general principle of peaceful enjoyment set out in the first sentence of article 1 of the First Protocol. The liability is simply an incident of the ownership of the land which gives rise to it. The peaceful enjoyment of land involves the discharge of burdens which are attached to it as well as the enjoyment of its rights and privileges. I do not think that in this case the right which article 1 of the First

Protocol guarantees, read alone or in conjunction with article 14 of the Convention, is being violated.

Conclusion

73 The law relating to the liability for chancel repairs is open to criticism on various grounds. The liability has been described by the Law Commission as anachronistic and capricious in its application and as highly anomalous: Liability for Chancel Repairs (1985) (Law Com No 152), para 3.1; Land Registration for the Twenty-first Century (1998) (Law Com No 254; Cm 407), para 5.37. The existence of the liability can be difficult to discover, as most lay rectories have become fragmented over the years as a result of the division and separate disposals of land: Transfer of Land, Liability for Chancel Repairs (1983) (Law Commission Working paper No 86), para 2.29. The fact that it is a several liability may operate unfairly in cases where there is more than one lay rector and the person who is found liable is unable to recover a contribution from others who ought to have been found liable.

74 On the other hand it was noted in the 1983 Law Commission Working Paper that there were some 5,200 chancels for which there is a chancel repair liability. Not all of these cases involve individual landowners. About 800 are the liability of the Church Commissioners, 200 the liability of cathedrals and 200 the liability of educational foundations. Charitable donations may provide relief in some cases, while in others grants may be available from English Heritage. But there is no other source of private funding that can be relied upon, and there is no right of access to public funds. Unsatisfactory though the system may appear to be, there is no obvious alternative. Ferris J recognised, in para 18 of his judgment, that the law relating to chancel repairs is capable of operating arbitrarily, harshly and unfairly. But he did not find any basis for declaring the law to be otherwise than it appeared to be on the authorities.

75 It is not open to us to resolve these problems judicially. All one can say is that the Human Rights Act 1998 does not provide a vehicle for doing so. I would allow the appeal and restore the order and determination made by Ferris J.

LORD HOBHOUSE OF WOODBOROUGH

76 My Lords, it is admitted by the defendants that, apart from the Human Rights Act 1998, they are, as the joint owners of Glebe Farm, Aston Cantlow, and have been at all material times personally responsible for the repair of the chancel of the church of St John the Baptist Aston Cantlow and that, they having failed to repair the chancel, the Parochial Church Council ("PCC") is entitled to a judgment against them under section 2(3) of the Chancel Repairs Act 1932 for such sum as represents the cost of putting the chancel into a proper state of repair. This is because the defendants, Mr and Mrs Wallbank, being liable to repair the chancel, would, but for the 1932 Act, have been liable to be admonished to repair the chancel by an ecclesiastical court. The obligation of the defendants is the obligation to repair. Under the 1932 Act the remedy of an order that the obligation be performed is no longer to be available and the monetary remedy is provided in lieu but the character of the obligation was left unchanged.

77 The obligation to repair is one which derives from the ownership of land to which the obligation is attached. The obligation runs with the land. The 15th and 16th century origins of this are helpfully explained in the opinion of my noble and learned friend, Lord Scott of Foscote. In the present case the obligation arose not from the receipt of tithes but as a result of an enclosure award of 1743 made under the private Act of Parliament of 1742 (15 Geo 2, c 42). It is a personal obligation but only exists so long as the person in question is the owner of the land. Thus he acquires it by a voluntary act—the acquisition of the title to the land of which the obligation is an incident. He can divest himself of the obligation by a further voluntary act—the disposal of the land or, under section 52 of the Ecclesiastical Dilapidations Measure 1923, by redemption. At all the times material to this case, the obligation was categorised by section 70 of the Land Registration Act 1925 as an overriding interest. The person or persons who are under such an obligation are described, using the historical terminology, as the "lay rectors" or the "lay impropriators".

78 In fact the defendants knew that ownership of the land was believed to carry with it the obligation. It was referred to in all the title deeds and, in at least one conveyance, an express indemnity had been taken by the vendor. In other cases some special consideration might arise from the fact that the relevant landowner had acquired the title to the land without any notice of the existence, or possible existence, of the obligation. But that is not this case and it need not be discussed further.

79 The only defence now raised by the defendants to the claim of the PCC under the 1932 Act is based upon the Human Rights Act 1998 and/or the Convention. The 1998 Act had not come into force at the time when the defendants failed to carry out the relevant repairs, nor when the PCC served the notice required by section 2(1) of the 1932 Act, nor at the time when Ferris J tried the case and gave judgment for the PCC. He was formally trying two preliminary issues ordered by Master Bragge but, when he decided the human rights issue against the defendants, the defendants, having abandoned their case on the other issue, admitted that they had no defence to the claim except as to quantum. He accordingly made a declaration of liability, ordered an inquiry as to quantum and ordered the defendants to pay to the claimants the sum found due on the inquiry. The question of quantum arose under section 2(3) of the 1932 Act: "[the] court . . . shall give judgment . . . for such sum as appears to the court to represent the cost of putting the chancel in proper repair". The points which the defendants were taking on quantum were pleaded in paragraph 1 of the outline defence. The judgment of Ferris J was in English procedural law a final judgment. The defendants appealed to the Court of Appeal. By the time that the defendants' appeal was heard, the 1998 Act had however come into force.

80 This timetable raises again the question of the extent to which the Act has a retrospective effect, a question on which the Court of Appeal did not express an opinion since no point was taken in that regard by the PCC. Your Lordships were not satisfied that this was necessarily correct; however it was clearly convenient and in the interest of both of the parties that the House should first hear the parties' arguments upon the points which the Court of Appeal did decide. I stress that the House have not heard any argument upon the question of the extent, if at all, to which the Act has

retrospective effect. It is not appropriate that any view should be expressed on it in the present case. Anything said will not be authoritative. The retrospectivity point will arise for decision in other unrelated appeals and will then fall to be decided after full argument and due consideration. It is in any event not correct to approach that question on the basis that the judgment of Ferris J was undeterminative or merely interlocutory. In English procedural law, it was a final judgment which, unless reversed on appeal, determined the parties' rights and liabilities, subject only to quantum. I will accordingly proceed on the basis of assuming that the Human Rights Act 1998 applies to this case in accordance with the provisions of sections 22(4), 7(1)(b) and 6.

81 The structure of the defendants' argument under the Human Rights Act 1998 is that they have to establish three propositions. If they fail on any one of these, their defence fails. They are: (a) that the PCC is a public authority, the sections 6(1), (3) and (5) point, and (b) that there has been a breach of article 1 of the First Protocol, the article 1 and article 14 point, and (c) that the exclusion in section 6(2) does not apply. Before Ferris J only point (b) arose and he decided it in favour of the claimants. In the Court of Appeal all three points were decided in favour of the defendants.

82 These were the questions of law raised on this appeal. They are questions which are of relevance not only to the present case but to many other cases or potential cases concerning the enforcement under the 1932 Act of the obligation to repair chancels. Other cases may, on their facts, raise special considerations not found in this case and, similarly, legal questions not dependent upon the Human Rights Act 1998 may arise. Your Lordships' decision on this appeal does not touch upon any of them. But I must expressly disassociate myself from any suggestion that there is a cap upon the monetary liability under section 2(3) of the 1932 Act or that any such point is presently open to the defendants upon the inquiry ordered by Ferris J as discussed in the opinion of my noble and learned friend, Lord Scott of Foscote, which I have had the privilege of reading in draft after I had prepared this opinion, together with his questioning of the correctness of the decision in *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417. The question was neither raised nor argued. There are contentious points which will arise if it ever is. Does the cap apply where the express words of the 1932 Act are applicable? How does it apply to successive or continuing and cumulative breaches of the obligation to repair? Does the cap apply where the liability is not attributable to the ownership of a tithe rentcharge but simply to the ownership of land? If so, how does one assess what the cap should be? It is by no means clear that any of these questions should be answered in a way that could assist the defendants. But they have not been argued and I will say no more about them.

Is the PCC a public authority?

83 Historically parochial church councils did not exist. They were introduced by the Parochial Church Councils (Powers) Measure 1921 as a body at parish level which would better enable the lay members of the congregation to be represented. It was agreed that at the material times the powers and functions of PCCs were defined by the Parochial Church Council (Powers) Measure 1956. Section 2 (as amended) provided:

"*General Functions of Council*

"(1) It shall be the duty of the minister and the [PCC] to consult together on matters of general concern and importance to the parish.

"(2) The functions of [PCCs] shall include—(a) cooperation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical; (b) the consideration and discussions of matters concerning the Church of England or any other matters of religious or public interest, but not the declaration of the doctrine of the Church on any question; (c) making known and putting into effect any provision made by the diocesan synod or the deanery synod, but without prejudice to the powers of the council on any particular matter; (d) giving advice to the diocesan synod and deanery synod on any matter referred to the council; (e) raising such matters as the council consider appropriate with the diocesan synod or deanery synod.

"(3) In the exercise of its functions the [PCC] shall take into consideration any expression of opinion by any parochial church meeting."

Section 3 provided that the PCC was to be a body corporate with perpetual succession. Section 4 made provision for the PCC as successor to certain other bodies to have the relevant powers of those bodies:

"(1) . . . the council of every parish shall have . . . (ii) the like powers duties and liabilities as, immediately before [1 July 1921], the churchwardens of such parish had with respect to—(a) The financial affairs of the church including the collection and administration of all moneys raised for church purposes and the keeping of accounts in relation to such affairs and moneys; (b) The care, maintenance, preservation and insurance of the fabric of the church and the goods and ornaments thereof; (c) The care and maintenance of any churchyard (open or closed) and the power of giving a certificate under the provisions of section 18 of the Burial Act 1855 with the like powers as, immediately before [1 July 1921] were possessed by the churchwardens to recover the cost of maintaining a closed churchyard . . ."

Of these powers, the most relevant to the present case are those in section 4(1)(ii)(b) but it is important to note that these are only those powers and duties which the churchwardens had and that the churchwardens did not have a duty to repair the fabric but only a duty to report its disrepair. As stated by Richard Burn Ch in his work *Burn on Ecclesiastical Law*, 9th ed (1842), edited by Robert Phillimore, vol 1, p 357,

"And although churchwardens are not charged with the repairs of the chancel, yet they are charged with the supervisal thereof, to see that it be not permitted to dilapidate and fall into decay; and when any such dilapidations shall happen, if no care be taken to repair the same, they are to make presentation thereof at the next visitation."

It was no doubt following this logic that the PCC were given the power (and correlative duty) in 1932 to bring the action to obtain a remedy for the failure of a lay rector to repair the chancel. (The changes later introduced by section 39 of the Endowments and Glebe Measure 1976 relating to incumbents of a benefice are not relevant to this case.)

A **84** The PCC is thus the creature of a statutory provision by what was then the National Assembly of the Church of England. It has only those functions, duties and powers which have been conferred on it by that or other legislation. It is part of the structure known as the Church of England but the Church of England is not itself a legal entity. The legal entities are the various office-holders and various distinct bodies set up within that structure.

B **85** The Human Rights Act 1998 and section 6 do not contain any complete or general definition of the term "a public authority". Section 6 does however contain a secondary definition in subsections (3)(b) and (5) as including, in respect of acts which are not of a private nature, persons (or bodies) certain of whose functions are functions of a public nature. This secondary category has been described as "hybrid" public authorities. It C requires a two-fold assessment, first of the body's functions, and secondly of the particular act in question. The body must be one of which at least some, but not all, of its functions are of a public nature. This leaves what by inference from subsection (3)(b) is the primary category, i e, a person or body *all* of whose functions are of a public nature. This category has conveniently been called by the commentators a "core" public authority. For this category, there is no second requirement; the section potentially applies to D everything that they do regardless of whether it is an act of a private or public nature.

86 Is a PCC a "core" public authority? The answer I would give to this question is that it is clearly not. Its functions, as identified above from the relevant statutory provisions, clearly include matters which are concerned only with the pastoral and organisational concerns of the diocese and the E congregation of believers in the parish. It acts in the sectional not the public interest. The most that can be said is that it is a creature of a church measure having the force of a statute—but that is not suggested to be conclusive—and that some aspects of the Church of England which is the "established church" are of wider general interest and not of importance to the congregation alone. Thus the priest ministering in the parish may have responsibilities that are certainly not public, such as the supervision of the F liturgies used or advising about doctrine, but may have other responsibilities which are of a public nature, such as a responsibility for marriages and burials and the keeping of registers. But the PCC itself does not have such public responsibilities nor are its functions public; it is essentially a domestic religious body. The fact that the Church of England is the established church of England may mean that various bodies within G that Church may as a result perform public functions. But it does not follow that PCCs themselves perform any such functions. Even the monasteries of the established church in Greece, which has strong legal links with the state, such as the presence of representatives of the state on its governing body and direct financial links with the state, has been held not to be an emanation of the state for the purposes of the Convention: *Holy Monasteries v Greece* 20 EHRR 1.

H **87** The Court of Appeal reached a different conclusion. I do not find their reasoning satisfactory. Neither parliamentary material nor references to the law of judicial review assist on this question. The relevant underlying principles are to be found in human rights law not in Community law nor in the administrative law of England and Wales. The Strasbourg jurisprudence

has already been deployed in the opinion of my noble and learned friend, Lord Hope of Craighead, and I need not repeat it. The relevant concept is the opposition of the "victim" and a "governmental body". The former can make a complaint; the latter can only be the object of a complaint. The difference between them is that the latter has a governmental character and discharges governmental functions. If there is a need to find additional assistance in construing section 6 of the Act, this is where it is to be found. The structure of the Act also supports the same conclusion. It is through section 7 and its reference to victims in section 7(1) and (7) that one gets from section 22(4) to section 6(1). Section 7 is drafted having regard to the Strasbourg jurisprudence; it would be inconsistent to construe section 6 in a manner opposed to that jurisprudence. The Court of Appeal's approach cannot be supported.

88 In my opinion it has not been established that PCCs in general nor this PCC in particular perform any function of a public or governmental nature. If it is to be said that they do, I am unaware what specifically it can be said is that function. The Court of Appeal (in paragraph 34) said that the recovery of money under section 2 of the 1932 Act was the function which made the PCC a public authority. This is to be contrasted with the statement in paragraph 37 that the "power and, no doubt duty" to do so is a "common law" power. The nature of the person's functions are not to be confused with the nature of the act complained of, as section 6 makes clear. But in neither case are they governmental in nature nor is the body itself inherently governmental. It follows that in my opinion the PCC was neither a "core" nor a "hybrid" public authority. On that basis the defence of Mr and Mrs Wallbank must fail.

89 But, if I am wrong, and the PCC was a "hybrid" public authority, the further question arises under section 6(5): Is the nature of the relevant act private? The act is the enforcement of a civil liability. The liability is one which arises under private law and which is enforceable by the PCC as a civil debt by virtue of the 1932 Act. The 1932 did not alter the preexisting law as to the obligations of lay impropriators. It is simply remedial (as the Court of Appeal recognised in paragraph 37). Its purpose is to enable repairs to be done which the lay rector ought to have, but has not, himself carried out. It is argued that it is akin to a power of taxation. Whether or not it was once true in the 16th century that such a power existed, it was certainly not true in the 20th century. Whatever the former obligations of lay impropriators may once have been, by the 18th century they were or had been converted into civil obligations. In the present case this occurred in 1743 as a result of an enclosure award made under a private Act of Parliament of 1742 entitled An Act for Dividing and Inclosing, Setting out and Allotting, certain Common Fields and Inclosures within the Manor and Parish of Aston Cantlow, in the County of Warwick (15 Geo 2, c 42). In return for financial and proprietorial advantages then conferred upon them, the impropriators accepted the obligation to repair the chancel as and when the need arose. That is the private law obligation which is being enforced in the present action using the remedy provided in the 1932 Act.

90 The 1932 Act is irrelevant unless and until the lay impropriator fails to perform his obligation to repair the chancel, a failure which may have occurred on a single occasion or may, as in the present case, have been a continuing and cumulative failure over a long period of time. The

responsibility for repairing the chancel was since 1743 an incident of the ownership of certain particular parcels of land. When Mr and Mrs Wallbank acquired the title to that land they assumed that responsibility to repair and the consequent liability in default if they should fail to discharge it. This was not a responsibility and liability which they shared with the public in general; it was something which they had personally assumed voluntarily by a voluntary act of acquisition which at the time they apparently thought was advantageous to them. From the point of view of both the PCC and the Wallbanks, the transaction and its incident were private law, non-governmental, non-public activities and not of a public nature. Again, this conclusion is adverse to the Wallbanks' defence.

Has there been a breach of article 1 (and article 14)?

91 Article 14 (discrimination) is not a freestanding provision but has to be read in conjunction with the recognition of the rights conferred by other articles. Therefore the material article is article 1 of the First Protocol which endorses the entitlement to the peaceful enjoyment of a person's possessions and prohibits depriving a person of his possessions, subject to certain qualifications. The word "possessions" has been considered by the European Court of Human Rights, in particular in the cases of *Marckx v Belgium* (1979) 2 EHRR 330 and *Sporrong and Lönnroth v Sweden* 5 EHRR 35. It applies to all forms of property and is the equivalent of "assets". But what is clear is that it does not extend to grant relief from liabilities incurred in accordance with the civil law. It may be that there are cases where the liability is merely a pretext or mechanism for depriving someone of their possessions by expropriation but that is not the case here. The liability is a private law liability which has arisen from the voluntary acts of the persons liable. They have no Convention right to be relieved of that liability. Nor do they have a Convention right to be relieved from the consequences of a bargain made, albeit some 200 years earlier, by their predecessors in title. They do not make any complaint under article 6 or complain about the fairness of these legal proceedings. They cannot complain that they are being discriminated against. The only reason why they are being sued is because they are the parties liable. This defence also fails. The submission that there should be a declaration of incompatibility likewise fails.

92 For the sake of completeness, it was clear that at all material times both they and their predecessors in title knew of the responsibility to repair or at least that it was asserted that they would be responsible if they acquired the title to the relevant land, an assertion which they have now admitted to be correct subject only to the Human Rights Act 1998. Further, they originally ran a case of waiver by the PCC which they have now accepted was rightly rejected. If they had had a legal defence it would have been recognised by the court and the action would have been dismissed. Their financial liability under the 1932 Act is not arbitrary. It arises from their failure to perform a civil private law obligation which they had voluntarily assumed.

The section 6(2) point

93 This point would only arise if I was wrong on all the preceding points. One therefore has to assume that the PCC is a public authority and the demand for payment is not of a private nature. In such circumstances,

subsection (2) creates an exception to the application of subsection (1). The words of exception relevant to this case are "the authority was acting so as to give effect to or enforce" provisions of primary legislation. The primary legislation is the 1932 Act. Incontrovertibly the PCC were seeking to give effect to and enforce provisions of that Act. On the above-stated assumption, the PCC's act in suing the Wallbanks comes squarely within the exception. Paragraph (b) of the subsection is to be contrasted with paragraph (a) which is manifestly intended to cover cases where the public authority did not have any alternative but to act as it did (i e it was compelled to do so). Paragraph (b), on the other hand, covers situations where the public authority was empowered by legislation to act as it did and the intention of the legislation, whilst leaving open a measure of discretion, was that it should use the power provided. For some unstated reason, the Court of Appeal treated only paragraph (a) as being relevant and this accounts for their mistaken decision on this point.

Conclusion

94 It follows that, far from making out all three of the necessary constituents in their defence, the defendants have made out none. Their defence accordingly fails and the appeal must be allowed. There is no need to consider the retrospectivity question.

LORD SCOTT OF FOSCOTE

Introduction

95 My Lords, the respondents, Mr and Mrs Wallbank, are the freehold owners of Glebe Farm, Aston Cantlow in Warwickshire. Glebe Farm, which consists of a farmhouse and about 179 acres of land, includes five fields amounting to just over 52 acres known, or formerly known, as Clanacre. The Clanacre fields, it is contended, were and remain rectorial property thereby constituting its owners for the time being lay rectors and subjecting them to the liability of paying for all and any necessary repairs to the chancel of St John the Baptist church, the parish church of Aston Cantlow.

96 The appellants, the parochial church council of Aston Cantlow are responsible for supervising the care, maintenance, preservation and insurance of the fabric of the church (see section 4(1)(ii)(b) of the Parochial Church Councils (Powers) Measure 1956) and have served notices on Mr and Mrs Wallbank requiring them to put the chancel in proper repair. The notices were served on 12 September 1994 and 23 January 1996 pursuant to section 2 of the Chancel Repairs Act 1932. The cost of the necessary repairs is put in the notices at £95,260-odd. Mr and Mrs Wallbank dispute their liability. This litigation has resulted.

The law on chancel repairs

97 A description, even a brief one, of the law on chancel repairs must, if it is to be comprehensible, start with mediaeval times when every parish had its parish priest, the "rector". The rector had, by virtue of his office, a number of valuable proprietary rights which, collectively, constituted his "rectory". These rights included the profits of glebe land and tithes, usually one-tenth of the produce of land in the parish. Responsibility for the repair

of the parish church was, absent some special custom to the contrary (see *Bishop of Ely v Gibbons* (1833) 4 Hagg Ecc 156), shared between the rector and the parishioners. The parishioners were responsible for repairing the part of the church where they sat, the western end of the church. The rector was responsible for repairing the chancel, the eastern end of the church. The rector's glebe land and tithes, the "rectory", provided both for his maintenance and a fund from which he could pay for chancel repairs.

98 The right of appointment to a rectory, the advowson, was an item of property transferable by conveyance and often in the hands of a lay person, typically the landowner who had built and endowed the church or his successors. But the appointee had to be a spiritual rector and, on appointment, would become entitled to the rectorial rights and subject to the chancel repair liability.

99 In the 300 years or so prior to the dissolution of the monasteries under Henry VIII a great number of advowsons were acquired by monasteries. A monastery, having acquired an advowson, would almost invariably appoint itself the rector and thereby appropriate to itself the valuable rectorial rights, the rectory. It would, of course, be a spiritual rector. The parish would, however, need a parish priest. So the monastery would appoint a deputy, a vicar, to fulfil that role, usually allocating to the vicar some part of the rectorial tithes or glebe. It seems, interestingly, never to have been suggested that the vicar, by virtue of the allocation to him of some part of the rectory thereby became liable for chancel repairs. Vicarial tithes or vicarial glebe did not carry that liability which remained with the rector.

100 On the dissolution of the monasteries under Henry VIII the property of religious houses, including their advowsons and the rectories they had appropriated, were compulsorily sold, impropriated, to lay institutions, such as Oxford and Cambridge colleges, and individuals. The lay institutions and individuals who acquired the rectories became lay rectors, or lay impropriators (the terms are synonymous) and, as such, subject to the chancel repair liability. The lay rector may have, and usually had, also acquired the advowson and thereby become the patron and entitled to appoint the vicar of the parish. A vicar, thus appointed, was no longer a deputy but held office in his own right. The obligation to repair the chancel lay on the lay rector in that capacity and not as owner of the advowson.

101 The proprietary rights acquired by lay rectors would have included the rectorial glebe and the rectorial tithes. These rights could be alienated and divided up. Many rectorial tithes were extinguished under Inclosure Awards made pursuant to Inclosure Acts. Under these Awards plots forming part of the common lands to be enclosed were allotted to lay rectors in lieu of their rectorial tithes. It is generally assumed that the allotted lands then took the place of the tithes as the lay rector's rectorial property (see para 2.11 of the Law Commission's Working Paper No 86 Transfer of land. Liability for Chancel Repairs (1983).

102 Tithes, other than those extinguished under Inclosure Awards, were converted into tithe rentcharges under the Tithe Act 1836 (6 & 7 Will 4, c 71). Tithe rentcharges, unlike their predecessor tithes, were charged on the land in respect of which the tithe had been payable and attracted the same chancel repair liability as had been attracted by the predecessor tithes—see

section 71 of the 1836 Act which subjected the rentcharges to "the same liabilities and incidents as the like estate in the tithes commuted". Over the next 100 years various further statutory changes were made until, finally, the Tithe Act 1936 abolished tithe rentcharges and replaced them with tithe redemption annuities. The annuities were payable to the Government and the owners of the rentcharges received Government stock in compensation for the extinction of their rights.

103 Section 31 of the 1936 Act and Schedule 7 to the Act dealt specifically with chancel repairs. As to liability for chancel repair arising from the ownership of tithe rentcharges (evidently on the footing that the tithe rentcharge had taken the place of the tithes as rectorial property) a part of the Government stock to be issued in respect of that rentcharge was to go to the diocesan authority to provide for the cost of future repairs to the chancel and the cost of insuring against damage by fire (section 31(2)). Subsections (3) and (4) of section 31 merit mention. They provided, in conjunction with section 21 of the 1936 Act and section 1 of the Tithe Act 1839 (2 & 3 Vict c 62), that where the tithe rentcharge and the land on which it was charged were in the same ownership, the rentcharge would be treated as abolished by merger but the land would be subject to the chancel repair liability "to the extent of the value of . . . the rentcharge" (section 1 of the 1839 Act). The chancel repair liability of the lay rector became thereby limited to the value of the rectorial property, the rentcharge, from which his office of lay rector was derived.

104 It is clear that a lay rectorship and liability for chancel repair could attach to a person who had become owner of a part only of the rectorial property. That that is so is implicit in the decision of this House in *Representative Body of the Church in Wales v Tithe Redemption Commission* [1944] AC 228, the "Welsh Commissioners" case. The issue, which arose out of the disestablishment in 1914 of the Welsh Church, was whether tithe rentcharges which, until abolished by the 1936 Act, had become temporally vested in the Commissioner of Church Temporalties in Wales (the Welsh Commissioners) pending their transfer to the University of Wales under provisions in the Welsh Churches Acts 1914 and 1919 had, while so vested, subjected the Welsh Commissioners to chancel repair liability. If the answer was "Yes", Government stock needed to be issued to the appropriate Welsh authority pursuant to the Tithe Act 1936. Their Lordships held that the Welsh Commissioners, so long as they held the tithe rentcharges, were lay impropriators and accordingly under a chancel repair liability. The issue, which applied to a number of parishes in Wales, was examined by reference to a particular parish, Llantwit Major in Glamorgan. Tithe rentcharges valued at £481 7s 11d, representing rectorial property of the parish, were held by the Dean and Chapter of Gloucester. Other tithe rentcharges, valued at £64 4s 2d and also representing rectorial property of the parish were held by a limited company, Plymouth Estates Ltd. Viscount Simon LC said, at p 239, that "Plymouth Estates Ltd . . . plainly and admittedly remain liable for chancel repair". He described the obligation of a rector to repair the chancel as "an obligation imposed by common law": p 240 and see also Lord Wright, at p 247. Lord Porter expressed himself to the same effect. He said, at p 249, "Prima facie, therefore, if the tithe rentcharge gets into the hands of a lay impropriator at anytime it is held

A subject to the liability to repair" and at p 250 that "impropriation exists where the property is in lay hands . . ."

105 But although it must now be regarded as settled law that an individual who becomes the owner of rectorial property of a parish becomes liable for chancel repair, there remain subsidiary issues which, in my opinion, are not settled. For example, the extent of the liability is not settled. Is the liability limited to the value of the rectorial profits the B ownership of which has attracted the office of lay rector and the consequent chancel repair liability or is it unlimited in amount? I have already referred to the effect of section 31(3) and (4) of the Tithe Act 1936 whereby, by reference to section 21 of the 1936 Act and section 1 of the Tithe Act 1839, the chancel repair liability of a lay rector attributable to his ownership of a tithe rentcharge which had merged in the land on which it C was charged was limited to the value of the rentcharge. In *Walwyn v Awberry* (1677) 2 Mod 254 a lay rector brought an action for trespass because the local bishop had sequestered his tithes on account of his failure to obey an admonition to repair the chancel of the parish church. The issue was whether sequestration was an available remedy. It was held that it was not. Atkins J, at p 258 who disagreed on the sequestration point, said that "it was agreed by all, that an impropriator is chargeable with the repairs of D the chancel; but the charge was not personal but in regard of the profits of the impropriation . . ." This suggests that the liability is limited to the amount of the profits. A similar suggestion appears in the Report of the Chancel Repairs Committee presented by the Lord Chancellor to Parliament in May 1930 (Cmd 3571). The chancel repair liability was described in para 4(a) as "an obligation imposed by the Common Law of E England, which annexes to the ownership of the rectory the duty of the rector to maintain the chancel of the church *out of the profits of the rectory*." (Emphasis added.) As to the position where the rectorial property has passed to several owners, the paragraph said "every several owner is, *to the extent of the profits derived by him from his piece of the property*, under the duty of maintaining the chancel." (Emphasis added.)

F 106 In *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417, however, the Court of Appeal decided otherwise. The defendants were lay rectors of the parish of Wickhambrook by virtue of ownership of rentcharge of £39 11s 9d per year, a subdivided part of a tithe rentcharge of £120 per year. The cost of the necessary chancel repairs was estimated to be £123 12s 6d. It was this sum that the PCC sought to recover from the defendants. It was proved at trial that the total sum actually received by the G defendants from their ownership of the rentcharge was £50-odd. The trial judge, relying on passages in *Phillimore's Ecclesiastical Law* 2nd ed (1895), held that it was necessary to prove that the impropriator had received tithes or other profits belonging to the rectory sufficient to cover the cost of repair (p 423) and, accordingly, that the PCC's claim failed. He was reversed on appeal. Lord Hanworth MR after examining various reports of *Walwyn v Awberry* expressed the view that the case was an unsatisfactory authority on H which to found a limitation of a lay rector's chancel repair liability (p 437) and concluded that "the liability of a lay impropriator is personal, and is not limited to the amount of the receipts from the tithe". But he held that the defendants had a right of contribution from other owners of parts of the tithe rentcharge. Romer LJ agreed with Lord Hanworth MR, as too did

Eve J who added that "the result . . . does not appear to me to be reasonable or just". A

107 In the "Welsh Commissioners" case [1944] AC 228, 239, Viscount Simon LC, having referred to the chancel repair liability of Plymouth Estates Ltd, said that "It is not necessary for the purposes of the present appeal to discuss the difficult question of the extent of their possible responsibility, or whether *Wickhambrook Parochial Church Council v Croxford* was rightly decided." B

108 Counsel before your Lordships have not argued whether the *Wickhambrook* case was or was not rightly decided. But if Mr and Mrs Wallbank are liable as lay rectors, the question whether their liability should be limited to the profits they have received from the rectorial property may be open to them. The point is certainly still open in this House. C

109 A further point of law that cannot, in my opinion, yet be regarded as settled is whether each and every alienation by a lay rector of impropriatorial assets of the rectory necessarily makes the alienee a co lay rector and liable for chancel repairs. The point arose in *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585, 594 where Wynn-Parry J held that the liability to repair the chancel "is not a charge on the rectorial property, but a personal liability imposed on the owner or owners for the time being of the rectorial property". and that "If there is more than one owner, each is severally liable". For reasons which will appear, this is not a point which can have any bearing on the present case but, none the less, the conclusion to which the judge came may be open to question. Is it really the case that on every disposition of any part of former rectorial property, no matter how small and no matter what may be the intentions of the parties, express or implied, regarding the assumption by the transferee of chancel repair liabilities, the transferee becomes willy-nilly by dint of inflexible legal principle a lay impropriator liable to chancel repairs? I doubt it. D E

The conveyancing history of Clanacre

110 At the time of the Inclosure Act 1742 and the Award of 1743, under which the common lands of Aston Cantlow were enclosed, Lord Brooke was the lay impropriator of the rectory of the parish church of Aston Cantlow. A recital to the Act so states. It appears from another recital to the Act that Lord Brooke was the owner of tithes and it appears from the terms of the Award that the impropriated property included glebe land. F

111 Under the Award Lord Brooke was allotted Clanacre. It was described as "one plot lying in Aston Cantlow . . . called Clanacre combining (containing) . . . 52 acres two roods and 21 perches". Details of its boundaries were given so that there could be no doubt as to the identity of what had been allotted. G

112 It is unclear from the extract of the Award contained in the papers before your Lordships on account of what rectorial rights Clanacre was allotted. It may have been allotted on account of Lord Brooke's tithes or it may have been allotted on account of glebe comprised in the common lands that were being enclosed. But it is not in dispute that one way or another Clanacre became, by substitution, rectorial property. Certainly all Lord Brooke's tithes over the common lands were extinguished by the Act and the Award. H

A **113** At some time between 1743 and 1875 Lord Brooke, or his successors, sold Clanacre together with the rest of what later became Glebe Farm. Whether the sale was of all Lord Brooke's impropriated property or of only part of it is not apparent from the papers in evidence in the case.

114 The first readable conveyance dealing with Clanacre is a conveyance of 21 October 1918 under which the vendor, Thomas Wood, conveyed to two purchasers, both with the surname Terry, Glebe Farm and
B its 179 odd acres including the 52-odd Clanacre acres. The habendum to the Conveyance says that the purchasers were to hold the land "in fee simple in equal shares as tenants in common subject primarily and in priority to the other hereditaments charged therewith to the repairs of the Chancel of Aston Church". The "subject to" provision indicates the strong likelihood that the vendor, Thomas Wood, who must have been a lay impropriator, was selling
C part of the rectorial property but retaining other parts. It seems to me unlikely, given the content of this provision, that Mr and Mrs Wallbank could succeed in claiming from Thomas Wood or his successors a contribution towards any chancel repairing liability that rests on them by virtue of their ownership of Clanacre.

115 In 1970 Mr and Mrs Coulton, Mrs Wallbank's parents, purchased Glebe Farm and the 179 acres from Herbert Terry & Sons Ltd, no doubt the
D successors of the 1918 Terry purchasers. Clause 2 of the Conveyance to the Coultons said that the property was conveyed "subject to the liability for the repair of the Chancel of Aston Church . . . so far as the same affects the property hereby conveyed and is still subsisting and capable of being enforced". And under two deeds of gift dated respectively 21 March 1974 and 1 May 1986 Glebe Farm and the bulk of the 179 acres, including all the
E Clanacre fields, were conveyed to Mrs Wallbank by her parents. Mrs Wallbank later placed the property in the joint names of herself and her husband.

116 It is plain from this conveyancing history that Mr and Mrs Wallbank acquired Glebe Farm, including Clanacre, with the knowledge that ownership might carry with it a liability to pay for repairs to the chancel of the parish church.

F

The Chancel Repairs Act 1932

117 The Chancel Repairs Act 1932 was passed in consequence of the inadequacies of enforcement procedure revealed by litigation between Hauxton PCC and a Mr Stevens. Pre 1932 the enforcement of chancel repair liability was primarily a matter for ecclesiastical courts. Proceedings for the
G issue of an admonition requiring the alleged lay rector to carry out the repairs had to be issued in the consistory court. It had been established by dicta in, if not by the ratio of, *Walwyn v Awberry* 2 Mod 254 that ordinary civil law enforcement procedures were not available. If the consistory court issued the admonition and it was not obeyed, the next step would be either a decree of excommunication or a transfer of the proceedings to the High Court in order for proceedings for committal for contempt of court to be
H brought, or both. The unfortunate Mr Stevens, having unsuccessfully disputed his liability, ignored the admonition issued by the consistory court. He ended up in prison for contempt under a committal order made in the King's Bench Division. He obtained his release only on undertaking to carry out the requisite repairs.

118 Such a disproportionate remedy was obviously unsatisfactory and section 2 of the 1932 Act authorised PCCs to serve notices to repair on individuals alleged to be liable for chancel repairs. If such a notice is not complied with, the PCC can commence proceedings in the ordinary courts to recover the sum required to put the chancel in proper repair. The court, if satisfied that the defendant would, but for the 1932 Act, "have been liable to be admonished to repair the chancel by the appropriate ecclesiastical court", can give judgment against the defendant for the sum representing the cost of the necessary repairs. The judgment would be enforceable like any other money judgment. Hence the notices served by the PCC on Mr and Mrs Wallbank and the litigation that followed Mr and Mrs Wallbank's denial of liability.

The litigation

119 The pleadings in the case confirmed that there was a dispute as to Mr and Mrs Wallbank's liability to bear the cost of the chancel repairs. On 29 September 1999 the case came before Master Bragge on what I take to have been a summons for directions. On this summons Master Bragge directed that two preliminary issues be tried. Each related to contentions by Mr and Mrs Wallbank as to why they were not liable. One of these contentions was abandoned at trial. The other is the issue that has found its way to your Lordships' House. But before reciting its terms it is important to notice an important concession made by Mr Wallbank, who appeared in person, and on the basis of which the master directed the trial of the preliminary issues. The concession is recorded in the order in the following terms:

> "And upon the second defendant on his own behalf and on that of the first defendant stating that he agreed and accepted that the defendants (and each of them) as the joint freeholders of Glebe Farm Aston Cantlow Warwickshire are and at all material times have been the lay rector and are personally liable for the repair of the chancel of the church of St John the Baptist Aston Cantlow Warwickshire ('the church') if and to the extent that the liability is enforceable and/or exists by reason of the preliminary issues particularised below."

This concession very greatly reduced the number of issues relating to chancel repair liability that Mr and Mrs Wallbank could raise.

120 The preliminary issue that was, and is, persisted in was subsequently amended and in its amended form is as follows:

> "Whether having regard to the provisions of the European Convention on Human Rights, a co-rector is liable to repair the chancel of the church or otherwise to meet the costs of the said repairs by reason of the provisions of the Chancel Repairs Act 1932 and the common law."

121 The preliminary issue was tried before Ferris J. It was tried after the Human Rights Act 1998 had been passed but before 2 October 2000, the date on which the Act was to come into effect. In paragraph 9 of his judgment Ferris J described the argument addressed to him by counsel for Mr and Mrs Wallbank as having two main elements, namely,

A "(i) that English law is not yet settled in deciding that a lay rector is liable for chancel repairs, at any rate where the rectorial property owned by that lay rector consists of part only of a larger parcel of land allotted under an inclosure award in lieu of tithes or other rectorial property; and (ii) that it should be decided that such a lay rector is not liable because to hold to the contrary would involve a contravention of one or more of the rights declared by the Convention."
B

122 I find some difficulty in reconciling the first argument with Mr Wallbank's concession as recited in Master Bragge's order. That, perhaps, does not matter because Ferris J, following *Wickhambrook Parochial Church Council v Croxford* [1935] 2 KB 417 and *Chivers & Sons Ltd v Air Ministry* [1955] Ch 585 held that it was settled law that an
C individual who had come into ownership of part only of the rectorial property became liable to the full burden of the chancel repair liability. In the Court of Appeal [2002] Ch 51, 58, para 15, Sir Andrew Morritt V-C, relying on the same authorities, agreed and held, in addition, that the liability "is not limited or proportioned to the value or fruits of the benefice: its sole measure is the cost of necessary repairs". This was what had been held in the *Wickhambrook* case, a case by which the Court of Appeal in the
D present case was bound. This is not a point which has been argued before your Lordships in the present appeal nor, in my opinion, is it a point which arises under the preliminary issue. It is a point that may re-emerge if the quantum of the cost of repairs for which the Wallbanks are liable has to be litigated. For the present I want to say no more about it than Viscount Simon LC said in the "Welsh Commissioners" case, namely, that it is a
E difficult question and that whether the *Wickhambrook* case was rightly decided is open to debate at least in this House.

123 As to the *Chivers & Sons Ltd v Air Ministry* point (see paragraph 16 of Sir Andrew Morritt V-C's judgment) it cannot avail the Wallbanks. The 1918 Conveyance plainly intended to make the Terrys, the transferees, co-rectors. Otherwise there would have been no mention of the chancel repair liability.
F

124 As to the second argument for the Wallbanks to which Ferris J referred, the argument based on the 1998 Act, the judge held that there was no breach of article 1 of the First Protocol. The Wallbanks' liability to repair the chancel was an incident of their ownership of the Clanacre fields and the enforcement of that liability by those entitled to enforce it could not be regarded as a deprivation of their possessions. Their
G possessions, he pointed out, were always liable to such enforcement. Ferris J, therefore, answered in the negative the question posed in the preliminary issue.

125 The Court of Appeal disagreed with Ferris J on the 1998 Act point. They held, first, that the PCC was a core "public authority" within the meaning of that expression in section 6 of the Act. Section 6(1) provides that "It is unlawful for a public authority to act in a way which is incompatible
H with a Convention right." They held, alternatively, that the PCC's function in enforcing against the Wallbanks their chancel repair liability was a function "of a public nature". Section 6(3)(b) provides that the expression "public authority" includes "any person certain of whose functions are functions of a public nature" and section 6(5) says that "In relation to a

particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private". A

126 Having reached conclusions under which the PCC's attempts to enforce the chancel repair liability against the Wallbanks were acts of a public authority for section 6 purposes, the question was whether the enforcement was incompatible with a Convention right. The Court of Appeal first addressed itself to article 1 of the First Protocol and held that the liability to defray the cost of chancel repairs was "inescapably" a form of taxation. The reasoning was that "a private individual who has no necessary connection with the church [was being] required by law to pay money to a public authority for its upkeep": para 40. The Court of Appeal identified in Strasbourg jurisprudence a requirement that "the legitimate aim of taxation in the public interest must be pursued by means which are not completely arbitrary or out of all proportion to their purpose" (paragraph 44), held that the liability for chancel repair was a tax which operated entirely arbitrarily "first because the land to which it attaches, now shorn of any connection with the rectory, does not differ relevantly from any other freehold land, and secondly because the liability may arise at any time and be . . . in almost any amount" (para 45), and held that the "tax" accordingly violated article 1 of the First Protocol. B C D

127 The Court of Appeal held, also, that the way in which the chancel repair liability operated discriminated, impermissibly and in breach of article 14, between the Wallbanks, who were subject to the liability, and other landowners in the parish who were not.

128 The following issues therefore arise for decision on this appeal. (1) Is the PCC a "core" public authority for the purposes of section 6 of the 1998 Act? (2) If the PCC is not a core public authority, is its function in enforcing chancel repair liability a function "of a public nature"? (3) If the PCC's enforcement of chancel repair liability is a function of a public nature, does the enforcement infringe article 1 of the First Protocol to the Convention? (4) Or does it infringe article 14 of the Convention? E

Is the PCC a core public authority? F

129 I have had the advantage of reading in advance the opinions of my noble and learned friends, Lord Hope of Craighead and Lord Rodger of Earlsferry. Each has concluded that a PCC is not a core public authority. I am in complete agreement with their reasons for coming to that conclusion and cannot usefully add to them. I, too, would hold that a PCC is not a core public authority. G

Is the enforcement of chancel repair liability a function of a public nature?

130 On this issue my noble and learned friends have come to the conclusion that the nature of enforcement of chancel repair liability is private. I have found this a difficult question but at the end have come to the opposite conclusion. I agree with Lord Hope that the answer to the question, whether an authority, not being a "core" public authority, is, when exercising a particular function, exercising a function of a public nature, must depend upon the facts of the particular case (paragraph 63 of his opinion). The important facts and matters relevant to the question in the present case seem to me, in no particular order of importance, to be the H

following. (1) The parish church is a church of the Church of England, a church by law established. (2) It is a church to which the Anglican public are entitled to have recourse, regardless of whether they are practising members of the church, for marriage, for baptism of their children, for weddings, for funerals and burial, and perhaps for other purposes as well. (3) Members of other denominations, or even other religions, are, if parishioners, entitled to burial in the parish churchyard. (4) The church is, therefore, a public building. It is not a private building from which the public can lawfully be excluded at the whim of the owner. (5) The PCC is corporate and its functions are charitable. Its members have the status of charity trustees. Charitable trusts are public trusts, not private ones. (6) A decision by a PCC to enforce a chancel repairing liability is a decision taken in the interests of the parishioners as a whole. It is not taken in pursuit of any private interests. If it were so taken, it would I think be impeachable by judicial review.

131 Lord Hope has said that the liability of the lay rector to repair the chancel arises as a matter of private law from the ownership of glebe land: paragraph 71 of his opinion. I would respectfully question whether the adjective "private" is apt. In the *Welsh Commissioners* case [1944] AC 228 Sir Walter Monckton KC for the appellants in his submissions to their Lordships commented on the fact that the Welsh Churches Act 1914 had made no express provision for a tribunal to take the place of the consistory court in enforcing chancel repair and put to their Lordships that "Perhaps the Attorney General might have dealt with the matter as a public right": p 234. There was no recorded dissent and I respectfully suggest that Sir Walter's comment was soundly based. The liability of a lay rector is a personal liability arising from his ownership of impropriated property and is imposed by common law (see Viscount Simon LC, at p 240). But obligations imposed by common law are not necessarily private law obligations. Whether they are so or not must depend on those to whom they are owed. The chancel repair obligations are not owed to private individuals. Private individuals cannot release them. Section 52 of the Ecclesiastical Dilapidations Measure 1923 provided a procedure whereby lay rectors liable for chancel repairs could compound their liability and thereby obtain a release from it. The procedure required there to be consultation with the PCC of the parish, the obtaining of approval from the Diocesan Dilapidations Board and payment of the requisite sum to the Diocesan Authority. The sum paid becomes trust money (see subsection (5)). These provisions have an unmistakable public law flavour to them. The chancel repair obligations resting on a lay rector are not, in my opinion, private law obligations.

132 In my opinion, therefore, the question posed under this issue should be answered in the affirmative. It follows, if that is right, that in enforcing chancel repair liability, a PCC must not act in a manner incompatible with a Convention right. Is enforcement of chancel repair liability against Mr and Mrs Wallbank an infringement of their rights under article 1 of the First Protocol?

133 The terms of article 1 have been set out by Lord Hope in paragraph 66 of his opinion. I need not repeat that exercise. The question is whether the enforcement of the chancel repair liability constitutes a deprivation of the lay rector's possessions. The Court of Appeal prayed in

aid the analogy of taxation in order to justify the proposition that the relevant deprivation was of the Wallbanks' funds. It was their personal funds of which they were to be deprived, not Glebe Farm. For my part, although I disagree with the categorisation of the liability as a form of taxation (see paragraph 40 of the Court of Appeal's judgment) I would accept the analysis. The enforcement of the liability is indeed an attack on the Wallbanks' personal funds but it does not on that account infringe article 1 any more than a claim to enforce any other pecuniary liability does so. It is here, perhaps, that the taxation analogy does become relevant. Taxation is a levy imposed by a state, or perhaps by some core public authority authorized by the state to impose the levy, either on the public generally or on some identified section of the public. In *Black's Law Dictionary*, 6th ed (1990), "tax" is described as "a charge by the government", as a pecuniary burden laid upon individuals or property to support the government, and [being] a payment exacted by legislative authority" and whose "essential characteristics . . . are that it is not a voluntary payment or donation but an enforced contribution, exacted pursuant to legislative authority". It may be that the obligation imposed on parishioners by the common law to pay tithes to the rector of the parish could, although not imposed by government or by the legislature, reasonably be regarded as an obligation to pay a tax. But the obligation of the recipient of the tithes to repair the chancel of the parish church could not, in my opinion, be so described. When tithe rentcharge took the place of tithes, the obligation to pay the tithe rentcharge might similarly have been regarded as an obligation of a taxation character. But the obligation to repair the chancel of the church resting on the recipient of the tithe rentcharge could not be so described. It remained a quid pro quo for the receipt of the tithe rentcharge. The substitution under an Inclosure Award of land for tithes could no more have changed the nature of the obligation to repair the church chancel than the substitution of tithe rentcharge for tithes could have done. The taxation analogy drawn by the Court of Appeal is, in my respectful opinion, misplaced.

134 The chancel repair liability satisfies, in my opinion, the requirements of the article 1 exception: it is a liability created by the common law, it operates in the narrow public interest of the parishioners in the parish concerned and in the general public interest in the maintenance of churches. It is created by common law and is subject to the incidents attached to it by common law. And in the case of Mr and Mrs Wallbank they acquired the rectorial property and became lay rectors with full knowledge of the potential liability for chancel repair that that acquisition would carry with it. I can see no infringement of (or incompatibility with) article 1 produced by the actions of the PCC in enforcing that liability.

135 Nor, in my opinion, do Mr and Mrs Wallbank have any case of infringement of article 14. The comparators for article 14 purposes cannot possibly be persons who are not lay rectors. A person who is sued for £1,000 that he owes is not discriminated against for article 14 purposes because people who do not owe £1,000 are not similarly sued. A person who builds in breach of planning permission and has proceedings taken against him by the local planning authority is not discriminated against for article 14 purposes because a person who builds and has obtained planning permission is not sued. The comparators are not apt. The apt comparator in

the present case would be a co-lay rector who was liable for chancel repairs to the Aston Cantlow church but on whom no 1932 Act notice had been served. There is no case here of article 14 discrimination.

136 For these reasons I would allow the appeal and restore the declaration and order made by Ferris J.

137 A final point before your Lordships was whether, if the PCC's enforcement of the chancel repair liability had constituted an infringement of Mr and Mrs Wallbank's Convention rights, the PCC could have relied on section 6(2)(a) or (b) of the 1998 Act. As to (a), it was contended that, as a result of section 2 of the 1932 Act, the PCC could not have done otherwise than enforce the chancel repair liability. In my opinion, this contention could not be sustained. Section 2 confers a power. It does not impose a mandatory duty. The PCC could have decided not to enforce the repairing obligation. They could have so decided for a number of different reasons which, in particular factual situations, might have had weight. They might, for example, have recommended the deconsecration of the church and its sale for conversion into a dwelling. They might have taken into account excessive hardship to Mr and Mrs Wallbank in having to find £95,000. Trustees are not always obliged to be Scrooge. Section 2 is not, in my opinion, a provision of primary legislation capable of engaging section 6(2)(a) of the 1998 Act. As to (b), it is not section 2 of the 1932 Act that produces the alleged incompatibility with Convention rights. Section 2 merely provides enforcement machinery for the obligation created by the common law. If section 2 had never been enacted the allegedly Convention infringing obligation to pay for chancel repairs would still have been present. None the less, if the imposition by the common law of the obligation constitutes an infringement of Convention rights so, too, the use of section 2 for the purpose of enforcement would constitute an infringement. So I respectfully agree with my noble and learned friends, Lord Nicholls of Birkenhead and Lord Hobhouse of Woodborough, that the PCC would be entitled to rely on section 6(2)(b).

LORD RODGER OF EARLSFERRY

138 My Lords, in 1986 Mrs Gail Wallbank became the owner of the freehold of Glebe Farm near the village of Aston Cantlow in Warwickshire. Four years later she conveyed the property into the joint names of herself and her husband. As owners of Glebe Farm Mr and Mrs Wallbank are the lay rectors or impropriators of the parish church and, as such, potentially liable to pay the cost of repairs to the chancel. By 1990 the chancel was in disrepair. At that time the Parochial Church Council ("the PCC") did not know about the conveyance into joint names and accordingly it simply asked Mrs Wallbank to pay for the repairs. She disputed the liability. In 1994 the PCC, as the responsible authority, served notice on Mrs Wallbank under section 2(1) of the Chancel Repairs Act 1936, calling on her to repair the chancel. When she still refused to do so, the PCC began these proceedings under section 2(2) of the 1936 Act to recover over £95,000, the estimated cost of the repairs. Subsequently, the PCC joined Mr Wallbank as a defendant.

139 My noble and learned friend, Lord Scott of Foscote, has described the origins and development of the liability for chancel repairs as well as the way in which that liability attaches to the owners of Glebe Farm. The law as

it applies today can scarcely be regarded as satisfactory and may well cause real hardship to lay rectors who are called on to pay the cost of repairs to the chancel. Not surprisingly, the Law Commission have made proposals for the abolition of the liability over a period of time: Liability for Chancel Repairs (Law Com No 152, (1985)). Not altogether surprisingly either, Parliament has not yet acted on those proposals since abolition without compensation would cause significant financial harm to many ancient parish churches throughout England. This case highlights both aspects of the problem.

140 Mr and Mrs Wallbank do not now dispute that, absent the Human Rights Act 1998, they would be liable to pay the reasonable cost of the necessary repairs to the chancel. They defend the proceedings, however, on the basis that the PCC is a "public authority" which has acted unlawfully in terms of section 6(1) of the 1998 Act by requiring them to pay the sum in question and so interfering with their peaceful enjoyment of their possessions in contravention of article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms.

141 The demand for payment was made and the action begun long before the 1998 Act was even thought of. And indeed Ferris J heard argument and delivered judgment at first instance some months before the Act came into force. By the time of the hearing in the Court of Appeal the 1998 Act was in force and the PCC conceded that, by virtue of sections 7(1)(b) and 22(4), Mr and Mrs Wallbank were entitled to rely on their Convention right. In their judgment delivered by Sir Andrew Morritt V-C, the Court of Appeal accepted the concession: [2002] Ch 51, 56, para 7. In its written case in this House the PCC indicated an intention to withdraw the concession. When the appeal opened, however, Mr George indicated that he did not intend to argue the point. This may have been, in part at least, because the Church authorities are anxious to have the substantial issue resolved. In these circumstances the House heard no argument on what the cases show to be a difficult area of the law. I therefore prefer to express no view on the point.

142 Differing from the decision of Ferris J, the Court of Appeal disposed of the case by holding that the liability of Mr and Mrs Wallbank, as lay rectors, to meet the cost of the chancel repairs was unenforceable by reason of the 1998 Act. In that way the Court of Appeal lifted the burden from lay rectors like Mr and Mrs Wallbank, albeit at the expense of PCCs like the one at Aston Cantlow. The question for the House is whether the Court of Appeal were right to take this momentous step on the basis of the 1998 Act.

143 In reaching their conclusion the Court of Appeal held that the PCC was indeed a "public authority" in terms of section 6 of the 1998 Act. While a number of other issues were argued in the hearing of the appeal to your Lordships' House, none of them arises unless the PCC is indeed to be regarded as a public authority for this purpose.

144 Section 6 provides, inter alia:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right."
>
> "(3) In this section 'public authority' includes . . . (b) any person certain of whose functions are functions of a public nature . . ."
>
> "(5) In relation to a particular act, a person is not a public authority by virtue only of subsection 3(b) if the nature of the act is private."

The use of the word "includes" in subsection (3) shows that there are public authorities other than persons only certain of whose functions are of a public nature. So there must be persons who are public authorities because all their functions are of a public nature. These are sometimes referred to as "core" public authorities, as opposed to "hybrid" authorities, only certain of whose functions are public and some of whose acts may be private in nature. In view of my overall conclusion on the appeal I have not found it necessary on this occasion to explore the significance of the distinction between the two kinds of public authorities.

145 In deciding that the PCC was to be regarded as a public authority, the Court of Appeal first noted that in the area of judicial review the cases at present draw a conceptual line between functions of public governance and functions of mutual governance. But the Court of Appeal could detect no surviving element of mutuality or mutual governance as between the impropriator and the church in the modern liability for chancel repairs: the relationship in which the function arose was created by a rule of law and a state of fact which were independent of the volition of either of them: [2002] Ch 51, 62–63, para 34. In the hearing before the House Mr George did not argue the contrary. The Court of Appeal continued, at p 63, para 35:

> "In our judgment it is inescapable, in these circumstances, that a PCC is a public authority. It is an authority in the sense that it possesses powers which private individuals do not possess to determine how others should act. Thus, in particular, its notice to repair has statutory force. It is public in the sense that it is created and empowered by law; that it forms part of the church by law established; and that its functions include the enforcement through the courts of a common law liability to maintain its chancels resting upon persons who need not be members of the church. If this were to be incorrect, the PCC would nevertheless, and for the same reasons, be a legal person certain of whose functions, chancel repairs among them, are functions of a public nature. It follows on either basis by virtue of section 6 that its acts, to be lawful, must be compatible with the rights set out in Schedule 1 to the Human Rights Act 1998."

The Court of Appeal's main conclusion therefore was that the PCC was a core public authority. Alternatively, it was a hybrid authority, some of whose functions were public—among them enforcing the impropriators' obligation to pay for chancel repairs.

146 There is no doubt that, in terms of section 2(1) of the Chancel Repairs Act 1932, the PCC is an authority—more precisely, "the responsible authority". For present purposes, however, the question is whether the PCC should be regarded as a public authority in terms of section 6. Parliament has chosen to use a composite phrase "public authority". There are therefore distinct dangers in interpreting it by breaking it down and examining the two components separately. Be that as it may, the Court of Appeal considered each of the two elements in turn.

147 They first held that the PCC was an "authority" for purposes of section 6 because it had powers which private individuals do not possess to determine how others should act—the relevant example being its power to serve a notice to repair which has statutory force. That is a somewhat imprecise criterion for identifying an authority, however. When a police officer arrests an offender, his act is that of a public "authority" irrespective

of whether or not the arrest is one that a private citizen could have effected. Moreover Parliament can, if it wishes, invest private individuals with quite remarkable powers over their fellow citizens. For instance, section 391 of the Burgh Police (Scotland) Act 1892 (55 & 56 Vict c 55), now repealed, provided:

> "It shall be lawful for any householder, personally or by his servant, or by a constable of police, to require any street musician or singer to depart from the neighbourhood of the house of such householder; and every person who shall continue to sound or play any instrument, or sing in any street, at any time after being so required to depart, shall be liable to a penalty not exceeding twenty shillings."

A paterfamilias standing in evening dress at the entrance to his New Town residence could address an order to an organ-grinder to depart from the vicinity, or his butler could issue it from the top of the area steps. In either event, the organ-grinder would commit an offence under the section if he continued to play in the street. But if, instead, they had summoned a constable who had issued the same instruction with exactly the same effect, he would unquestionably have been an "authority"—and indeed a "public authority". The existence or non-existence of the equivalent statutory power in the householder and his servant would not be germane to the constable's status. So the fact that no individual possesses the power to issue a statutory repair notice with specific effects on the lay rector cannot in itself be sufficient to show that the PCC is to be regarded as an authority for the purposes of section 6.

148 The Court of Appeal drew attention to three features which they thought pointed to the PCC being a "public" authority for purposes of section 6: the PCC is created and empowered by law; it forms part of the church by law established and its functions include the enforcement through the courts of a common law liability to maintain the chancel resting upon persons who need not be members of the Church.

149 It is necessary to look a little more closely at the Court of Appeal's observation that the PCC "is created and empowered by law". The origins of PCCs can be traced back to the movement that began in the 19th century for greater self-government and better representation of the laity in the Church of England. Part of the problem was that, while the Convocations of Canterbury and York could pass canons which were binding on the clergy, any wider legislation had to be by Act of Parliament and Parliament passed only relatively few of the Acts for which the Church asked. In 1916 a special committee set up to look into the question recommended the formation of a Church Council with power to legislate on ecclesiastical matters. Eventually, after further work by another committee, the necessary scheme was approved by the Convocations of Canterbury and York. Both Convocations adopted identical addresses which were presented to King George V on 10 May 1919. The text is to be found in the Acts of the Upper and Lower Houses, Convocation of Canterbury, 6 May 1919, Upper House, *Official Year Book of the Church of England 1920*, p 193. Attached to the addresses was an appendix (*Official Year Book of the Church of England 1921*, p 16) setting out the constitution of what was now called the National Assembly of the Church of England. Paragraph 17 of the constitution provided that, before entering on any

other legislative business, the Assembly should make further provision for the self-government of the Church by passing through the Assembly two measures, the second being to confer "upon the Parochial Church Councils constituted under the Schedule to this Constitution such powers as the Assembly may determine."

150 The necessary machinery for giving Assembly measures legal effect was created later that year when Parliament passed the Church of England Assembly (Powers) Act 1919. Under section 4, measures passed by the Assembly and submitted to the Ecclesiastical Committee of Parliament would, on being approved and receiving the Royal Assent, have the force and effect of an Act of Parliament. In accordance with that procedure, the National Assembly proceeded to pass the Parochial Church Councils (Powers) Measure 1921. The Preamble duly records that the measure was passed to fulfil a requirement of the constitution of the National Assembly to

> "make further provision for the self-government of the Church by passing through the Assembly Measures inter alia for conferring on the Parochial Church Councils constituted under the Schedule to such Constitution such powers as the Assembly may determine."

151 As the Preamble shows, just like the National Assembly itself, the PCCs were actually constituted when the scheme, comprising the constitution of the National Assembly and the schedule of rules for the representation of the laity, was approved by the Convocations of Canterbury and York. The function of the 1921 Measure was, accordingly, not to constitute or "create" the PCCs but to confer powers on them. The same division survives today. The rules for the representation of the laity, including those relating to PCCs, are to be found in Schedule 3 to the Synodical Government Measure 1969, while the powers of PCCs are now in the Parochial Church Council (Powers) Measure 1956. Like section 3 of the 1921 Measure, section 3 of the 1956 Measure provides for the PCC to be a body corporate. Section 2 of the 1921 Measure made it "the primary duty of the council in every parish to co-operate with the incumbent in the initiation and development of Church work both within the parish and outside", while section 2 of the 1956 Measure, which was inserted by section 6 of the 1969 Measure, confers rather more elaborate general functions on the council. I come back to that section shortly.

152 On closer examination, therefore, the process by which the PCCs were constituted and received their powers is really very different from the way in which a public body such as the Equal Opportunities Commission is created and given its powers by statute. In a case of that kind, the fact that the body owes both its existence and its powers to statute may well indicate that it has been called into existence to carry out some function that relates to the government of the country in a broad sense. By contrast, the PCCs were not constituted by statute but by the Church. They then became bodies corporate and received their powers not by virtue of an Act of Parliament but by virtue of an Assembly Measure, having the force and effect of an Act of Parliament. These factors suggest that, in reality, PCCs were constituted by the Church to carry out functions to be determined by the National Assembly, later the General Synod, of the Church.

153 The Court of Appeal pointed next to the PCC being part of the Church by law established. In his submissions on behalf of Mr and Mrs Wallbank Mr Beloff embellished this argument. The Church of England—with Her Majesty the Queen at its head, with bishops appointed by the Queen on the recommendation of the Prime Minister, with the legislation of General Synod receiving the Royal Assent and having the force and effect of an Act of Parliament and with the civil power being available to enforce the judgments of its courts—was so woven into the fabric of the state that it should be regarded as a core public authority for purposes of section 6. Then, since "the parish is the basic building block of the church" (*Hill, Ecclesiastical Law*, 2nd ed, p 74), the PCC too should be regarded as a core public authority—whatever might be its precise functions in terms of section 2 of the 1956 Measure.

154 I would reject that argument. In this case the House is not concerned with any theological doctrine of establishment such as gave rise to one of the issues in *General Assembly of the Free Church of Scotland v Lord Overtoun* [1904] AC 515. Mr Beloff's argument centred, rather, on the general position of the Church of England in English law. The juridical nature of the Church is, notoriously, somewhat amorphous. The Church has been described as "an organised operative institution" or as "the quasi corporate institution which carries on the religious work" of the Church of England: *In re Barnes; Simpson v Barnes (Note)* [1930] 2 Ch 80, 81. Whether or not such an institution itself could ever count as a public authority in terms of section 6, I see no basis upon which a body within the Church, which would not otherwise be regarded as a public authority, could be impliedly invested with that character simply by reason of being part of the wider institution.

155 On the other hand, the 1956 Measure passed by the National Assembly of the Church casts light on the nature of the functions of a PCC. Under section 2(1) its duty is to consult with the minister on matters of general concern and importance to the parish. By section 2(2) the PCC's general functions include:

> "(a) co-operation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical; (b) the consideration and discussions of matters concerning the Church of England or any other matters of religious or public interest, but not the declaration of the doctrine of the Church on any question; (c) making known and putting into effect any provision made by the diocesan synod or the deanery synod, but without prejudice to the powers of the council on any particular matter; (d) giving advice to the diocesan synod and the deanery synod on any matter referred to the council; (e) raising such matters as the council consider appropriate with the diocesan synod or deanery synod."

In addition to these general functions, by virtue of section 4 the PCC is given powers, duties and liabilities which formerly vested in the churchwardens. These focus very much on the parish church and its affairs. In particular, under section 4(1)(b) the PCC has powers, duties and liabilities with respect to the care, maintenance, preservation and insurance of the fabric of the church and of its goods and ornaments. By section 7(ii) the PCC has power

A to levy and collect a voluntary church rate for any purpose connected with the affairs of the parish church.

156 The key to the role of the PCC lies in the first of its general functions: co-operation with the minister in promoting in the parish the whole mission of the Church. Its other more particular functions are to be seen as ways of carrying out this general function. The mission of the Church is a *religious* mission, distinct from the secular mission of B government, whether central or local. Founding on scriptural and other recognised authority, the Church seeks to serve the purposes of God, not those of the government carried on by the modern equivalents of Caesar and his proconsuls. This is true even though the Church of England has certain important links with the state. Those links, which do not include any funding of the Church by the government, give the Church a unique position C but they do not mean that it is a department of state: *Marshall v Graham* [1907] 2 KB 112, 126, per Phillimore LJ. In so far as the ties are intended to assist the Church, it is to accomplish the Church's own mission, not the aims and objectives of the Government of the United Kingdom. The PCC exists to carry forward the Church's mission at the local level.

157 Against that background the adjective "private" is not perhaps the one that springs most readily to mind to describe the functions of a PCC in D the Church of England either generally or as compared, for instance, with those of a church council in the Methodist Church. It might therefore be tempting to conclude that the PCC's functions must be "public" and that the PCC must itself be a "public" authority for the purposes of the 1998 Act. At this point it becomes necessary to look more closely at the meaning of the composite expression "public authority" in section 6. This in turn takes one E back behind the Act to the Convention itself.

158 The "High Contracting Parties" to the Convention were "the governments signatory" to the Convention, more particularly "the governments of European countries" having certain common characteristics. In the fourth recital to the Convention they reaffirmed their profound belief in those rights and freedoms which are the foundation of justice and peace in the world and which are best maintained by a common F understanding and observance of the human rights upon which they depend. The governments gave concrete expression to the beliefs and aspirations recorded in the recitals by undertaking in article 1 to secure to everyone within their jurisdiction the rights and freedoms set out in section 1 of the Convention. It can reasonably be inferred from the terms of the recitals and article 1 that the freedoms, and the rights on which they depend, relate to the G powers and responsibilities of the governments which are parties to the Convention.

159 That inference is confirmed by article 34 which provides that the European Court of Human Rights ("the European Court")

> "may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a H violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

I respectfully agree with the Court of Appeal [2002] Ch 51, 62, para 33, that, taken together, articles 1 and 34 assume the existence of a state which stands

distinct from persons, groups and non-governmental organisations. I would go further: the reference in article 1 to the rights and freedoms defined in section 1 of the Convention only makes sense if the state in question is exercising a range of functions which are, in a broad sense, governmental—and to which the rights and freedoms in section 1 can therefore relate. Long ago, the functions of government were usually confined to defending the realm and keeping the peace. Nowadays, in addition, they commonly cover such matters as education, health and the environment. The exact range of governmental power will vary, of course, from state to state, depending on the history of the particular state and the political philosophy of its government. Similarly, the distribution of governmental power will depend on the constitutional arrangements of the individual states. In some, the central government will retain most functions, in others power will be shared on some kind of federal system, while, in most at least, some functions will be allotted to local or community bodies. Irrespective of these and other possible permutations, under article 1 of the Convention the states parties are responsible for securing that all bodies exercising governmental power within their jurisdiction respect the relevant rights and freedoms. This approach underlies the admissibility decision of the Fourth Chamber of the European Court in *Ayuntamiento de Mula v Spain* Reports of Judgments and Decisions 2001-I, p 531.

160 The obligation under article 1 has bound the United Kingdom ever since the Convention came into force. Since 1966 individuals have been able to bring proceedings in Strasbourg to ensure that the United Kingdom complies with that obligation. Prima facie, therefore, when Parliament enacted the 1998 Act "to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights", the intention was to make provision in our domestic law to ensure that the bodies carrying out the functions of government in the United Kingdom observed the rights and freedoms set out in the Convention. Parliament chose to bring this about by enacting inter alia section 6(1), which makes it unlawful for "a public authority" to act in a way that is incompatible with a Convention right. A purposive construction of that section accordingly indicates that the essential characteristic of a public authority is that it carries out a function of government which would engage the responsibility of the United Kingdom before the Strasbourg organs.

161 Mr Beloff accepted, of course, that, in order to achieve the government's declared aim of bringing rights home, in the legislation which it placed before Parliament the term "public authority" must have been intended to include all bodies that carry out a function of government that would engage the responsibility of the United Kingdom in Strasbourg. But, he said, that was simply a minimum. The government and, more particularly, Parliament could well have intended to go further and to include other public bodies, even though their acts would not engage the international responsibility of the United Kingdom. It would therefore be wrong to limit the scope of "public authority" in section 6 to bodies exercising a governmental function of the state, however loosely defined. Mr Beloff could not point to any authoritative statement showing that Parliament had intended the 1998 Act to have this wider effect. But he argued that, if Parliament had meant to limit the legislation to bodies carrying out a function of government, the natural thing would have been

to use some such term as "a governmental authority" or "a governmental organisation"—which would mirror the term "non-governmental organisation" to be found in article 34 of the Convention. That was how the draftsman of the Act had proceeded in section 7(7) when he provided that a person was to be a "victim" of an unlawful act for the purposes of the section only if he would have been a victim for the purposes of article 34 in proceedings before the European Court in respect of that act. Not only had the draftsman not adopted a similar approach in section 6(1): when an attempt had been made to amend the Bill so as to align the domestic test with the test adopted by the European Court in interpreting the Convention, the government had opposed it and the amendment had failed.

162 I see no proper basis for referring to Hansard as an aid to construing the term "public authority" in section 6. But it appears that, in advancing this particular argument, Mr Beloff had in mind the amendments moved by Mr Edward Leigh MP and discussed by the Home Secretary during the Commons committee stage of the Bill: Hansard (HC Debates), 7 June 1998, cols 400, 418–425 and 432–433. Since the Convention is concerned with the obligations of the governments of the states parties, it does not define the domestic bodies whose acts engage the liability of those governments. Moreover, the jurisprudence of the Strasbourg court on the point is not extensive. A definition of the relevant public bodies in the 1998 Act by reference to the approach of the Strasbourg court would therefore not have been particularly workable. Keith J made much the same point in relation to the Hong Kong Bill of Rights in *Hong Kong Polytechnic University v Next Magazine Publishing Ltd* [1996] 2 HKLR 260, 264B–F. According to the Home Secretary, because of these problems and in an attempt to replicate the situation under the Convention, the government chose the term "public authority" to indicate that the body concerned was to be sufficiently public to engage the responsibility of the United Kingdom. If—contrary to my view—the House could properly derive assistance from the fate of these amendments, it would lie in the confirmation that, in promoting the Bill, the government intended to give people rights in domestic law against the same bodies as would engage the liability of the United Kingdom before the Strasbourg court.

163 In the present case the question therefore comes to be whether a PCC is a public authority in the sense that it carries out, either generally or on the relevant occasion, the kind of public function of government which would engage the responsibility of the United Kingdom before the Strasbourg organs. It so happens that there are two cases from Strasbourg dealing with the position of churches in this regard. They suggest that, in general, church authorities should not be treated as public authorities in this sense.

164 The first case is *Holy Monasteries v Greece* 20 EHRR 1. On the basis of various provisions of the Convention, including article 1 of the First Protocol, the applicant monasteries challenged a Greek statute which changed the rules of administration of their patrimony and provided for the transfer of a large part of their estate to the Greek state. The links between the Greek Orthodox Church and the Greek state were particularly close. In Greek law the Holy Monasteries were public law entities that could be founded, merged or dissolved by means of a decree of the President of

Greece. Another public law entity, under the supervision of the ministry of education and religious affairs, was responsible for managing the property belonging to the monasteries. In these circumstances the Greek Government stated, as a preliminary objection to the Holy Monasteries' application, that they were not a non-governmental organisation which could make an application as a victim in terms of article 25(1) (now article 34) of the Convention. Repelling that objection, the European Court held, at p 41, para 49:

> "Like the Commission in its admissibility decision, the court notes at the outset that the applicant monasteries do not exercise governmental powers. Section 39(1) of the Charter of the Greek Church describes the monasteries as ascetic religious institutions. Their objectives—essentially ecclesiastical and spiritual ones, but also cultural and social ones in some cases—are not such as to enable them to be classed with governmental organisations established for public administration purposes. From the classification as public law entities it may be inferred only that the legislature—on account of the special links between the monasteries and the state—wished to afford them the same legal protection vis-à-vis third parties as was accorded to other public law entities. Furthermore, the monastery councils' only power consists in making rules concerning the organisation and furtherance of spiritual life and the internal administration and furtherance of spiritual life and the internal administration of each monastery. The monasteries come under the spiritual supervision of the local archbishop, not under the supervision of the state, and they are accordingly entities distinct from the state, of which they are completely independent. The applicant monasteries are therefore to be regarded as non-governmental organisations within the meaning of article 25 of the Convention."

While the positions of the Holy Monasteries and of a PCC are scarcely comparable, the judgment of the European Court is important for its reasoning that the nature of the objectives of the monasteries was not such that they could be classed with "governmental organisations established for public administration purposes". The court also attached importance to the fact that the monasteries came under the spiritual supervision of the local archbishop rather than under the supervision of the state, as an indication that they were entities distinct from the state.

165 In *Hautanemi v Sweden* 22 EHRR CD 156 the applicants were members of a parish of the Church of Sweden who complained of a violation of article 9 of the Convention because the Assembly of the Church of Sweden had prohibited the use of the liturgy of the Finnish Evangelical-Lutheran Church in their parish. Under reference to the judgment in the *Holy Monasteries* case, the Commission recalled article 25(1) (now article 34) of the Convention and observed, at p 155, that

> "at the relevant time the Church of Sweden and its member parishes were to be regarded as corporations of public law. Since these religious bodies cannot be considered to have been exercising governmental powers, the Church of Sweden and notably the applicant parish can nevertheless be regarded as 'non-governmental organisations' within the meaning of article 25(1)."

Having held that, as members of the parish, the applicants could be regarded as victims in terms of article 25(1), the Commission added, at p 156:

> "The Commission has just found that, for the purposes of article 25 of the Convention, the Church of Sweden and its member parishes are to be regarded as 'non-governmental organisations'. It follows that the respondent state cannot be held responsible for the alleged violation of the applicants' freedom of religion resulting from the decision of the Church Assembly . . . There has thus been no State interference with that freedom."

166 In the light of these decisions what matters is that the PCC's general function is to carry out the religious mission of the Church in the parish, rather than to exercise any governmental power. Moreover, the PCC is not in any sense under the supervision of the state: under section 9 of the 1956 Measure it is the bishop who has certain powers in relation to the PCC's activities. In these circumstances the fact that the PCC is constituted as a body corporate under the 1956 Measure is irrelevant. For these reasons, in respectful disagreement with the Court of Appeal, I consider that the PCC is not a core public authority for purposes of section 6 of the Act.

167 This conclusion finds further support in the treatment of certain churches in relation to article 19(4) of the German Constitution or Grundgesetz. That article provides that, if any person's rights are infringed by "public power" ("öffentliche Gewalt"), recourse to the courts is open to him. The history of relations between Church and State in Germany is, of course, very different from the history of that relationship in any part of the United Kingdom. In Germany it has culminated in a declaration that there is to be no State Church (article 137(1) of the Weimar Constitution incorporated by article 140 of the Constitution). This important difference must not be overlooked. Nevertheless, as permitted by article 137, certain churches are constituted as public law corporations. In general, domestic public law entities are regarded as exercising public power in terms of article 19(4), whereas natural persons and private law associations are not. Despite this, because of their particular (religious) mission which does not derive from the state, the churches that are public law corporations are treated differently from other public law corporations that are organically integrated into the state. "Church power is indeed public, but not state power" ("ist kirchliche Gewalt zwar öffentliche, aber nicht staatliche Gewalt"): BVerwGE 18, 385, 386–387; BVerwGE 25, 226, 228–229. So, in relation to these churches, the Administrative Court interprets the phrase "public power" in article 19(4) as being equivalent to "state power". Since within their own sphere the churches do not exercise state power, even if they exercise public power, the article 19(4) guarantee does not apply. Despite the rather different context, this interpretation of "public power" tends to confirm the interpretation of "public authority" in section 6 which I prefer. Moreover, due allowance having been made for the particular position of the Church of England, the reasoning of the Administrative Court also tends to confirm that the mere fact that section 3 of the 1956 Measure makes every PCC a body corporate does not carry with it any necessary implication that the PCC should, on that account alone, be regarded as a public authority for the purposes of section 6.

168 Of course, if the churches in Germany go outside their own unique sphere and undertake state functions, for example, in running schools, the constitutional guarantee in article 19(4) applies to them: BVerwGE 18, 385, 387–388; BVerwGE 25, 226, 229. In much the same way, for example, a Church of England body which was entrusted, as part of its responsibilities, with running a school or other educational establishment might find that it had stepped over into the sphere of governmental functions and was, in that respect, to be regarded as a public authority for purposes of section 6(1).

169 The Court of Appeal did indeed consider that, even if they were wrong in holding that PCCs are core public authorities, a PCC should be regarded as a public authority when enforcing the common law obligation of lay rectors, who need not be members of the Church, to maintain the chancel of the parish church. Mr Beloff reinforced this argument by pointing both to the duty of the minister under the relevant canons to hold certain services in the parish church and to the widespread belief, whether particularly well-founded or not, that any resident of a parish was entitled to be married in the church. These were indications of the public role of the parish church and, accordingly, of the public nature of the PCC's function in relation to the maintenance of the fabric of the church so that the minister could perform those public duties there. Enforcing the lay rectors' obligation was part of that public function.

170 For the most part, in performing his duties and conducting the prescribed services, the minister is simply carrying out part of the mission of the Church, not any governmental function of the state. On the other hand, when in the course of his pastoral duties the minister marries a couple in the parish church, he may be carrying out a governmental function in a broad sense and so may be regarded as a public authority for purposes of the 1998 Act. In performing its duties in relation to the maintenance of the fabric of the church so that services may take place there, the PCC is doing its part to help the minister discharge his pastoral and evangelistic duties. The PCC may be acting in the public interest, in a general sense, but it is still carrying out a church rather than a governmental function. That remains the case even although, from time to time, when performing one of his pastoral duties—conducting a marriage service in the church—the minister himself may act as a public authority.

171 Moreover, the fact that, as part of its responsibilities in relation to the maintenance of the church fabric, the PCC may have to enforce a common law obligation against a lay rector who happens not to be a member of the Church can hardly transform the PCC into a public authority. Indeed, the very term "lay rector" is a reminder that the common law obligation which the PCC is enforcing is the last remnant of a set of more complex rights and liabilities that were ecclesiastical in origin. As Ferris J held, at para 23 of his judgment, today the liability to repair the chancel can be regarded as one of the incidents of ownership of rectorial property:

> "It is, of course, an unusual incident because it does not amount to a charge on the land, is not limited to the value of the land and imposes a personal liability on the owner of the land. But in principle I do not find it possible to distinguish it from the liability which would attach to the

owner of land which is purchased subject to a mortgage, restrictive covenant or other incumbrance created by a predecessor in title."

I respectfully agree. There is nothing in the nature of the obligation itself, or in the means or purpose of its enforcement, that would lead to the conclusion that the PCC of Aston Cantlow is exercising a governmental function, however broadly defined, when it enforces the lay rectors' obligation to pay for chancel repairs. Therefore, even when it is enforcing that obligation, the PCC is not to be regarded as a public authority for the purposes of section 6 of the 1998 Act.

172 I should add that I agree with the observations of my noble and learned friend, Lord Nicholls of Birkenhead, in the final paragraph of his speech.

173 For these reasons I would allow the appeal and make the order proposed by Lord Scott of Foscote.

Appeal allowed.
Defendants to pay plaintiff's costs before Ferris J and the Court of Appeal.
No order as to costs in the House of Lords.

Solicitors: Winckworth Sherwood for Rotherham & Co, Coventry; Eddowes Perry & Osbourne, Sutton Coldfield.

S H

Case No: HQ 04 X 2793

Neutral Citation Number: [2004] EWHC 2543 (QB)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 10th November 2004

Before :
THE HONOURABLE MR JUSTICE GRIGSON

Between :

(1) The Chancellor, Masters and Scholars of the University of Oxford (The University of Oxford) **(2) David Robert Holmes, Registrar of the University of Oxford (for and on behalf of the employees and the members of the University (as defined) pursuant to CPR 19.6)** **(3) Jennifer Gregory (for and on behalf of the employees and shareholders of the contractors, sub-contractors and suppliers of the University (as defined) pursuant to CPR 19.6)** **(4) The Oxford University Fixed Assets Ltd ("OUFAL")**	**Claimants**
- and -	
(1) Mel Broughton **(2) John Curtin** **(3) Robert Cogswell** **(4) SPEAK Campaigns** **(5) Stop Primate Experiments at Cambridge ("SPEAC")** **(6) STOP HUNTINGDON ANIMAL CRUELTY ("SHAC")** **(7) Oxford Animal Rights Group** **(8) People Against Cruelty to Animals – West Midlands** **(9) West Midlands Animal Action** **(10) Animal Liberation Front ("ALF")**	**Defendants**

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Mr T Lawson-Cruttenden (instructed by **Lawson-Cruttenden**) for the Claimants
Mr Simon Dally (instructed by) for the 1st, 3rd, 4th, 6th, 8th and 9th Defendants
Mr Broughton in person
Mr Curtin in person
Mr Cogswell in person
Dr. Gaston in person for SHAC
Pauline Burgess in person for the 8th Defendants
The 5th and 10th Defendants were unrepresented

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
Mr Justice Grigson

Mr Justice Grigson :

1. This is an application for the continuation of injunctive relief granted to the 2nd and 3rd Claimants against all Defendants. The injunction was initially granted ex parte by Mrs. Justice Cox on the 3rd September 2004. The matter came before Mr Justice Simon on the 13th of September 2004. There was not sufficient time for the matter to be heard. Mr. Justice Simon varied the terms of the injunction but continued it until this hearing. The time estimate was for 2 to 3 days. That was, in the event, grossly optimistic. It is to be hoped that time estimates for the actual hearing will be more accurate. They should include a sensible estimate of the time necessary for the trial judge to 'read himself into' the papers.

The parties.

2. The 1st Claimant is the Chancellor, Masters and Scholars of the University of Oxford, referred to as the University.

3. The 2nd Claimant is David Robert Holmes, Registrar of the University who acts as representative of the employees and members of the University pursuant to CPR 19.6.

4. The 3rd Claimant is Jennifer Gregory as representative for the employees and shareholders of the contractors, sub-contractors and suppliers of the University pursuant to CPR 19.6.

5. I have given leave to add a 4th Claimant, the Oxford University Fixed Assets Ltd ['OUFAL']. This Claimant is the contractor responsible for carrying out the work on the Research Laboratory. The 3rd Claimant, Jennifer Gregory is expressly authorised by the 4th Claimant to represent its employees and shareholders.

The Defendants

6. 1st Defendant: Mel Broughton. Mr. Broughton is a Co-founder of SPEAK (the 4th Defendant) and a spokesman for that organisation. He denies that he was an organiser of SHAC (the 6th Defendant) and that he is associated with any other animal rights group or campaign. He states that he is not a member of ALF (the 10th Defendant) and claims that his role as a spokesman for SPEAK is incompatible with membership of ALF.

7. On the 25th February 2000 he was sentenced to 4 years imprisonment at the Northampton Crown Court for conspiracy to cause explosions likely to endanger life or property. It is argued that the fact of that conviction supports the suggestion that he was then a member of or closely associated with ALF. Mr. Broughton points out that the facts upon which this conviction was based occurred in 1998. Mr. Broughton has entered into a personal undertaking as a consequence of which the Claimants do not pursue their claim for interim injunctive relief against him. He has made representations on behalf of himself and SPEAK.

8. 2nd Defendant: John Curtin. Mr. Curtin represents himself. He has filed no evidence. He has addressed me upon various of the issues. He relied upon the joint declaration of Greg Avery, Natasha Avery and Heather Nicholson as evidence that he was not involved with SPEAC as a founder or organiser. The 2nd Claimant, Mr. Holmes asserts that Mr. Curtin was a member of ALF. Mr. Curtin accepts that in the past he has taken part in criminal activities in pursuance of his aims as an animal rights activist. Mr. Holmes also asserts that Mr. Curtin is an Co-leader and Co- founder of both SPEAC and SPEAK. Mr. Curtin denies both. He accepts that he was involved in tortious acts (trespass) as part of the SHAC campaign. He states that his only role as far as Oxford University is concerned is that he has attended two protests. Mr. Curtin has not entered any undertaking so it will be necessary to refer the evidence relating to his beliefs and activities in more detail. Mr. Curtin has been convicted of a number of criminal offences arising from his support of animal rights and has served sentences of imprisonment. The last conviction for an offence so motivated was on the 16th July 1992, some 14 years ago, a fact which Mr. Curtin relies upon to support his contention that he is no longer prepared to commit crime in pursuit of his aims.

9. 3rd Defendant: Robert Cogswell. Mr. Cogswell is a co-founder and a spokesman for SPEAK and the editor of Arkangel Website. He denies that he is associated with any other group or organisation: in particular he denies that he was an organiser of SHAC. He has a previous conviction. I do not regard it as relevant to these proceedings. He has given an undertaking in similar terms to that given by Mr. Broughton, with the same consequence.

10. 4th Defendant: SPEAK campaigns. SPEAK is the name of the campaigns whose aim is to stop the construction of the research laboratory at Oxford. It was founded by the 1st and 3rd Defendants.

11. 5th Defendant: SPEAC. Stop Primate Experiments at Cambridge (SPEAC). It is common ground that the campaign to stop the construction of a research laboratory at Cambridge where experimentation of live animals would take place has succeeded. It is the 5th Defendant's case that this organisation has ceased to exist. There is evidence that this organisation still has a website which has the same registration address as the Arkangel website, namely BCM 9240 London WC1N 3XX.

12. 6th Defendant: Stop Huntingdon Animal Cruelty (SHAC). This organisation was founded by, inter alia, Greg Avery, Natasha Avery and Heather Nicholson. In a joint declaration they state that neither Mr. Broughton, John Curtin nor Robert Cogswell have ever been members of SHAC, nor have they played any active role in the foundation, organisation or structure of SHAC. They assert that neither SPEAC nor SPEAK have been members of SHAC.

13. Dr Gastone is a representative of SHAC and has spoken on behalf of that organisation. Dr. Gastone has previous convictions arising from his beliefs in animal rights. On the 17th October 2003 for criminal damage a community service order for 100 hours was imposed. On the 16th January 2004 he was convicted at Lichfield and Tamworth Magistrates Court of two offences of aggravated trespass and ordered to perform community service. He tells me that this conviction is subject to an appeal. The incident relates to a demonstration against those who operate the Newchurch Guinea Pig Farm.

14. Greg Avery was convicted in March 2000 of harassment and in November 2001 at Basildon Crown Court for inciting a public nuisance. That offence arose from the campaign against HLS. Heather Avery was convicted of the latter offence. She has 3 convictions subsequent to that for public order offences. Natasha Avery was also convicted of inciting a public nuisance.

15. Evidence has been adduced on behalf of SHAC from Maxime Kaye, Helen Brand, Doreen Brand, Peter Radcliffe and others as to the draconian effect of the injunctions granted at the behest of Huntingdon Life Science against SHAC.

16. 7th Defendant: Oxford Animal Rights Group.

17. 8th Defendant: People against Cruelty to Animals – West Midlands.

18. 9th Defendant: West Midlands Animal Action. Mary Brough also known as Mary Brady has attended this hearing and has put in a written statement. She is an Oxford graduate and asserts that the effect of the injunction is "to criminalize her" as well as forbidding her to enter Oxford. She does not tell me how often she would normally visit Oxford, excluding visits for the purposes of demonstrating. She ignores the fact that the application before me is for the temporary extension of the present injunction.

19. 10th Defendant: ALF The Animal Liberation Front. ALF is not represented. That is no surprise as those who belong to this organisation are more likely than not to be engaged in criminal activities and consequently seek to remain anonymous. They do post bulletins on the Arkangel website publishing their activities.

20. Mr. Gratwick appears here as a representative of what it is convenient to refer to as law abiding protesters. He takes particular care to ensure that his actions are lawful.

Background

21. There is a body of opinion which holds that the use of live animals in research is both immoral and unjustified. How large is the number of persons holding that opinion is a matter of conjecture. Those who hold those opinions want to stop research which involves experiments on live animals. They can be described as the Animal Rights Movement. This movement is entirely amorphous. It has no structure only a community of belief. There is no consensus as to the means by which the research involving live animals may be stopped. The Animal Rights Movement includes those who restrict their activities to that which is lawful and, at the other end of the spectrum, those who believe that they are morally justified in committing crime in order to achieve their aims. It includes organisations with a formal structure such as the R.S.P.C.A. and the League against Cruel Sports. Within this 'broad church' are groups whose activities are directed against specific targets, for example, SHAC. Whilst such groups may have founders and organisers, they have no formal membership. Their activities are advertised and those who support their aims are invited to participate. The activities are, as advertised, lawful although, on occasions, these advertised activities may be accompanied by actions which are either tortious (for example trespass) or

which are deliberately criminal (for example assault or criminal damage.)

22. The movement includes those who will adopt civil disobedience as a means of achieving their aims and those who will commit crime in order to do so, an example of which is the Animal Liberation Front. A person can easily be part of the Animal Liberation Front – a fact which will be kept secret for obvious reasons – but also participate in activities which are entirely lawful or which are deliberately tortious.

23. Lawful activities of the Animal Rights Movement include public protest and dissemination of information. Tortious activities include trespass. Criminal acts include assault, criminal damage, theft, burglary and harassment.

24. Research involving the use of live animals done in conformity with the Animal (Scientific) Procedures Act 1986 is lawful. Those who conduct such research or who, in the broadest sense, provide the facilities for such research are acting lawfully and are entitled to go about their lawful business. If citizens use unlawful means to prevent them doing so, or promote the use of such means, then those involved in lawful activity are entitled to such protection as the Courts can provide to enable them to pursue their lawful activities. See judgement of Stuart Smith LJ in **Monsanto Plc v. Tilly [2000] ENV. LR. 313:**

> "Those views were genuinely and sincerely held and there was nothing whatever unlawful in trying to persuade others and particularly the Government of the rightness of their views provided they did not employ unlawful means to do so, and provided they did not incite others to use unlawful means, such that they were liable in tort to the Claimant….
>
> In a democratic society, the object of change in Government policy had to be effected by lawful and not unlawful means. Those who suffered infringement of their lawful rights were entitled to the protection of the law. If others deliberately infringed those rights in order to attract publicity to their cause, however sincerely they believed in its correctness, they had to bear the consequences of their law breaking. That was fundamental to the rule of law in a civilised and democratic society"

25. The University of Oxford (1st Claimant) is engaged in the construction of a research laboratory at South Park Road, Oxford. Some of the work to be carried out at that laboratory will involve experimentation on live animals, Such experimentation will conform with the Animal (Scientific) Procedures Act 1986 and will be monitored by the Home Office. The object of SPEAK is to stop this construction.

26. Until the 19th July 2004 the main contactor for the construction of the laboratory was Walter Lilly, part of the Montpellier Group. Other contractors included Bullock Construction, also part of the Montpellier Group, HTC, Getjar and R.M.C. who were the main suppliers of concrete to the project. On the 19th July 2004 all those companies resigned from their contracts to do work on the construction of the laboratory.

27. Prior to that date the University and the contractors and sub-contractors engaged upon the construction of the research laboratory had been subject to a variety of activities designed to stop the project. They are listed in Ex D.R.H. 2. I shall only refer to parts of it. There have been lawful demonstrations. There have been acts of trespass. There have been serious acts of criminal damage against contractors and sub-contractors. There have been threats both explicit and veiled.

28. Inspector Pearl's witness statement (Claimants' bundle A.Tab 12.p.159) reveals that.

i) Some of the Directors of RMC and of Montpellier have been subject to targeting at their homes.

ii) Some of the Directors have received postal packages which gave the appearance of being 'parcel bombs'.

iii) Some have received letters threatening to send to their neighbours fictitious lists of convictions of sexual offences, unless the contract with the University was terminated within one week. It was. Further details of the conduct can be found at para 7 of his witness statement.

iv) Inspector Pearl attributes responsibility for this conduct to the 5, 6, and 10th Defendants on the basis of previous litigation. To my knowledge there is no concluded litigation. The 10th Defendant's plainly are responsible for illegal acts. That is their 'raison d'etre'. If there was evidence against the 5th and 6th Defendants, the organisers, who are known, could and should have been prosecuted. I infer that there is no such evidence.

29. I have particular regard for the statement of witness A. (Claimants' Bundle d. Tab 6 p. 575.)

30. Since the 19th July 2004 the University has been unable to continue with the construction of the laboratory and Miss Gregory expresses the view that unless there is injunctive relief to protect contractors and suppliers it is unlikely that it will be possible to resume construction.

The test to be applied

31. Since the decision of the House of Lords in the case of **Cream Holdings & others v. Banergee and others [2004] UKHL 44** that there are in fact two tests.

32. Where the right of freedom of expression is engaged, the threshold test which has to be satisfied before a Court may grant interlocutory injunctive relief is to be found in Section 12(3) of the Human Rights Act 1998.

> "no such relief is to be granted so as to restrain publication before trial unless the Court is satisfied that the applicant is

likely to establish that publication should not be allowed."

33. Lord Nicholls of Birkenhead who gave the only judgement discussed what 'likely' meant in this context and reach this conclusion, at para 22.

> "There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of Section 12(3) is that the Court is not to make an interim restraint order unless satisfied the applicants prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success 'sufficiently favourable' , the general approach should be that Courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the Court that he will probably ('more likely than not') succeed at trial. In general, that should be the threshold an applicant must cross before the Court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing convention rights."

34. It is to be noted that the "Cream" case involved a breach of confidentiality and that the restraint imposed precluded any publication of the material.

35. Where Convention Rights are not engaged, then the test is that derived from **American Cyanamical Co v. Ethican Ltd [1975] A.C. 396** namely whether 'there is a serious question to be tried'. It seems safer to apply the more stringent test.

36. I remind myself and the parties that it is no part of the courts function at this stage of litigation to try to resolve conflicts of evidence on affidavit nor to decide difficult questions of law calling for detailed argument and mature consideration. Per Lord Nicholls

> "Unless the applicant fails to show he has 'any real prospect of success in his claim for a permanent injunction at trial', the court should proceed to consider where the balance of convenience lies."

37. It is a criticism of myself as much as it is of the parties that we have tended to forget that important aspect of interlocutory proceedings.

38. Mr. Dally argues that the use of CPR 19.6 in these circumstances is an abuse of the process. He asserts that the "Protected Persons" must be part of a close-knit group. He relies upon a number of decisions which preceded the decision of the Divisional Court in **D.P.P. v. Dziurznski [2002] EWHC 1380** as well as the judgement in that case. Lord Justice Rose in **Dziurznski** accepted that the Act could apply both to an individual and to 'a close knit group'. The Court ruled that 60 employees whose only common feature was that they worked for the same employer did not come within that definition. Mr. Dally argues with some force that the 'protected persons' here cannot be described

as a close knit group.

39. In my judgement this submission is flawed as it confuses the terms of a civil injunction with the ingredients of a criminal offence. **Dziurznski** and the preceding cases (**Mills/Dunn)** were criminal cases. The issue was whether the Crown had proved against the Defendants the elements of the offence. The purpose of this injunction is to prevent harassment as defined by the Act taking place. To that end, the restraint is designed to prevent acts which may, if continued, constitute the full offence. It would be pointless otherwise. If the Claimants had to wait for the full offence to be committed, they could rely upon the Criminal Law but the Criminal Law acts retrospectively. A civil injunction is prospective. Necessarily an injunction is designed to catch acts which are less than the full offence. Consequently the Courts have the power to grant injunctions in wide terms to prevent the harassment of a class of persons, for example, the employees of contractors or sub-contractors, so that they may go about their lawful business.

40. Further, the broad definition of 'Protected Persons' in the order (as granted by Simon J) is appropriate at this stage because it can be assumed that no individual will consent to being the subject of 'harassment' as defined by the Act. They have a common interest. No Defendant would in fact be deprived of a defence if charged with either a breach of the injunction or the criminal offence. Each case would be 'fact sensitive'. If charged or made the subject of breach proceedings, the ordinary rules as to the burden and standard of proof would apply. There is no reason why any defendant in such proceedings should not have a fair trial.

41. Further, as Gibbs J. said in his judgement in HLS v. SHAC and Others given on the 20th.June 2004,

"….the rule is to be interpreted so as to allow representative proceedings to be treated not as a rigid matter of principle but as a flexible tool of convenience in the administration of justice. It should be applied not in any strict or rigorous sense but according to its wide and permissive scope."

42. Mr Dally submits that the 'Protected Persons' must be named. He relies upon the case of **R v. Mann. (2000) L.S.Gazette.** That case was about an order made under Section 5 of the Act and turned on the specific requirements of subsection (2). In my judgement it has no application here. He goes on to assert that the use of CPR 19.6 denies the Defendants of the right to a fair trial under Article 6(1) of the European Convention. For the reasons stated at para 38 and 39 above, I reject this argument.

43. He asserts correctly that at this stage the contractors and sub-contractors and their employees are anonymous. In that he is plainly right. However for the purpose of any breach of proceedings or criminal proceedings the alleged victims would have to be identified. He goes on to argue that the anonymity of the protected persons make it impossible for 'protesters' to comply with the order. I simply make two comments. The first is that the notion of 'accidental harassment' which is in effect what Mr. Dally complains about is absurd. The second is that in none of the other reported cases involving various members of the Animal Rights movement have the protesters had the slightest difficulty in identifying contractors, sub-contractors and their employees. Not

only has there been no difficulty, the details of such people have been publicised on web-sites and they have been the target of harassment. If a protester can identify a person as a suitable target of harassment, he or she can equally identify those who are protected by injunction.

44. Mr. Dally submits that the definition of 'Protester' is too wide. Mr Lawson-Cruttenden relies upon the case of **M. Michaels (Furriers) v.Askew [1983] C.A. Bound Transcript 278.** Dunn. LJ said this,

> "Care must be taken to ensure that Ord. 15 v 12 is not abused. But when a number of unidentified person are causing injury and damage by unlawful acts of one kind or another, and there is an arguable case that they belong to a single organisation or class which encourages action of the type complained of, and their actions can be limited to that organisation, then the rule enables the Court to do justice in the particular case. The narrow construction of the rule advanced b y Mr. Warner would in my view deprive the Courts in a situation like this of a useful remedy."

Purchase LJ said

> "Convenient administration of justice, in my judgement demands that the Courts should be able to afford effective protection to the victims of illegal or threatened illegal action by members of associations whose declared aims are in line with a calculated to promote such illegal action."

45. Mr Dally argues that that case is distinguishable because the two named defendants had been ordered to represent members of an unincorporated body. He asserts that no such order has been made here. In that he is correct. The individuals named here are defendants in their own right. The case of **M Michael (Furriers) v. Askew.** established that an injunction can be ordered against unknown members of loosely formed unincorporated association. That is what is sought in this case.

46. He argues that the declared aims of both the named individuals and of most of the unincorporated associations are lawful. That is so but it is a matter of evidence whether the named individuals and/or unidentified members of the named associations restrict themselves to lawful activities.

47. Mr. Dally further argues that the judgement of Lord Justice Rose in **D.P.P. v. Dziurznski [2002] EWHC 1380** makes it clear that the provisions of the Protection from Harassment Act 1997 (The Act) cannot be invoked to protect corporations. The 1st and 4th Defendants are, on the face of it, corporations. Mr Lawson-Cruttenden whilst accepting that that is the effect of the judgement does not accept that that is an accurate statement of the law nor that the 1st Claimant is a body corporate. It seems likely that this court is bound by the decision in **Dziurznski** but I do not need to decide these issues and decline to do so

Issues

48. a) Do members and/or employees of the University face or can it be reasonably anticipated that they are likely to face a course of conduct which amounts or may amount to unlawful harassment by members of the animal rights movement?

b) Do the shareholders and/or employees of the contractors sub-contractors or suppliers of the University employed in building of the research laboratory face a similar course of conduct?

49. Mr Lawson-Cruttenden's submission is that the actions which have been (and still are) directed against the Newchurch Guinea Pig Farm, against Huntingdon Life Science and were against Cambridge University are 'likely' to be repeated in the campaign to stop the building of the research laboratory at Oxford.

50. It is not necessary for the purposes of this judgement to set out in any detail what happened in the course of those campaigns. There were entirely lawful protests and demonstrations. There was also a catalogue of actions which were tortious and/or criminal. None of the organisations represented here seek to justify criminal acts. Mr. Curtin whilst he disassociates himself from the more extreme actions seems to me to be at best ambivalent about less extreme but none the less criminal acts. I have been taken through the evidence and to the passages upon which both sides rely. I am not going to detail all the evidence nor rehearse all the arguments. The test I have to apply is whether I am satisfied that the Claimants are more likely than not to succeed at trial on this issue.

51. Claimants File B p.259 SPEAK Website May 2004:

> "This new phase on the SPEAK campaign is clear in its objective to make sure that no 'expansion' of the vivisection industry can be allowed to happen, no matter where it raises its ugly head. The victory over Cambridge University …… marked a truly historic day for our movement and democracy. We must stand firm and resist any attempt to reverse the gains we have fought so hard to achieve.
>
> The fight against those who torture animals in the name of science has moved up a step and we must be ready to take our struggle forward. Now is not the time to rest on our laurels, now is the time to stand together and strike another blow for justice for the animals, compassion, and real science."

This article is accompanied by a plan of the proposed site of the laboratory.

52. Claimants' File B p. 260 SPEAK Website. May 2004

> "Oxford University can rest assured a line has been drawn in the sand, SPEAK and the animal rights movement will stop your

> barbarism, there will only be one victor in this campaign. We defeated the Government and Cambridge University and we plan to do the same".

I attach no weight to the use of the word 'barbarism'. I do attach importance to the words 'will stop' and to the last sentence.

53. Claimant File B p. 265 SPEAK Website. 2nd August 2004. The article is headed:

> "The gloves are off"

This phrase derives from boxing. As I understand its wider meaning it is that the rules of combat (the Queensbury Rules) no longer apply and that any means may be used to achieve 'victory'.

The article ends with this paragraph:

> "We will not go away. We will not be silent. We will not disappear. No matter how many laws governments pass to stop us. The evidence is there and we will continue to demand a fair hearing until those in power sit up and listen to the truth. With every day that passes, thousands of animals die; as long as they continue to suffer and die, peaceable people will fight back. That is a fact. Take courage. We are winning the battle."

54. Claimants' bundle B. At p. 275 'No Compromise' The Militant, Direct Action Publication of Grassroots Animal Liberationists and their Supporters. This publication contains an article jointly written by Mr. Cogswell (3rd Defendant) and Mr. Broughton (1st Defendant) (p.275) and is under the headline 'SPEAK'. It says that SPEAK evolved from SPEAC. There are references to SHAC. At p.276 this passage appears:

> "The SPEAC campaign of Cambridge remodled itself into the SPEAK campaign –Voice for Animals, which now focuses its attention on Oxford……
>
> Now the battle begins……..
>
> The successful campaign in Cambridge is a clear indicator to the animal rights movement……of just what can be achieved when the animal rights movement comes together in a spirit of co-operation. No height is ever too difficult to scale when we work as a unified force. As a movement we are an unstoppable force for change, and by working together, our goal of animal liberation is one step closer."

55. I have already commented how the animal rights movement encompasses those who advocate and use unlawful means in pursuit of their aims. No distinction is made in this article between the two. On the contrary, the actions of the whole movement are endorsed.

56. Claimants' bundle B p. 339 SPEAK website. This article announces the decision of Cambridge University to abandon its plans to build a new research facility. This paragraph appears:

> "Today's announcement is a victory for everyone fighting greed and political self interest; it would not have been possible without the inspiring efforts of those already engaged in the struggle against HLS and Newchurch. We are one movement and together we will move forward."

57. I comment that the campaigns against HLS and against the Newchurch Guinea Pig Farm have included serious and substantial criminal acts.

58. Mr. Dally has referred me to other passages. I have considered them. He argues as does Mr. Cogswell that these are examples of 'mere rhetoric'. Rhetoric they certainly are but it is the rhetoric of the militant.

59. I am quite satisfied that these passages provide ample proof that all the aspects of the campaign against HLS, Newchurch Guinea Pig Farm and Cambridge University will be deployed against the University of Oxford in general and in particular, they will be employed not only against the members and employees of the university but also against contractors and sub-contractors and their employees. It is hard to resist the conclusion that it is the unlawful means which are effective.

The Defendants

60. Mr. Lawson-Cruttenden points to particular articles which he submits evidence a community of interest between SHAC and SPEAK, in particular : Claimants Bundle B p.334. The SHAC website report of World Day 2004. That event featured speeches by Robin Webb (a spokesman for ALF) and Mr. Broughton the first Defendant speaking on behalf of SPEAK campaigns.Greg Avery of SHAC is reported as saying:

> "…..direct action works and that if the political process worked then we would do it. In fact we will do whatever works to save animals from the agony they go through at the hands of monsters."

61. Other speeches are quoted which demonstrate the common intention and the lack of nicety as to means. At P. 330 there is a reference to the December 6th National March and Rally and Mr. Avery giving an 'impassioned angry talk about how everyone needs to stay focused on HLS, their customers and suppliers and keep piling on the pressure until they go under'. Mr. Broughton spoke also see p. 331.

62. The article ends with this paragraph:

> "All in all the Dec 6th demo was a passionate, angry heartfelt demo uniting activists and campaigns from all over the country together to renew their determinations and sheer will to close

> down HLS and all the other evil disgusting hell-holes run by the worst filth of the earth. These filth are learning the lesson that if you are responsible for animals dying in fear and agony, then you will be held accountable for your crimes.
>
> SHAC has reports of home demos against directors of HLS suppliers taking place after the above as well as reports of damage caused to officers at companies supplying HLS."

It is difficult to see this as anything other than an endorsement of an encouragement to illegal activity.

63. Mr. Cogswell accepted that the SPEAK Website published reports of the illegal activities of activists. He is the editor of the Arkangel Website which he describes as 'a news service and discussion forum'. On this Website he has permitted the posting of unedited material posted to the Website anonymously but by necessary inference, in fact posted by or on behalf of ALF.

64. Examples can be seen at Claimants Bundle C tab 27 where there is a report of an incident of criminal damage being inflicted upon the car of a director of the Montpellier Group. Mr. Cogswell likens that to a newspaper report . That is a description which I regard at best as disingenuous. The account included these words:

> "This is just the beginning however. It is time to sever that contract before your life is ruined. For the animals ALF."

65. There are other similar examples. At Claimant's Bundle C Tab 38 there is an account of an attack on R.M.C. premises at Weeford and a description of the damage caused. The article ends:

> "The ALF wants to make it clear to RMC, if you persist in the construction of this animal torture centre then we will wage an unending war against you."

66. This is not news reporting. It is acting as a publicity agent for ALF. It is re-enforcing ALF's message by publishing it without comment. In effect ,it not only condones such illegal activities but incites others to commit such acts. It is of note that below the title " Arkangel", the words:

> "Barry Horne/SHAC/SPEAK/SNPG/Subscribe appear"

67. At Claimants' Bundle C. Tab 44 p. 371 another article appears which reinforces Mr. Lawson-Cruttenden's point,

> "The Montpellier Group is building the new animal torture lab at Oxford University. This means that they are a legitimate target for actions. Over the past two weeks some of their directors have been visited. Two of these directors live in Birmingham, the other lives in Cannock. In three separate attacks a total of seven cars have had paint stripper poured over them. We would like to suggest to the Montpellier Group that they stop building this hell hole for animals with immediate effect."

68. I do not have to consider the First and Third Defendants. I shall come to the Second Defendant after I have considered the case against the others. As far as the 10th Defendant is concerned, the evidence against it is plain and I shall, subject to what I say hereafter about its terms, grant the relief sought.

69. **SPEAK Campaigns,** [the Fourth Defendant]. In my judgement, the evidence is equally plain that injunctive relief should be ordered against this organisation. I have referred to the lack of distinction in their publications between lawful and unlawful activities and to the terms in which their spokesman describe their campaign and their aims. A recent declaration that they do not endorse criminal activity is in my judgement a device which is designed to deal with the argument now available to the Claimants following the decision in the case of **Thomas v. News Group Newspapers Ltd and Simon Hughes Neutral Citation Number 2001 EWCA Civ. 1233.** In my judgement the late addition of a disclaimer is both cynical and ineffective.

70. **SPEAC,** The Fifth Defendant. The evidence is that this organisation has achieved hits objective and that SPEAK has succeeded it. The mere fact it has a website is not sufficient evidence that it has any active role. The application to continue the injunction against this Defendant is refused.

71. **SHAC,** The Sixth Defendant. This Defendant is till active and its members have a community of interest with SPEAK. In my judgement there is a real prospect of the Claimants showing that there is also a community of means.

72. **The 7th, 8th and 9th Defendants.** Mr. Dally has submitted that there is not sufficient evidence against any of these Defendants to justify the continuation of the injunction, I agree. In any event, these organisations support SPEAK and in my judgement, if they joined in SPEAK activities they would fall within the definition of " Protester".

73. **Mr. Curtin,** the Second Defendant. Mr. Curtin asserts that he presently is no longer engaged in unlawful activities in support of his beliefs. I am inclined to accept that assertion. However, that does not provide an answer to the Claimants case. Mr Lawson-Cruttenden has take me through various reports, for example, the interview to be found at Claimants Bundle B Tab 2 p 190 from 'Biteback'. Mr, Curtin invites me to dismiss this whole interview as being untrue and offensive to him. That is the sort of judgement I cannot make at this stage of the proceedings. In fact, I do not need to. The best evidence regarding Mr. Curtin comes from his own mouth and is to be found in the

interview he gave to a BBC Journalist, John Waite. The edited version is to be found in the Claimants' bundle A p.140. We have all listened to the unedited interview on tape. I quote from a passage at p. 141:

> "But I haven't got a problem with direct action. I haven't got a problem…with right down to smashing the windows of someone's house…….are they responsible for animal abuse? And if they are, then they become a legitimate target for us."

74. The unedited version does not qualify this passage. It is plain that whilst Mr. Curtin is no longer prepared to perform illegal acts himself, he still regards the less extreme of criminal acts as both justified and necessary. One then has to look at the role he admits to playing at Oxford. He says he has attended two meetings and spoke at the 'Spring Demo'. He told me 'I am known as a demonstrator now'. At Claimants' Bundle B, Tab 6 p. 333 is an article from the SPEAK Website reporting on the 'Spring Demo'. I quote:

> "The demo marched to the rallying point in Broad Street where John Curtin addressed the crowd. John spoke of the animal liberation struggles waged in Oxford over the last two decades, including the raids which resulted in the liberation of hundreds of animals from places like Newnham Courtney Cat Colony, Park Farm and Hillgrove. Oxford University have only got a taste of what is to come, they can look to Newchurch, HLS and Cambridge to see that the animals rights movement has never been more focused and angry.
>
> Oxford University may have been living under the illusion that they could quietly usher in the next phase of their animal abuse establishment. Academic arrogance and lies are no protection from the cutting edge of a movement ready to act as 'the voice of the animals'."

75. Mr Curtin denies these sentiments are attributable to him. It is difficult to see why SPEAK should seek to misquote him. Further, what he is reported as saying is consistent with what he said to John Waite in his BBC interview.

76. In my judgement, there is clear evidence that Mr. Curtin endorses the use of illegal means in pursuit of his aims and that his words are capable of being an incitement to others so to act.

77. These comments apply equally to SPEAK. This article also demonstrates the community of interest between SHAC and SPEAK.

78. Reliance has been placed upon various articles of the European Convention on Human Rights. I have already dealt with Mr. Dally's submissions as to Article 6.

79. Mr. Gratwick, in particular, has relied upon Article 10 and Article 12. Article 10 provides for freedom of expression. It involves the freedom to hold opinions and to

receive and impart information and ideas without interference by public authority… Section 2 states:

> "….the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of…….or for public safety, for the prevention of disorder or crime…..for the protection of the rights of others."

80. The right of freedom of expression is not to be exercised in a vacuum created by the assumption that only the views of the animal rights movement are correct. Those who believe that experiminentation on live animals is both morally and scientifically justified also have the right of freedom of expression. Further such people and those who, in the broadest sense, work for them have the right to respect for their private and family life, their homes and correspondence under Article 8.

81. Whilst Mr. Gratwick has the right to express his views, another citizen has an equal right not to listen to Mr. Gratwick. Mr. Gratwick has no right to coerce an unwilling citizen to receive Mr. Gratwick's opinions. Freedom of expression entitles you to publish your views on a website. It does not entitle you to incite others to commit criminal offences.

82. Further, when considering the infringement upon Mr. Gratwick's right to express himself, the Court must keep in mind.

i) that this is an application to extend an injunction only until trial.

ii) It does not prevent Mr. Gratwick (or anybody else) expressing his views. He may do so to his hearts content. What it does restrict is to whom and where he expresses those views. A similar consideration applies in respect of his right to peaceful assembly and freedom of association [Article 11]. A right to freedom of peaceful assembly does not entitle a citizen, by means of a mass protest, to stop the lawful activities of others. A protest may impinge on others rights temporarily, but actions designed to prevent permanently others exercising their lawful rights cannot be regarded as a reasonable exercise of civil rights and consequently the Courts may act to restrain them.

83. On analysis the real objection to the restrictions imposed upon 'protesters' by the continuation of this injunction is that they allow the Claimants to go about their lawful business,, namely the building of the research laboratory - a project that the 'protestors' are determined to stop.

84. With all these considerations in mind, I am satisfied that it is both just and convenient to continue the injunction. I find:

i) that the injunctive relief sought is necessary to enable the Claimants to go about their

lawful business.

ii) that the restrictions placed upon the specific Defendants and upon members of the unincorporated associations are proportionate: the restrictions are limited, and do not significantly impinge on the rights of the protesters: there is no other way to achieve the protection of the Claimants from tortious and criminal activities.

The terms of the Order.

85. Mr. Dally submits that any order should be made only in respect of persons who are actually harassing or are likely to harass the protected persons. As regards the first category, such persons could simply be arrested and charged with the criminal offence. As regards the second category, other than the specific defendants, it is unlikely that they could be identified. To grant an order in those terms would be to neuter it. As I have pointed out, the purpose of injunctive relief is to prevent acts which, if repeated against individuals would amount to harassment, whoever it is who commits them.

Exclusion Zones.

86. I have considered the submissions made by the defendants. I have considered the case of Burris v. Azadani [1995] 4 All E R . I have been much assisted by the analysis of Gibbs J. in the case cited above. I am satisfied on the evidence before me that the exclusion zones as defined in the order of Simon J. are both necessary and proportionate .

87. I am persuaded that it is equally necessary to include the prohibition on photographing the protected persons. Photography is the easiest way of identifying potential targets.

88. The Order is to be in the same terms as the Order of Simon J of the 17th September 2004 save that :

i) Paragraphs 11 to 15 of the proposed draft order be incorporated and the definitive section amended accordingly.

ii) That the Order should include paragraph 2 (a) on the proposed draft order. (the prohibition on photography.)

iii) That the Order be renumbered to take into account these additions and amended to give effect to the terms of my judgement.

89. Costs reserved.

House of Lords

Regina *v* Rimmington

Regina *v* Goldstein

[2005] UKHL 63

2005 July 20, 21; Oct 27

Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Rodger of Earlsferry, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood

Nuisance — Public nuisance — Common law offence — Whether offence existing at common law — Whether acts against several different individuals capable of constituting public nuisance — Whether actual knowledge of risk of nuisance necessary — Whether breach of Convention rights — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 7(1)

The defendant in the first case sent to several different people a total of 538 separate letters and packages containing racially offensive material. He was indicted on a single count of causing a public nuisance contrary to common law. Following a preliminary hearing the judge held that the offence of causing a public nuisance continued to be known at common law, that its prosecution did not amount to a breach of articles 7(1), 8(1) or 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms[1], and that the defendant's conduct was capable of amounting to an offence of public nuisance. The Court of Appeal dismissed the defendant's appeal, holding that it was appropriate to treat the sending of the letters and packages as constituting one offence which could justifiably be described as public nuisance and that the jury could conclude that the contents of the letters amounted to an unreasonable interference with the rights and comforts of others.

The defendant in the second case sent through the post to an old friend an envelope containing a cheque in repayment of a debt together with a small quantity of salt. The inclusion of the salt was intended as a humorous gesture which the recipient would have understood as a joke. In the course of sorting the mail at the Post Office some of the salt leaked on to the hands of a postal worker who, fearing that the salt might be anthrax, raised the alarm. The building, in which several people worked, was evacuated, the second delivery of post for that day was cancelled and the police were called before it was ascertained that the substance was salt and harmless. The defendant was charged with causing a public nuisance. The judge directed the jury that they could convict the defendant if they were satisfied that he ought to have known that there was a real risk that the consequence of his act would be to create a nuisance. The defendant was convicted and appealed. The Court of Appeal dismissed the appeal.

On the defendants' appeals—

Held, allowing the appeals, (1) that the common law offence of causing a public nuisance as currently interpreted and applied was committed when a person did an act not warranted by law, or omitted to discharge a legal duty, and the effect of the act or omission was to endanger the life, health, property or comfort of the public, or to obstruct the public in the exercise of rights common to everyone; that that definition of the offence was clear, precise, adequate and based on a rational discernible principle so that it had the certainty and predictability necessary to meet the requirements of the common law and of article 7 that the citizen should be able to foresee, if need be with appropriate advice, the consequences which a given course of

[1] 1 Human Rights Act 1998, Sch 1, Pt I, art 7(1): see posts, para 34.

action might entail; that many offences which were formerly chargeable as the common law offence of causing a public nuisance had now become the subject of express statutory provision, and although it could not be said that conduct falling within the terms of a specific statutory offence could never be prosecuted as a common law crime, good practice and respect for the primacy of statute required that the offence should be prosecuted under the relevant statutory provision unless there was good reason for doing otherwise; that the avoidance of mandatory time limits or limits on penalties which applied to statutory offences could not ordinarily amount to good reasons for resorting to the common law offence; that, therefore, the circumstances in which in future there could properly be resort to the common law crime of public nuisance would be relatively rare, but it was nevertheless an offence which still existed in law, and power to abolish an existing offence lay only with Parliament and not with the courts (post, paras 6, 12, 28–32, 33–34, 36–37, 41, 43–45, 52–54, 58, 60).

R v Misra [2005] 1 Cr App R 328, CA approved.

(2) That an individual act of causing a private nuisance such as making an offensive telephone call or sending an offensive communication by post could not become a criminal public nuisance merely by reason of the fact that the act was one of a series; that individual acts causing injury to several different people rather than to the community as a whole or a significant section of it could not amount to the offence of causing a public nuisance, however persistent or objectionable the acts might be; that the sending of racially offensive material by post to different individuals as alleged against the defendant in the first case lacked an essential ingredient of the offence of causing a public nuisance in that it did not cause common injury to a section of the public; and that, accordingly, the defendant could not be charged with causing a public nuisance (post, paras 6, 38, 46–47, 49, 58, 60).

R v Johnson (Anthony) [1997] 1 WLR 367, CA overruled.

(3) That the mens rea which had to be proved against a defendant to convict him of causing a public nuisance was that he knew or ought to have known, because the means of knowledge were available to him, the consequence of what he did or omitted to do; that there would have been no public nuisance if the letter containing the salt had reached the addressee as the defendant in the second case intended when he posted it; that the public nuisance alleged was the escape of the salt from the envelope, although that was not a result which the defendant intended, nor could he have known that it would occur, since it would have rendered his joke futile; that it was not possible to infer that he should reasonably have known that the salt would escape unless there had been a detailed consideration of the type of envelope used and the care taken in sealing it; that at his trial and in the Court of Appeal the emphasis had been on the foreseeable consequence if the salt escaped and not on the foreseeability of an unintended escape; that therefore, it was not proved that the defendant knew or reasonably should have known that the salt would escape in the sorting office or in the course of post; and that accordingly, his conviction for causing a public nuisance could not be upheld (post, paras 39–41, 43, 56–58, 60).

R v Stephens (1866) LR 1 QB 702; *Attorney General v PYA Quarries Ltd* [1957] 2 QB 169, CA; *R v Madden* [1975] 1 WLR 1379, CA and *R v Shorrock* [1994] QB 279, CA considered.

Decision of the Court of Appeal [2003] EWCA Crim 3450; [2004] 1 WLR 2878; [2004] 2 All ER 589 reversed.

The following cases are referred to in the opinions of their Lordships:

Attorney General v PYA Quarries Ltd [1957] 2 QB 169; [1957] 2 WLR 770; [1957] 1 All ER 894, CA

G v Federal Republic of Germany (1989) 60 DR 256

Hashman and Harrup v United Kingdom (1999) 30 EHRR 241

Hunter v Canary Wharf Ltd [1997] AC 655; [1997] 2 WLR 684; [1997] 2 All ER 426, HL(E)

Kokkinakis v Greece (1993) 17 EHRR 397
R v Adler [1964] Crim LR 304, CCA
R v Clark (Mark) [2003] EWCA Crim 991; [2003] 2 Cr App R 363, CA
R v Clark (No 2) [1964] 2 QB 315; [1963] 3 WLR 1067; [1963] 3 All ER 884, CCA
R v Crawley (1862) 3 F & F 109
R v Eskdale [2001] EWCA Crim 1159; [2002] 1 Cr App R (S) 118 CA
R v G [2003] UKHL 50; [2004] 1 AC 1034; [2003] 3 WLR 1060; [2003] 4 All ER 765, HL(E)
R v Harley [2002] EWCA Crim 2650; [2003] 2 Cr App R (S) 16, CA
R v Henson (1852) 1 Dears 24
R v Holliday and Leboutillier [2004] EWCA Crim 1847; [2005] 1 Cr App R (S) 349, CA
R v J [2004] UKHL 42; [2005] 1 AC 562; [2004] 3 WLR 1019; [2005] 1 All ER 1, HL(E)
R v Jarvis (1862) 3 F & F 108
R v Johnson (Anthony) [1997] 1 WLR 367, CA
R v Lowrie [2004] EWCA Crim 2325; [2005] 1 Cr App R (S) 530, CA
R v Madden [1975] 1 WLR 1379; [1975] 3 All ER 155, CA
R v Medley (1834) 6 C & P 292
R v Millward (1986) 8 Cr App R (S) 209, CA
R v Misra [2004] EWCA Crim 2375; [2005] 1 Cr App R 328, CA
R v Moore (1832) 3 B & Ad 184
R v Moule [1964] Crim LR 303, CCA
R v Norbury [1978] Crim LR 435
R v Ong [2001] 1 Cr App R (S) 404, CA
R v Ruffell (1991) 13 Cr App R (S) 204, CA
R v Shorrock [1994] QB 279; [1993] 3 WLR 698; [1993] 3 All ER 917, CA
R v Soul (1980) 70 Cr App R 295, CA
R v Stephens (1866) LR 1 QB 702
R v Stevenson (1862) 3 F & F 106
R v Vantandillo (1815) 4 M & S 73
R v White and Ward (1757) 1 Burr 333
R v Withers [1975] AC 842; [1974] 3 WLR 751; [1974] 3 All ER 984, HL(E)
S and G v United Kingdom (Application No 17634/91), (unreported) 2 September 1991, EComHR
SW v United Kingdom (1995) 21 EHRR 363
Sedleigh-Denfield v O'Callaghan [1940] AC 880; [1940] 3 All ER 349, HL(E)
Sherras v De Rutzen [1895] 1 QB 918, DC
Soltau v De Held (1851) 2 Sim NS 133
Sunday Times v United Kingdom (1979) 2 EHRR 245
Wingrove v United Kingdom (1996) 24 EHRR 1
X Ltd and Y v United Kingdom (1982) 28 DR 77

The following additional case was cited in argument:

Attorney General's Reference No 3 of 2003 [2004] EWCA Crim 868; [2005] QB 73; [2004] 3 WLR 451, CA

APPEALS from the Court of Appeal

By leave of the House of Lords (Lord Bingham of Cornhill, Lord Rodger of Earlsferry and Lord Carswell) granted on 1 April 2004, the defendants, Anthony Rimmington and Harry Chaim Goldstein, appealed from a decision of the Court of Appeal (Criminal Division) (Latham LJ, Moses J and Sir Edwin Jowitt) on 28 November 2003, dismissing their appeals, in Mr Rimmington's case from a ruling of Leveson J at the Central Criminal Court on 3 September 2002 that the offence of causing a public nuisance was

known to the common law and that the prosecution was not an abuse of process, and in Mr Goldstein's case against his conviction on 3 October 2002 before Judge Fingret and a jury at Southwark Crown Court of causing a public nuisance.

The facts are stated in the opinions of their Lordships.

James Guthrie QC and *Bernard Eaton* for the defendant Rimmington. In recent times the offence of public nuisance has been invoked in widely varying circumstances. However it has never before been invoked to punish the dissemination of political or other views, even when expressed in an abusive, intimidating or offensive manner. [Reference was made to *R v Madden* [1975] 1 WLR 1379 and *R v Johnson (Anthony)* [1997] 1 WLR 367.]

The offence of public nuisance does not satisfy the test of legal certainty. It therefore violates article 6 of the Human Rights Convention (the right to a fair trial) and article 7 (no punishment without) law. Causing a nuisance to the public is a vague concept which fails to provide the objective criteria by which a defendant's actions can be either regulated or determined. As a consequence the offence is likely to be misleading and inappropriate and does not properly reflect the criminality complained of. That is compounded in this defendant's case by the variety of conduct which is alleged against him under the single offence with which he is charged. It would therefore be an abuse of process for him to be tried for public nuisance. [Reference was made to *Kokkinakis v Greece* (1993) 17 EHRR 397; *R v Misra* [2005] 1 Cr App R 328 and *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241.]

A further objection to the offence of public nuisance being applied to new circumstances such as those of the present case is the principle that the courts have no power to create new offences. If the ambit of the common law offence of public nuisance is to be enlarged it must be done gradually on a case by case basis and not in one leap. [Reference was made to *Attorney General v PYA Quarries Ltd* [1957] 2 QB 169; *R v Withers* [1975] AC 842 and *R v Clark (Mark)* [2003] 2 Cr App R 363.]

To extend the offence of public nuisance to cover the facts of this defendant's case would be an impermissible extension of the common law. The defendant's actions were directed at individuals, not at the public or a section of the public. He could not have foreseen that his conduct was a public nuisance because the offence of public nuisance had never been construed in that way. For that reason his legal advisers would not have advised him that his conduct would have been so construed.

To prosecute the dissemination of offensive written material by post as a public nuisance is in reality creating a new common law offence in the face of legislation by Parliament which has enacted particular substantive offences which cover the same matters of complaint. The Crown should have charged the defendant under the relevant legislation with the substantive charges appropriate to the categories of conduct alleged, so that the case which the defendant had to meet and which the trial court had to consider would be identified with sufficient particularity.

There is a range of particular substantive offences for which the defendant might more suitably have been prosecuted on the facts of his case. In the case of each of those offences the defendant would know with the required

A element of certainty the case which he had to meet, the mental element of the crime which had to be proved, and any legal defences available to him. The same cannot be said of the common law offence of causing a public nuisance.

To charge the defendant with the offence of public nuisance for expressing his views in private correspondence to specific individuals also constitutes an interference with his right to privacy of correspondence contrary to article 8.

B To charge the defendant with public nuisance for expressing his opinions to public figures is also an interference with his right to freedom of expression under article 10 of the Convention. The defendant was expressing his beliefs and his perception of the wrongs in society. In a democratic society it is imperative that people should be able to do that freely without fear of censorship by the organs of the state. The defendant C sent material alleged to be racist which to many would be an unpalatable means of expressing and seeking support for his views. But that judgment is based on perceived unacceptability to the mainstream and is ultimately based on subjective opinion.

In the context of the defendant's conduct the charge of public nuisance cannot be said to be "in accordance with" or "as prescribed by" law and the D common law offence of public nuisance is not reasonable, proportionate and necessary in a democratic society. It is not necessary to protect the rights and freedoms of others or to prevent crime and disorder. The conduct complained of is adequately controlled by appropriate legislation.

Jonathan Goldberg QC and *Gary Grant* for the defendant Goldstein. This defendant's conduct in sending salt by post was a joke with an old E friend with a particular sense of humour. It was never intended or anticipated by the defendant that the salt would leak in the Post Office. The issue is therefore whether the mens rea requirement of the common law offence of causing a public nuisance is satisfied by proving that the defendant either knew or ought to have known, in the sense that the means of knowledge were available to him, that there was a real risk that the consequence of his actions would be to create the sort of nuisance which in F fact occurred: see *R v Shorrock* [1994] QB 279. [Reference was also made to *Sedleigh-Denfield v O'Callaghan* [1940] AC 880; *R v Stephens* (1866) LR 1 QB 702 and *Attorney General's Reference No 3 of 2003* [2005] QB 73.]

The test of mens rea laid down in *R v Shorrock* is an objective one requiring no more than a species of recklessness or even mere negligence to G be proved. That test is an inappropriate one and could cause real injustice. There is no justification for permitting such a diluted mental element. *R v Shorrock* was wrongly decided.

All modern trends in the criminal law suggest that a defendant should not be convicted of a serious criminal offence unless his state of mind was culpable in the sense that he was aware of the risk of the prohibited consequences occurring. Common law offences always require mens rea. H Parliament intended mens rea to be shown unless it was specifically excluded. The minimum appropriate mental element is a subjective recklessness test akin to that set out in *R v G* [2004] 1 AC 1034.

Public nuisance is an equally serious offence to that charged in *R v G*, namely arson, and also carries a sentence of life imprisonment. There is a

perfectly reasonable alternative to the common law offence of public nuisance.

To uphold the rule of law the common law's approach to criminal offences is guided by the twin principles of maximum legal certainty and non-retroactivity, which are now enshrined in article 7 of the Human Rights Convention. The offence of causing a public nuisance as currently defined is so vague, imprecise amorphous and broad that it offends against those principles and leads to injustice.

The facts of this defendant's case highlight the potential for injustice. The posting of salt was not a prescribed offence prior to the events in New York on 11 September 2001 or even after that. At the time this defendant sent his letter Parliament had just enacted section 85 of the Postal Services Act 2000 which specifically prohibited the sending of certain dangerous and unpleasant articles by post. Salt was not amongst them.

The principle that the criminal law must meet the requirements of reasonable certainty and accessibility is deeply embedded in English law. The constitutional requirement of foreseeability forms an important part of the rationale for the rule that criminal statutes are to be restrictively interpreted. Sending salt in the post was in itself a lawful and unprohibited act so that, even if the defendant had taken legal advice or researched the criminal law before posting his letter, it is unlikely that he would have been advised of any law declaring that he could not. A prudent lawyer might well have advised him to seal the envelope carefully. But the difference between a harmless joke and a serious criminal act should not be based on the perceived efficiency of the envelope's adhesive properties.

The events in New York could not create a new crime out of hitherto lawful conduct. Parliament had not criminalised this defendant's conduct and the common law should not be extended to fill the gap. His conduct would retroactively be deemed a crime only because of the uncertain definition of the offence of causing a public nuisance which permits almost any act that detrimentally affects another to be deemed criminal if the prosecutor chooses to take action. The offence has also been the target of eminent and forceful academic criticism The remedy is for the common law no longer to recognise the offence.

The defendant's rights under articles 7, 8 and 10 of the Human Rights Convention were also infringed. He had a right to express his harmless and private joke to his friend by sending him the letter. His prosecution, conviction and sentence were a disproportionate response and was not necessary in a democratic society. The restriction of his rights were not "prescribed by law" or in "accordance with the law" because the offence of public nuisance is too imprecise and the criminal consequences of his actions were not sufficiently foreseeable.

David Perry for the Crown, with *Mark Rainsford* for the defendant Rimmington, and with *Tracy Ayling* for the defendant Goldstein. The common law offence of public nuisance is well known to the criminal law and is not obsolete. It bears the distinctive feature of a criminal offence in that it is concerned with public wrongs, and it is a proper and proportionate response to the need to protect the public from unwarranted acts or omissions which endanger the life, health, property, morals or comfort of the

A public or which obstruct the public in the exercise or enjoyment of their rights.

The mens rea element of the offence was correctly identified by the Court of Appeal in *R v Shorrock* [1994] QB 279. The elements of the offence are sufficiently clear to enable a person, with appropriate legal advice if necessary, to regulate his behaviour.

B The defendants' arguments would exclude from liability those who are indifferent and callous and give no thought to the consequences of their actions, and who are the most likely to create a public nuisance. It is the callousness or indifference on the part of the accused which displays culpability in that the accused has put his own interests before those of others to such a degree that the fact that others have such interests does not register as a reason for acting otherwise. It demonstrates a particular C attitude towards his fellow citizens. Society may properly protect itself from the harm created and attach liability to an individual who ought to have realised the risks created by his actions but was culpably indifferent to the risks.

The suggestion that there are other offences with which the defendants could have been charged is not realistic. Most of those others are summary D offences chargeable in the magistrate's courts. If the defendants' actions fall within the ambit of the offence of public nuisance it is reasonably foreseeable to a lawyer that the offence would be committed. It was foreseeable in the case of both defendants. There must be a boundary for liability and that threshold must be to consider the act at the point of commission.

The common law offence of public nuisance is sufficiently clear for the purposes of article 7 of the Human Rights Convention, and it follows that E while a prosecution for such an offence might constitute an interference with the rights guaranteed by articles 8 and 10, the prosecution will be "in accordance with law" for the purposes of article 8 and as "prescribed by law" for the purpose of article 10. Any interference with articles 8 or 10 is justified on the basis that it serves a legitimate aim and is necessary in a democratic society in the interests of public safety, for the prevention of F disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The defendants' actions must be looked at in context. The defendant Goldstein's actions took place soon after the events on 11 September 2001 in New York. Moreover, two postmen in the United Sates of America had died of anthrax poisoning. There was an anthrax scare when the defendant G sent a letter containing a substance which looked like anthrax. The prosecution was a sufficiently proportionate response to the need to protect the public.

The common law offence of public nuisance as originally developed related to the use of land and rights of way, but it has now been developed to include acts such as making obscene telephone calls. The House of Lords is not being asked to create a new offence but to expand the scope of an H offence. The expansion of an offence within reasonable limits is perfectly permissible both under domestic law and Strasbourg law.

Guthrie QC and *Goldberg QC* replied.

Their Lordships took time for consideration.

27 October. **LORD BINGHAM OF CORNHILL**

1 My Lords, these appeals, heard together, raise important and difficult questions concerning the definition and ingredients, today, of the common law crime of causing a public nuisance. The appellants contend that, as applied in their cases, the offence is too imprecisely defined, and the courts' interpretation of it too uncertain and unpredictable, to satisfy the requirements either of the common law or of the European Convention on Human Rights. A question also arises on the mens rea which must be proved to establish the offence.

2 The facts of the two cases are quite different. Mr Rimmington was charged in an indictment containing a single count of public nuisance, contrary to common law. The particulars were that he:

> "between 25 May 1992 and 13 June 2001, caused a nuisance to the public, namely by sending 538 separate postal packages, as detailed in the schedule . . . containing racially offensive material to members of the public selected by reason of their perceived ethnicity or for their support for such a group or randomly selected in an attempt to gain support for his views, the effect of which was to cause annoyance, harassment, alarm and/or distress."

No evidence has yet been called or facts formally admitted, but it is not effectively in dispute that Mr Rimmington sent the packages listed in the schedule to the identified recipients, some of them prominent public figures, between the dates specified. The communications were strongly racist in content, crude, coarse, insulting and in some instances threatening and arguably obscene. When arrested in June 2001 Mr Rimmington suggested that his campaign had been prompted by a racially-motivated assault upon him by a black male in 1992: he had decided to retaliate by causing "them" mental anguish. The indictment preferred against him was challenged at the Central Criminal Court before Leveson J, who held a preparatory hearing under section 29 of the Criminal Procedure and Investigations Act 1996 to resolve the issues of law raised by the defence. He ruled that the indictment charged Mr Rimmington with an offence known to the law and that the prosecution was not an abuse of process because brought inconsistently with articles 7, 8 or 10 of the European Convention. Mr Rimmington's appeal to the Court of Appeal (Criminal Division) against that decision was heard by Latham LJ, Moses J and Sir Edwin Jowitt with that of Mr Goldstein, and was dismissed: [2004] 1 WLR 2878.

3 In the proceedings against Mr Rimmington so far, he has been anonymised as "R" in the title of the case. Where a preparatory hearing is likely to be followed by a substantive trial and there is a risk that the trial may be prejudiced by reporting of the preparatory hearing, there may be very good reason to defer full reporting of the preparatory hearing, as is recognised by section 37 of the 1996 Act. But there is no statutory warrant for withholding the name of a defendant (see section 37(9)), and in the present case there is no reason why reporting should be restricted. I would accordingly order under section 37(5) of the Act that subsection (1) shall not apply to this appeal. There should be no resort to anonymity in criminal cases without good reason and statutory authority.

4 Mr Goldstein was charged in an indictment containing one count of public nuisance contrary to common law. The particulars were that he:

A "between 16 October 2001 and 20 October 2001 caused a nuisance to the public by posting or causing to be posted, an envelope containing salt to Unit 36, Northend Road, Wembley."

Mr Goldstein, an ultra-orthodox Jew, is a supplier of kosher foods in Manchester. He bought supplies from the company of an old friend in London, Mr Abraham Ehrlich, with whom he had a bantering relationship. B Mr Goldstein owed Mr Ehrlich a significant sum of money, which the latter had pressed him to pay. Mr Goldstein accordingly put the cheque in an envelope (addressed to Ibrahim Ehrlich) and included in the envelope a small quantity of salt. This was done in recognition of the age of the debt, salt being commonly used to preserve kosher food, and by way of reference to the very serious anthrax scare in New York following the events of C 11 September 2001, which both men had discussed on the telephone shortly before. The inclusion of the salt was intended to be humorous, and Mr Ehrlich gave unchallenged evidence at trial that had he received the envelope he would have recognised it as a joke. But the envelope did not reach him. In the course of sorting at the Wembley Sorting Office some of the salt leaked onto the hands of a postal worker who understandably feared it might be anthrax and raised the alarm. The building, in which some 110 D people worked, was evacuated for about an hour, the second delivery for that day was cancelled and the police were called. On inspecting the envelope the police were satisfied that the substance was salt. Mr Goldstein pleaded not guilty before a judge (Judge Fingret) and jury in the Crown Court at Southwark but on 3 October 2002 he was convicted. He was sentenced to a community punishment order of 140 hours, and ordered to E pay £500 compensation and £1,850 towards the costs of the prosecution. His appeal against conviction was heard and dismissed with that of Mr Rimmington.

Nuisance

5 The origins and nature of nuisance have been the subject of detailed F scholarly research which need not for present purposes be rehearsed: see Winfield, "Nuisance as a Tort" (1932) 4 CLJ 189; F H Newark, "The Boundaries of Nuisance" (1949) 65 LQR 480; Janet Loengard, "The Assize of Nuisance: Origins of an Action at Common Law" [1978] CLJ 144. It seems clear that what we would now call the tort of private nuisance, recognised in the assize of nuisance, provided a remedy complementary to that provided by the assize of novel disseisin. As Holdsworth succinctly puts G it (*A History of English Law*, 5th ed (1942), vol III, p 11): "The novel disseisin was directed to secure an undisturbed possession: the assize of nuisance to secure its free enjoyment." By the 15th century an action on the case for private nuisance was recognised. Thus the action for private nuisance was developed to protect the right of an occupier of land to enjoy it without substantial and unreasonable interference. This has remained the H cardinal feature of the tort, as recently affirmed by the House in *Hunter v Canary Wharf Ltd* [1997] AC 655. The interference complained of may take any one of many different forms. What gives the tort its unifying feature (see *Fleming, The Law of Torts,* 9th ed (1998), p 457) is the general type of harm caused, interference with the beneficial occupation and enjoyment of land, not the particular conduct causing it.

6 It became clear over time that there were some acts and omissions which were socially objectionable but could not found an action in private nuisance because the injury was suffered by the local community as a whole rather than by individual victims and because members of the public suffered injury to their rights as such rather than as private owners or occupiers of land. Interference with the use of a public highway or a public navigable river provides the best and most typical example. Conduct of this kind came to be treated as criminal and punishable as such. In an unpoliced and unregulated society, in which local government was rudimentary or non-existent, common nuisance, as the offence was known, came to be (in the words of J R Spencer, "Public Nuisance—A Critical Examination" [1989] CLJ 55, 59) "a rag-bag of odds and ends which we should nowadays call 'public welfare offences' ". But central to the content of the crime was the suffering of common injury by members of the public by interference with rights enjoyed by them as such. I shall, to avoid wearisome repetition, refer to this feature in this opinion as "the requirement of common injury".

7 Unusually, perhaps, conduct which could found a criminal prosecution for causing a common nuisance could also found a civil action in tort. Since, in the ordinary way, no individual member of the public had any better ground for action than any other member of the public, the Attorney General assumed the role of plaintiff, acting on the relation of the community which had suffered. This was attractive, since he could seek an injunction and the abatement of the nuisance was usually the object most desired: see Spencer [1989] CLJ 55, 66–73. It was, however, held by Fitzherbert J, as early as 1536 (YB 27 Hy VIII Mich pl 10) that a member of the public could sue for a common or public nuisance if he could show that he had suffered particular damage over and above the ordinary damage suffered by the public at large. To the present day, causing a public nuisance has been treated as both a crime and a tort, the ingredients of each being the same.

The crime of public nuisance

8 The House was very helpfully referred to a number of authoritative statements on and definitions of the crime of public nuisance. The earliest of these was *Hawkins*, *A Treatise of the Pleas of the Crown* (1716), Book 1, Ch LXXV, where he raised as a first question "What shall be said to be a Common Nuisance", and began his answer:

> "Sect 1. As to the first point it seems, That a Common Nuisance may be defined to be an Offence against the Publick, either by doing a Thing which tends to the Annoyance of all the King's Subjects, or by neglecting to do a Thing which the common Good requires. Sect 2. But Annoyances to the Interests of particular Persons are not punishable by a public Prosecution as Common Nuisances, but are left to be redressed by the private Actions of the Parties aggrieved by them."

He gave examples. In his *Commentaries on the Laws of England* (Book III (1768), Ch 13, p 216) Blackstone distinguished between public or common nuisances, "which affect the public, and are an annoyance to *all* the king's subjects" and private nuisances, which he defined as "any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another". In Book IV (1769), Ch 13, p 167, he explained further:

A "common nuisances are such inconvenient or troublesome offences, as annoy the whole community in general, and not merely some particular person; and therefore are indictable only, and not actionable; as it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow subjects."

B 9 In 1822, in the first edition of his long-lived work then called *A Summary of the Law Relative to Pleading and Evidence in Criminal Cases*, JF Archbold published a precedent of an indictment for carrying on an offensive trade. The requirement of common injury (as I have called it) was recognised in the particulars:

C "to the great damage and common nuisance of all the liege subjects of our said lord the King there inhabiting, being, and residing, and going, returning, and passing through the said streets and highways . . ."

He referred to such other common nuisances as using a shop in a public market as a slaughter house, erecting a manufactory for hartshorn, erecting a privy near the highway, placing putrid carrion near the highway, keeping hogs near a public street and feeding them with offal, keeping a fierce and D unruly bull in a field through which there was a footway, keeping a ferocious dog unmuzzled and baiting a bull in the King's highway. He went on to deal with such common nuisances as keeping a disorderly house and a common gaming house, although these became statutory offences the same year (3 Geo 4, c 114).

10 It seems likely that the draftsman of section 268 in chapter XIV of E the Indian Penal Code (Act XLV of 1860) intended to summarise the English common law on public nuisance as then understood.

"A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, F obstruction, danger or annoyance to persons who may have occasion to use any public right."

In the draft Code annexed to their Report by the Criminal Code Bill Commissioners in 1879 (C 2345), the following proposals were made:

"*Section 150*

G "*Common nuisance defined*

"A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives safety health property or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all Her Majesty's subjects.

"*Section 151*

H "*What common nuisances are offences*

"Every one shall be guilty of an indictable offence, and shall be liable upon conviction thereof to one year's imprisonment, who commits any common nuisance which endangers the lives safety or health of the public, or which injures the person of any individual.

"*Section 152*

"*When a common nuisance is not to be deemed criminal*

"Any one convicted upon any indictment or information for any common nuisance other than those mentioned in the preceding section shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right."

In *A Digest of the Criminal Law* (1877), Ch XIX, p 108, Sir James Stephen defined a common nuisance as:

"an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects."

In the eighth and ninth editions of the work, published in 1947 and 1950 respectively, this definition remained unchanged. The definition to be found in para 31–40 of the 2005 edition of *Archbold, Criminal Pleading, Evidence and Practice*, save in its reference to morals, reflects the effect of these definitions:

"A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects."

11 In a number of countries where the law has derived from English sources, an offence of common or public nuisance, having characteristics similar to those defined above, is to be found. Thus in Canada, where common law offences have been abolished, section 180 of the Criminal Code now provides:

"(1) Every one who commits a common nuisance and thereby—(a) endangers the lives, safety or health of the public, or (b) causes physical injury to any person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

"(2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby—(a) endangers the lives, safety, health, property or comfort of the public; or (b) obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada."

Section 230 of the Queensland Criminal Code provides:

"230 *Common nuisances*

"Any person who—(a)without lawful justification or excuse, the proof of which lies on the person, does any act, or omits to do any act with respect to any property under the person's control, by which act or omission danger is caused to the lives, safety, or health, of the public; or (b) without lawful justification or excuse, the proof of which lies on the person, does any act, or omits to do any act with respect to any property under the person's control, by which act or omission danger is caused to the property or comfort of the public, or the public are obstructed in the

A exercise or enjoyment of any right common to all Her Majesty's subjects, and by which injury is caused to the person of some person; is guilty of a misdemeanour, and is liable to imprisonment for two years."

To similar effect is the Tasmanian Criminal Code Act 1924, section 140:

"140 *Common nuisance defined*

B "(1) A common nuisance is an unlawful act or an omission to discharge a legal duty, such act or omission being one which endangers the lives, safety, health, property, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects.

"(2) For the purposes of this section the comfort of the public shall be deemed to be affected by any pollution of the environment within the C meaning of the Environmental Management and Pollution Control Act 1994."

12 All of the foregoing definitions, as I read them, treat the requirement of common injury as a, perhaps *the*, distinguishing feature of this offence.

The authorities: (1)

D **13** There are many authorities on this subject, and it is necessary to be selective. In *R v White and Ward* (1757) 1 Burr 333 the nuisance to "all the King's liege subjects" living in Twickenham and travelling and passing the King's highway was impregnating the air with "noisome and offensive stinks and smells". Each defendant, on undertaking to avoid repetition, was fined 6s 8d. A mother of a young child who took him through a public street well E knowing that the child suffered from the contagious, infectious and dangerous disease of smallpox, was convicted and sentenced to three months' imprisonment in the custody of the marshal: *R v Vantandillo* (1815) 4 M & S 73. The defendant in *R v Moore* (1832) 3 B & Ad 184 ran a rifle range in Bayswater where customers shot at pigeons, causing a crowd to assemble outside and in neighbouring fields to shoot at the pigeons which escaped, causing noise, damage, disturbance and mischief. On conviction F the defendant undertook to discontinue the shooting and no penalty was imposed. *R v Medley* (1834) 6 C & P 292 arose from pollution of the River Thames. Denman CJ directed the jury that the ignorance of the directors was no defence if they had authorised a manager to conduct the works, and they were each fined £25. In *Soltau v De Held* (1851) 2 Sim NS 133, 142–143, Kindersley V-C said:

G "I conceive that, to constitute a public nuisance, the thing must be such as, in its nature or its consequences, is a nuisance—an injury or a damage, to all persons who come within the sphere of its operations, though it may be so in a greater degree to some than it is to others."

R v Henson (1852) 1 Dears 24 involved a mare which, like the child in *R v Vantandillo* 4 M & S 73, was infected with a "contagious, infectious and H dangerous disease". The defendant, having brought the mare on to the highway with knowledge of its condition, was convicted of causing a common nuisance.

14 The House was referred to *R v Stevenson* (1862) 3 F & F 106, which concerned the exposing for sale of unfit meat. Similar authorities concern

the bringing to market of unfit meat (*R v Jarvis* (1862) 3 F & F 108) and the sending to a meat salesman of meat unfit for human consumption (*R v Crawley* (1862) 3 F & F 109). It is not entirely clear that these offences were charged as common nuisances at common law. But it is clear that knowledge of the unfitness of the meat, or its intended sale for human consumption, was treated as an ingredient of the offences.

15 The issue in *R v Stephens* (1866) LR 1 QB 702 was whether the owner of a slate quarry was answerable for a public nuisance caused by his workmen without his knowledge and contrary to his general orders. The jury had convicted. The case is important for the observations of Mellor J, at pp 708–709:

> "It is quite true that this in point of form is a proceeding of a criminal nature, but in substance I think it is in the nature of a civil proceeding, and I can see no reason why a different rule should prevail with regard to such an act as is charged in this indictment between proceedings which are civil and proceedings which are criminal. I think there may be nuisances of such a character that the rule I am applying here, would not be applicable to them, but here it is perfectly clear that the only reason for proceeding criminally is that the nuisance, instead of being merely a nuisance affecting an individual, or one or two individuals, affects the public at large, and no private individual, without receiving some special injury, could have maintained an action. Then if the contention of those who say the direction is wrong is to prevail, the public would have great difficulty in getting redress. The object of this indictment is to prevent the recurrence of the nuisance. The prosecutor cannot proceed by action, but must proceed by indictment, and if this were strictly a criminal proceeding the prosecution would be met with the objection that there was no mens rea: that the indictment charged the defendant with a criminal offence, when in reality there was no proof that the defendant knew of the act, or that he himself gave orders to his servants to do the particular act he is charged with; still at the same time it is perfectly clear that the defendant finds the capital, and carries on the business which causes the nuisance, and it is carried on for his benefit; although from age or infirmity the defendant is unable to go to the premises, the business is carried on for him by his sons, or at all events by his agents. Under these circumstances the defendant must necessarily give to his servants or agents all the authority that is incident to the carrying on of the business. It is not because he had at some time or other given directions that it should be carried on so as not to allow the refuse from the works to fall into the river, and desired his servants to provide some other place for depositing it, that when it has fallen into the river, and has become prejudicial to the public, he can say he is not liable on an indictment for a nuisance caused by the acts of his servants. It appears to me that all it was necessary to prove is, that the nuisance was caused in the carrying on of the works of the quarry."

Blackburn J, who had presided at the trial, agreed. He said, at p 710:

> "All that it is necessary to say is this, that where a person maintains works by his capital, and employs servants, and so carries on the works as in fact to cause a nuisance to a private right, for which an action would

A lie, if the same nuisance inflicts an injury upon a public right the remedy for which would be by indictment, the evidence which would maintain the action would also support the indictment. That is all that it was necessary to decide and all that is decided."

Thus the overlap between the criminal offence and the civil tort was affirmed, and this fact was relied on to justify a strict approach to the B ordinary requirement of mens rea.

16 This strict approach was acknowledged by Wright J in *Sherras v De Rutzen* [1895] 1 QB 918, 922. Usually cited for its reference to the presumption that mens rea is an essential ingredient in every offence, this passage continues with a discussion of various exceptions where the presumption does not apply (footnotes omitted):

C "Another class comprehends some, and perhaps all, public nuisances: *R v Stephens* where the employer was held liable on indictment for a nuisance caused by workmen without his knowledge and contrary to his orders; and so in *R v Medley* and *Barnes v Akroyd*. Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right: see per Williams and D Willes JJ in *Morden v Porter*, as to unintentional trespass in pursuit of game; *Lee v Simpson*, as to unconscious dramatic piracy; and *Hargreaves v Diddams*, as to a bona fide belief in a legally impossible right to fish."

17 The next case which must be mentioned, *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, was a case of private nuisance, concerned with E the liability of an owner for continuing a nuisance originally caused, without his knowledge, by a trespasser. Viscount Maugham opined, at p 887:

"All that is necessary in such a case is to show that the owner or occupier of the land with such a possible cause of nuisance upon it knows or must be taken to know of it. An absentee owner or an occupier oblivious of what is happening under his eyes is in no better position than F the man who looks after his property . . ."

Lord Wright formulated what has come to be accepted as the test, at p 904:

"Though the rule has not been laid down by this House, it has I think been rightly established in the Court of Appeal that an occupier is not prima facie responsible for a nuisance created without his knowledge and consent. If he is to be liable a further condition is necessary, namely, that G he had knowledge or means of knowledge, that he knew or should have known of the nuisance in time to correct it and obviate its mischievous effects. The liability for a nuisance is not, at least in modern law, a strict or absolute liability."

18 The leading modern authority on public nuisance is *Attorney General v PYA Quarries Ltd* [1957] 2 QB 169. This was a civil action H brought by the Attorney General on the relation of the Glamorgan County Council and the Pontardawe Rural District Council to restrain a nuisance by quarrying activities which were said to project stones and splinters into the neighbourhood, and cause dust and vibrations. It was argued for the company on appeal that there might have been a private nuisance affecting

some of the residents, but not a public nuisance affecting all Her Majesty's liege subjects living in the area. In his judgment Romer LJ reviewed the authorities in detail and concluded, at p 184:

> "I do not propose to attempt a more precise definition of a public nuisance than those which emerge from the textbooks and authorities to which I have referred. It is, however, clear, in my opinion, that any nuisance is 'public' which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. The sphere of the nuisance may be described generally as 'the neighbourhood'; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross-section of the class has been so affected for an injunction to issue."

Denning LJ agreed. He differentiated between public and private nuisance at p 190 on conventional grounds: "The classic statement of the difference is that a public nuisance affects Her Majesty's subjects generally, whereas a private nuisance only affects particular individuals." He went on to say, at p 191:

> "that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large."

19 In *R v Madden* [1975] 1 WLR 1379 the defendant made a hoax bomb call by telephone to a steel works. The message was received by a telephonist, who informed the engineer and also the police. The police informed the chief security officer of the works, who caused eight security men to carry out a search. This lasted for just over an hour before the telephone call was found to be a hoax. The defendant was convicted at trial but succeeded on appeal, because the recorder had directed the jury to consider potential and not actual danger and discomfort, and because the requirement of common injury was not met. Giving the judgment of the court, James LJ said, at p 1383:

> "It is, in our view, still an offence known to the law of this country to commit a public nuisance. A person who makes a bogus telephone call falsely giving information as to the presence of explosives may, in our view, if there is evidence, be shown to have committed an offence of public nuisance. In this particular case the conviction must be quashed on two grounds. First, the directions which the recorder was persuaded by the Crown to give to the jury were not right in that those directions invited the jury to consider the potential danger to the public rather than the actual danger; or the potential risk to the comfort of the public as distinct from the actual comfort of the public. Secondly, on the evidence which I have recited, it was not possible for a jury, properly directed, to have arrived at the conclusion that a considerable number of persons were affected by the action of the appellant. It is quite clear

A that, for a public nuisance to be proved, it must be proved by the Crown that the public, which means a considerable number of persons or a section of the public, was affected, as distinct from individual persons."

(The first of these grounds would seem hard to reconcile with the decisions in *R v Vantandillo* 4 M & S 73 and *R v Henson* 1 Dears 24.)

B **20** The decision of the Court of Appeal (Criminal Division) in *R v Soul* (1980) 70 Cr App R 295 is not easy to explain. The appellant, who had agreed with others to secure the unlawful release of a restricted Broadmoor patient, was charged and convicted of conspiring to effect a public nuisance. Her appeal failed. The court rejected an argument, based on *R v Madden* [1975] 1 WLR 1379, that the Crown had failed to prove any actual danger. C No more than, at most, passing reference was made to the requirement of common injury. A critical commentary in [1980] Crim LR 234 suggested that public mischief, held by the House of Lords in *R v Withers* [1975] AC 842 not to be an offence, could in effect be restored by judicial legislation.

21 *R v Ruffell* (1991) 13 Cr App R (S) 204 was an appeal against sentence. The appellant had pleaded guilty to causing a public nuisance, D and had been sentenced to a suspended term of 12 months' imprisonment and a fine of £7,000. The nuisance had consisted of an "acid house" party, which had attracted some thousands of people. A side road to the site had been blocked by traffic. There had been very loud music, overnight and lasting for about 12 hours. The surrounding woodlands had been littered with human excrement. The appeal against the sentence of imprisonment E failed, but the fine was quashed on the ground that the appellant had no means to pay it. The facts of *R v Shorrock* [1994] QB 279, which also involved an "acid house" party, were a little similar. The appellant accepted that a public nuisance had been caused, but denied that he had had the requisite knowledge to be criminally liable. Thus the issue concerned the mens rea which the Crown had to prove to establish guilt. Giving the judgment of a Court of Appeal which also included Simon F Brown LJ and Popplewell J, Rattee J reviewed the authorities and concluded, at p 289, that the answer was that given by the House in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880: the appellant was guilty of the offence charged

> "if either he knew or he ought to have known, in the sense that the means of knowledge were available to him, that there was a real risk that G the consequences of the licence granted by him in respect of his field would be to create the sort of nuisance that in fact occurred . . ."

22 *R v Ong* [2001] 1 Cr App R (S) 404 was an application for leave to appeal against a sentence of four years' imprisonment imposed on a plea of guilty to a court of conspiring to cause a public nuisance. The public nuisance which was planned was the extinguishment of the floodlights at a H Premier Division football match between Charlton Athletic and Liverpool in order to make a fraudulent gain for a group of Far Eastern bookmakers. The plan, if implemented, would have plunged those attending the match, presumably a crowd of thousands, into darkness, and prevented them seeing the match they had paid to see. Leave was refused.

The authorities: (2)

23 I have reserved for separate consideration a line of recent authority much relied on by the Crown in the case of Mr Rimmington, but the correctness of which is challenged by him.

24 The line appears to begin with *R v Norbury* [1978] Crim LR 435, a case heard by Judge Beezley in the Crown Court at Norwich in March 1977. The defendant had over a period of some four years made 605 obscene telephone calls to 494 different women. The making of such calls was a summary offence punishable with a maximum fine of £50 under section 78 of the Post Office Act 1969, but the defendant was indicted for causing a public nuisance, an indictable offence for which there was no maximum penalty. His counsel moved to quash the indictment, I infer on the ground that the requirement of common injury was not met, but this argument was rejected. The judge ruled:

> "It seems to me, dealing with the present indictment, that a repetition over a long period and on a number of occasions of telephone calls of an obscene nature, intending to cause offence and alarm and resulting in such offence and alarm to a large number of Her Majesty's subjects, selected from a telephone directory or merely by chance dialling is the very kind of act and, indeed, the very kind of series of acts which the public has an interest in condemning and has a right to vindicate."

In the light of this ruling the defendant pleaded guilty. The judge's observations, as quoted, are unexceptionable and must command unqualified assent. But they do not address the question whether separate calls to individual victims can satisfy the requirement of common injury as I have defined it in para 6 above. The commentator [1978] Crim LR 435, 436 sounded a note of warning:

> "The facts of the present case are strikingly different from the typical case of public nuisance which is obstruction of the highway. There might be some danger of public nuisance assuming the mantle of public mischief. The House of Lords has held that public mischief—even conspiracy to effect a public mischief—is not an offence known to the law: *Director of Public Prosecutions v Withers* [1975] AC 842; but there is no doubt that public nuisance is an offence. The question is as to how far it extends. The present case shows that it may have some potentiality for growth. Offences covering such a wide range of different matters with no obvious boundaries are only doubtfully compatible with the principle of legality—i e that no one should be punished for an act which was not declared by law to be an offence before the act was done."

25 The warning was not heeded. In *R v Millward* (1986) 8 Cr App R (S) 209 the defendant had made hundreds of telephone calls (636 in a single day) to a young woman police officer with whom he had become infatuated, at the police station where she worked. He had pleaded guilty to two counts of causing a public nuisance and the appeal, which did not succeed, was against a sentence of 30 months' imprisonment. The ingredients of the offence were not in issue, and the only reference to the requirement of common injury was in the judgment of the court delivered by Glidewell LJ, at p 210:

A "Quite apart from anything else, this disrupts the whole operation of the police station to which these calls are directed, because a member of the public may wish to report an urgent matter such as a criminal offence, and cannot do so or is delayed in doing so because of this kind of behaviour on the part of the appellant."

26 In *R v Johnson (Anthony)* [1997] 1 WLR 367, an appeal against
B conviction, the requirement of common injury was the central issue. The appellant had over a period of years made hundreds of obscene telephone calls to at least 13 women, and had been convicted of causing a public nuisance. It was argued on his behalf that (a) each telephone call was a single isolated act to an individual, and although that might have amounted to a private nuisance it was wrong to group all the calls together and to
C regard the cumulative effect as a public nuisance, and (b) that in any event the scale and width of the conduct complained of was insufficient to constitute a public nuisance. Tucker J, giving the reserved judgment of the court, rejected the argument. He ruled, at pp 370–371:

"In our judgment it is permissible and necessary to look at the cumulative effect of these calls, made to numerous ladies on numerous
D occasions in the case of each lady, and to have regard to the cumulative effect of the calls in determining whether the appellant's conduct constituted a public nuisance. In our opinion it was conduct which materially affected the reasonable comfort and convenience of a class of Her Majesty's subjects: see *per* Romer LJ in *Attorney General v PYA Quarries Ltd* . . . It was a nuisance which was so widespread in its range, or so indiscriminate in its effect, that it would not be reasonable to
E expect one person to take proceedings on her own responsibility, but that they should be taken on the responsibility of the community at large: see Denning LJ . . . It was proved by the Crown that the public, meaning a considerable number of persons or a section of the public, was affected, as distinct from individual persons."

27 There was a plea of guilty in *R v Eskdale* [2002] 1 Cr App R (S) 118.
F The appellant had made about 1,000 obscene telephone calls, some of them very highly objectionable, to 15 women over a period of two weeks. An appeal against a sentence of nine years' imprisonment was dismissed. There was also a plea of guilty in *R v Harley* [2003] 2 Cr App R (S) 16. Over three months in the summer of 2001 the appellant had made nearly 5,000 calls to more than 1,000 people. A sentence of 21 months' imprisonment
G was for special reasons reduced to nine months'. Sentences of 18 months' and five years' imprisonment were reduced to nine months' and 30 months' in *R v Holliday and Leboutillier* [2005] 1 Cr App R (S) 349. The appellants were animal liberation activists who had pleaded guilty to causing a public nuisance by making a large number of telephone calls to employees and shareholders of certain companies whose activities the appellants opposed. The calls were designed to jam the company telephone switchboards, and
H some of them were threatening and intimidating. In *R v Lowrie* [2005] 1 Cr App R (S) 530 the appellant appealed unsuccessfully against a sentence of eight years' imprisonment imposed on his pleas of guilty to 12 counts of causing a public nuisance. In each case the count was based on a hoax call to one of the emergency services.

The current standing of public nuisance

28 The appellants contended (1) that conduct formerly chargeable as the crime of public nuisance had now become the subject of express statutory provision, (2) that where conduct was the subject of express statutory provision it should be charged under the appropriate statutory provision and not as public nuisance, and (3) that accordingly the crime of public nuisance had ceased to have any practical application or legal existence.

29 There is a large measure of truth in the first of these contentions. Section 79(1) of the Environmental Protection Act 1990, as amended, establishes nine categories of statutory nuisance (the state of premises, smoke emissions, fumes or gases from dwellings, effluvia from industrial trade or business premises, accumulations or deposits, animals, noise from premises, noise from vehicles or equipment in a street and other matters declared by other Acts to be statutory nuisances). Section 33 controls the dumping of waste. The Act lays down a detailed procedure for securing abatement, provides for criminal proceedings and prescribes maximum penalties for failure to comply with an abatement notice: see, generally, *McCracken, Jones, Pereira & Payne, Statutory Nuisance* (2001), chapters 2, 3, 5, 8, 9 and 10. Section 85 of the Water Resources Act 1991 makes it an offence to pollute controlled waters. It prescribes a maximum penalty of three months' imprisonment and a fine of £20,000 on summary conviction, and two years' imprisonment and a fine on conviction on indictment. By section 137 of the Highways Act 1980 it is a summary offence punishable by a fine not exceeding level 3 on the standard scale wilfully to obstruct free passage along a highway. Section 1 of the Protection from Harassment Act 1997 creates a crime of harassment, punishable summarily by imprisonment for a maximum of six months and a fine on scale 5. If the harassment involves repeated threats of violence the defendant is liable under section 4, on conviction on indictment, to five years' imprisonment and a fine. Section 32 of the Crime and Disorder Act 1998 creates an offence of racially or religiously motivated harassment and prescribes maximum penalties. Section 63 of the Criminal Justice and Public Order Act 1994 confers powers on the police to remove persons attending or preparing for a rave

> "at which amplified music is played during the night (with or without intermissions) and is such as, by reason of its loudness and duration and the time at which it is played, is likely to cause serious distress to the inhabitants of the locality."

Breach of the statutory requirements is punishable on summary conviction by imprisonment for up to three months and a fine not exceeding level 4 on the standard scale. By section 51 of the Criminal Law Act 1977, as amended, bomb hoaxes are punishable, on conviction on indictment, by a maximum of seven years' imprisonment, with a maximum of six months' and a fine of £1,000 on summary conviction. Section 114 of the Anti-terrorism, Crime and Security Act 2001 makes it an offence, attracting similar penalties, to place or send any substance or thing

> "with the intention of inducing in a person anywhere in the world a belief that it is likely to be (or contain) a noxious substance or other

A noxious thing and thereby endanger human life or create a serious risk to human health."

Section 85 of the Postal Services Act 2000 makes it an offence to send by post anything which is likely to injure a postal worker or anything which is indecent or obscene. On summary conviction the offence is punishable by a fine, on conviction on indictment by imprisonment for a maximum of
B 12 months and a fine. By section 1 of the Malicious Communications Act 1988, enacted to give effect to the Law Commission's Report on Poison-Pen Letters (Law Com No 147, HC 519 (1985)), as amended, it is an offence to send to another person a letter, electronic communication or article of any description which is indecent, grossly offensive, threatening or known or believed to be false. The offence is punishable on summary conviction
C with a maximum of six months' imprisonment and a fine on scale 5 on the standard scale. There has recently been enacted, in section 127 of the Communications Act 2003, an offence, attracting the same penalties, of improperly using a public electronic communications network. While it cannot be confidently asserted that there is no conduct which might formerly have been properly prosecuted as public nuisance which is not now the subject of express statutory provision, the appellants are in my opinion
D correct that the most typical and obvious causes of public nuisance are now the subject of express statutory prohibition.

30 There is in my opinion considerable force in the appellants' second contention under this head. Where Parliament has defined the ingredients of an offence, perhaps stipulating what shall and shall not be a defence, and has prescribed a mode of trial and a maximum penalty, it must ordinarily be
E proper that conduct falling within that definition should be prosecuted for the statutory offence and not for a common law offence which may or may not provide the same defences and for which the potential penalty is unlimited. If the directors in *R v Medley* 6 C & P 292 who were ignorant of what had been done, or the octogenarian owner in *R v Stephens* LR 1 QB 702 who was ignorant of what had been done and whose orders were disregarded, were today to be prosecuted for causing a public nuisance
F rather than under the relevant statutory provision, they would have powerful grounds for objecting, and the same point applies more generally. It cannot in the ordinary way be a reason for resorting to the common law offence that the prosecutor is freed from mandatory time limits or restrictions on penalty. It must rather be assumed that Parliament imposed the restrictions which it did having considered and weighed up what the
G protection of the public reasonably demanded. I would not go to the length of holding that conduct may never be lawfully prosecuted as a generally-expressed common law crime where it falls within the terms of a specific statutory provision, but good practice and respect for the primacy of statute do in my judgment require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise.

H 31 It follows from the conclusions already expressed in paras 29 to 30 above that the circumstances in which, in future, there can properly be resort to the common law crime of public nuisance will be relatively rare. It may very well be, as suggested by J R Spencer in his article cited in para 6 above, at p 83, that "There is surely a strong case for abolishing the crime

of public nuisance". But as the courts have no power to create new offences (see para 33 below), so they have no power to abolish existing offences. That is a task for Parliament, following careful consideration (perhaps undertaken, in the first instance, by the Law Commission) whether there are aspects of the public interest which the crime of public nuisance has a continuing role to protect. It is not in my view open to the House in resolving these appeals to conclude that the common law crime of causing a public nuisance no longer exists.

Definition

32 The appellants submitted that the crime of causing a public nuisance, as currently interpreted and applied, lacks the precision and clarity of definition, the certainty and the predictability necessary to meet the requirements of either the common law itself or article 7 of the European Convention. This submission calls for some consideration of principle.

33 In his famous polemic *Truth versus Ashurst,* written in 1792 and published in 1823, Jeremy Bentham made a searing criticism of judge-made criminal law, which he called "dog-law".

> "It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he *should not do*—they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it."

The domestic law of England and Wales has set its face firmly against "dog-law". In *R v Withers* [1975] AC 842 the House of Lords ruled that the judges have no power to create new offences: see Lord Reid, at p 854G; Viscount Dilhorne, at p 860E; Lord Simon of Glaisdale, at pp 863D, 867E; Lord Kilbrandon, at p 877C. Nor (per Lord Simon, at p 863D) may the courts nowadays widen existing offences so as to make punishable conduct of a type hitherto not subject to punishment. The relevant principles are admirably summarised by Judge LJ for the Court of Appeal (Criminal Division) in *R v Misra* [2005] 1 Cr App R 328, paras 29–34, in a passage which I would respectfully adopt:

> "29. To develop his argument on uncertainty, Mr Gledhill [for Dr Misra] focused our attention on art 7 of the Convention, entitled 'No punishment without law' which provides: '7(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.' In our view the essential thrust of this article is to prohibit the creation of offences, whether by legislation or the incremental development of the common law, which have retrospective application. It reflects a well-understood principle of domestic law, that conduct which did not contravene the criminal law at the time when it took place should not retrospectively be stigmatised as criminal, or expose the

perpetrator to punishment. As Lord Reid explained in *Waddington v Miah* (1974) 59 Cr App R 149, 151 and 152: 'There has for a very long time been a strong feeling against making legislation, and particularly criminal legislation, retrospective . . . I use retrospective in the sense of authorising people being punished for what they did before the Act came into force.'

"30. Mr Gledhill demonstrated that the Convention contained repeated references to expressions in English such as 'prescribed by law': in French, the same phrase reads 'prévue par la loi'. We shall assume that the concepts are identical. Article 7 therefore sustains his contention that a criminal offence must be clearly defined in law, and represents the operation of 'the principle of legal certainty' (see, for example, *Brumarescu v Romania* (2001) 33 EHRR 35, para 61 and *Kokkinakis v Greece* (1993) 17 EHRR 397, para 52). The principle enables each community to regulate itself: 'with reference to the norms prevailing in the society in which they live. That generally entails that the law must be adequately accessible—an individual must have an indication of the legal rules applicable in a given case—and he must be able to foresee the consequences of his actions, in particular to be able to avoid incurring the sanction of the criminal law.' (*S W v United Kingdom: C R v United Kingdom* (1995) 21 EHRR 363).

"31. Mr Gledhill further emphasised that in *Grayned v City of Rockford* (1972) 408 US 104 the United States Supreme Court identified 'a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vagueness offends several important values . . . A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.' He pointed out that Lord Phillips MR had approved these dicta in *R (L) v Secretary of State for the Home Department* [2003] 1 WLR 1230, para 25.

"32. We acknowledge the force of these submissions, but simultaneously emphasise that there is nothing novel about them in our jurisprudence. Historic as well as modern examples abound. In the 17th century Bacon proclaimed the essential link between justice and legal certainty: 'For if the trumpet give an uncertain sound, who shall prepare himself to the battle? So if the law give an uncertain sound, who shall prepare to obey it? It ought therefore to warn before it strikes . . . Let there be no authority to shed blood; nor let sentence be pronounced in any court upon cases, except according to a known and certain law . . . Nor should a man be deprived of his life, who did not first know that he was risking it.' (Quoted in *Coquillette,* Francis Bacon pp 244 and 248, from *Aphorism 8* and *Aphorism 39—A Treatise on Universal Justice*). The judgment of the Supreme Court of the United States in *Grayned* effectively mirrored Blackstone: 'Law, without equity, though hard and disagreeable, is much more desirable for the public good than equity without law: which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.' (*Commentaries*, 3rd ed, 1769, vol 1 p 62).

"33. Recent judicial observations are to the same effect. Lord Diplock commented in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591, 638: 'The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.' In *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 279 he repeated the same point: 'Elementary justice or, to use the concept often cited by the European court, the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or more realistically by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible.' More tersely, in *Warner v Metropolitan Police Commissioner* (1968) 52 Cr App R 373, 414, [1969] 2 AC 256, 296, Lord Morris of Borth-y-Gest explained in terms that: 'In criminal matters it is important to have clarity and certainty.' The approach of the common law is perhaps best encapsulated in the statement relating to judicial precedent issued by Lord Gardiner LC on behalf of himself and the Lords of Appeal in Ordinary on July 26, 1966 *Practice Statement (Judicial Precedent)* (1986) 83 Cr App R 191, [1966] 1 WLR 1234. 'Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.' In allowing themselves (but not courts at any other level) to depart from the absolute obligation to follow earlier decisions of the House of Lords, their Lordships expressly bore in mind: 'the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.'

"34. No further citation is required. In summary, it is not to be supposed that prior to the implementation of the Human Rights Act 1998, either this court, or the House of Lords, would have been indifferent to or unaware of the need for the criminal law in particular to be predictable and certain. Vague laws which purport to create criminal liability are undesirable, and in extreme cases, where it occurs, their very vagueness may make it impossible to identify the conduct which is prohibited by a criminal sanction. If the court is forced to guess at the ingredients of a purported crime any conviction for it would be unsafe. That said, however, the requirement is for sufficient rather than absolute certainty."

There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done. If the ambit of a common law offence is to be enlarged, it "must be done step by step on a case by case basis and not with one large leap": *R v Clark (Mark)* [2003] 2 Cr App R 363, para 13.

34 These common law principles are entirely consistent with article 7(1) of the European Convention, which provides:

A "*No punishment without law*

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

B The European court has repeatedly considered the effect of this article, as also the reference in article 8(2) to "in accordance with the law" and that in article 10(2) to "prescribed by law".

35 The effect of the Strasbourg jurisprudence on this topic has been clear and consistent. The starting point is the old rule nullum crimen, nulla poena sine lege (*Kokkinakis v Greece* (1993) 17 EHRR 397, para 52; *SW v United Kingdom* (1995) 21 EHRR 363, para 35/33): only the law can define C a crime and prescribe a penalty. An offence must be clearly defined in law (*SW v United Kingdom* 21 EHRR 363), and a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to foresee, if need be with appropriate advice, the consequences which a given course of conduct may entail (*Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 49; *G v Federal Republic of Germany* (1989) 60 DR 256, D 261, para 1; *SW v United Kingdom* 21 EHRR 363, para 34/32). It is accepted that absolute certainty is unattainable, and might entail excessive rigidity since the law must be able to keep pace with changing circumstances, some degree of vagueness is inevitable and development of the law is a recognised feature of common law courts (*Sunday Times v United Kingdom* 2 EHRR 245, para 49; *X Ltd and Y v United Kingdom* E (1982) 28 DR 77, 81, para 9; *SW v United Kingdom* 21 EHRR 363, para 36/34). But the law-making function of the courts must remain within reasonable limits (*X Ltd and Y v United Kingdom* 28 DR 77, para 9). Article 7 precludes the punishment of acts not previously punishable, and existing offences may not be extended to cover facts which did not previously constitute a criminal offence (ibid). The law may be clarified and adapted to new circumstances which can reasonably be brought under the F original concept of the offence (*X Ltd and Y v United Kingdom* 28 DR 77, para 9; *G v Federal Republic of Germany* 60 DR 256, 261–262). But any development must be consistent with the essence of the offence and be reasonably foreseeable (*SW v United Kingdom* 21 EHRR 363, para 36/34), and the criminal law must not be extensively construed to the detriment of an accused, for instance by analogy (*Kokkinakis v Greece* 17 EHRR 397, G para 52).

36 How, then, does the crime of causing a public nuisance, as currently interpreted and applied, measure up to these standards? Mr Perry, for the Crown, pointed out, quite correctly, that offences such as blasphemous libel (*X Ltd and Y v United Kingdom* 28 DR 77), outraging public decency (*S and G v United Kingdom* (Application No 17634/91) (unreported) 2 September 1991) and blasphemy (*Wingrove v United Kingdom* (1996) 24 EHRR 1) had H withstood scrutiny at Strasbourg. Only in *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241 had a finding that the applicants had acted contra bonos mores been held to lack the quality of being "prescribed by law". It was suggested, as put by *Emmerson & Ashworth, Human Rights and Criminal Justice* (2001), para 10–23, that: "the standard of certainty

required under the Convention, and under comparable constitutional principles, is not a particularly exacting one." I would for my part accept that the offence as defined by Stephen, as defined in *Archbold* (save for the reference to morals), as enacted in the Commonwealth codes quoted above and as applied in the cases (other than *R v Soul* 70 Cr App R 295) referred to in paras 13 to 22 above is clear, precise, adequately defined and based on a discernible rational principle. A legal adviser asked to give his opinion in advance would ascertain whether the act or omission contemplated was likely to inflict significant injury on a substantial section of the public exercising their ordinary rights as such: if so, an obvious risk of causing a public nuisance would be apparent; if not, not.

37 I cannot, however, accept that *R v Norbury* [1978] Crim LR 435 and *R v Johnson (Anthony)* [1997] 1 WLR 367 were correctly decided or that the convictions discussed in paras 23 to 27 above were soundly based (which is not, of course, to say that the defendants' conduct was other than highly reprehensible or that there were not other charges to which the defendants would have had no answer). To permit a conviction of causing a public nuisance to rest on an injury caused to separate individuals rather than on an injury suffered by the community or a significant section of it as a whole was to contradict the rationale of the offence and pervert its nature, in Convention terms to change the essential constituent elements of the offence to the detriment of the accused. The offence was cut adrift from its intellectual moorings. It is in my judgment very significant that when, in 1985, the Law Commission addressed the problem of poison-pen letters, and recommended the creation of a new offence, it did not conceive that the existing offence of public nuisance might be applicable. It is hard to resist the conclusion that the courts have, in effect, re-invented public mischief under another name. It is also hard to resist the conclusion expressed by Spencer in his article cited above [1989] CLJ 55, 77:

> "almost all the prosecutions for public nuisance in recent years seem to have taken place in one of two situations: first, where the defendant's behaviour amounted to a statutory offence, typically punishable with a small penalty, and the prosecutor wanted a bigger or extra stick to beat him with, and secondly, where the defendant's behaviour was not obviously criminal at all and the prosecutor could think of nothing else to charge him with."

As interpreted and applied in the cases referred to in paras 23 to 27 above, the offence of public nuisance lacked the clarity and precision which both the law and the Convention require, as correctly suggested by the commentators in [1978] Crim LR 435, 436 and [1980] Crim LR 234, Spencer [1989] CLJ 55, 77–79, and Professor Ashworth in his commentary on the present cases at [2004] Crim LR 303, 304–306. See also *McMahon & Binchy, Law of Torts*, 3rd ed (2000), p 676, fn 6.

Mr Rimmington's appeal

38 It seems to me clear that the facts alleged against Mr Rimmington, assuming them to be true, did not cause common injury to a section of the public and so lacked the essential ingredient of common nuisance, whatever other offence they may have constituted. The Crown contended that, if persistent and vexatious telephone calls were a public nuisance, it was a

small and foreseeable step to embrace persistent and vexatious postal communications within that crime also. I would agree that if the telephone calls were properly covered it would be a small and foreseeable development, involving no change in the essential constituent elements of the offence, to embrace postal communications also. But, for reasons already given, the crime of public nuisance does not extend to separate and individual telephone calls, however persistent and vexatious, and the extension of the crime to cover postal communications would be a further illegitimate extension. The judge and the Court of Appeal, bound by *R v Johnson* [1997] 1 WLR 367, reached a different conclusion. I am of opinion that for all the reasons given above, and those given by my noble and learned friends, this appeal must be allowed.

Mr Goldstein's appeal

39 The argument in this appeal was very largely directed to the issue of mens rea: what state of mind must be proved against a defendant to convict him of causing a public nuisance? The Crown contended that the correct test was that laid down by the Court of Appeal in *R v Shorrock* [1994] QB 279, 289, that the defendant is responsible for a nuisance which he knew, or ought to have known (because the means of knowledge were available to him), would be the consequence of what he did or omitted to do. That was a test clearly satisfied on the facts of that case, where the defendant deliberately permitted use of his field and should have known what the result would be. It is a test satisfied, I think, in all the public nuisance authorities considered above, save those based on vicarious liability (which are hard to reconcile with the modern approach to that subject in cases potentially involving the severest penalties, and may well be explained, as Mellor J did in *R v Stephens* (1866) LR 1 QB 702, 708–709, by the civil colour of the proceedings). I would accept this as the correct test, but it is a test to be applied to the correct facts.

40 Mr Goldstein deliberately posted an envelope containing a small quantity of salt. He intended it to reach the addressee, Mr Ehrlich. Had it done so there would have been no public nuisance, as the trial judge correctly directed the jury. The public nuisance alleged was the escape of the salt from the envelope, which led to the evacuation of the sorting office by 110 workers for an hour and the cancelling of a second post. I am willing to assume (without deciding) that those events could be a sufficiently substantial injury to a significant section of the public to amount to a public nuisance. But the escape of the salt was not a result which Mr Goldstein intended. Nor, plainly was it a result which he knew would occur, since it would have rendered his intended joke entirely futile. It would seem far-fetched to conclude that he should reasonably have known that the salt would escape, at any rate without detailed consideration of the type of envelope used and the care taken in sealing it. He himself said that he had no idea the salt would leak out (see the Court of Appeal judgment, para 38). But neither at trial nor on appeal was this question squarely addressed. The emphasis was on a foreseeable consequence if there were an escape and not on the foreseeability of an unintended escape. In the event, I conclude that it was not proved against Mr Goldstein that he knew or reasonably should have known (because the means of knowledge were available to him) that the salt would escape in the sorting office or in the course of post. For these

reasons, and those given by my noble and learned friends, his appeal must be allowed and his conviction quashed.

LORD NICHOLLS OF BIRKENHEAD

41 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bingham of Cornhill. I respectfully agree with his exposition of the common law offence of public nuisance, its boundaries, and the place this offence now occupies in the criminal law. For the reasons he gives I too would allow both appeals.

42 I add just one footnote, concerning hoax messages. Whether a hoax message is capable of constituting the offence of causing a public nuisance depends primarily upon the content of the hoax. In the ordinary course a hoax message which, as intended, inconvenienced only the recipient would lack the necessary public element. Very different would be a hoax message of the existence of a public danger, such as a hoax telephone call that an explosive device has been placed in a railway station. A hoax message of this character is capable of constituting the offence even though made to one person alone. This is because the message, to whomsoever addressed, was expected and intended to be passed via the police to users and potential users of the railway station. In other words, the message was the means whereby the caller intended to cause public alarm and disruption.

LORD RODGER OF EARLSFERRY

43 My Lords, I have had the privilege of considering the speech of my noble and learned friend, Lord Bingham of Cornhill, in draft. I agree with it but add some observations in view of the difficulty and importance of the issues involved.

44 The law of nuisance and of public nuisance can be traced back for centuries, but the answers to the questions confronting the House are not to be found in the details of that history. What may, perhaps, be worth noticing is that in 2 Institutes 406 Coke adopts a threefold classification of nuisance: public or general, common, private or special. Common nuisances are public nuisances which, for some reason, are not prosecutable. See *Ibbetson*, *A Historical Introduction to the Law of Obligations*, p 106 nn 62 and 65. So for Coke, while all public nuisances are common, not all common nuisances are public. Later writers tend to elide the distinction between common and public nuisances but, throughout, it has remained an essential characteristic of a public nuisance that it affects the community, members of the public as a whole, rather than merely individuals. For that reason, the appropriate remedy is prosecution in the public interest or, in more recent times, a relator action brought by the Attorney General. A private individual can sue only if he can show that the public nuisance has caused him special injury over and above that suffered by the public in general. These procedural specialties derive from the effect of the public nuisance on the community, rather than the other way round. I therefore doubt whether, in a criminal context at least, it is of much help to follow Denning LJ in the civil case of *Attorney General v PYA Quarries Ltd* [1957] 2 QB 169, 191 and to seek to identify a public nuisance by asking whether the nuisance is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it.

A **45** As Lord Bingham has shown, there have been many attempts to define the scope of public nuisance. The concept was applied to a number of disparate situations at a time when there was no perceived need to define its boundaries very precisely. In consequence, it has been aptly described as "a ragbag of odds and ends": J R Spencer, "Public Nuisance—a Critical Assessment" [1989] CLJ 55, 59. In his *Digest of the Criminal Law* even the highly rational Sir James Fitzjames Stephen could do little more than reflect this reality. Mr Guthrie used this lack of coherence in the definition of the offence as a basis for submitting that its contours were so uncertain as to make it incompatible with article 7 of the European Convention on Human Rights. While a lack of coherence in defining the scope of an offence may offend modern eyes, it does not follow that there is any violation of article 7. If the individual elements of the crime are identified clearly enough and the law is applied according to its terms, potential offenders and their advisers know where they stand: they cannot complain because the law could perhaps have been formulated more elegantly. For present purposes I would be content to adopt the definition in *Archbold, Criminal Pleading, Evidence and Practice 2005*, para 31–40, under deletion of the reference to morals:

> "A person is guilty of a public nuisance (also known as common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects."

46 Mr Rimmington seems to have embarked upon his vile campaign of letter writing in 1992. At all events, the first entry in the schedule relates to a letter received on 1 June 1992. If—most improbably—after sending a number of letters Mr Rimmington had paused to consider whether he was committing the offence of public nuisance, then he would surely have found enough in the books to put him on his guard. While there was apparently no case where the writer of obscene or objectionable letters had been prosecuted for public nuisance, there were several cases, starting with *R v Norbury* [1978] Crim LR 435, where it had been held or accepted that the making of a large number of obscene or objectionable telephone calls to individuals could constitute public nuisance. It would have been only prudent for Mr Rimmington to assume that the general reasoning behind those decisions would be applicable to the sending of a large number of obscene or objectionable letters. In that situation, superficially at least, the law was sufficiently certain to meet the requirements of article 7 for Mr Rimmington's purposes.

47 Of course, it does not follow that the law as laid down in the *R v Norbury* line of cases was correct: a statement of the law may be definite but wrong. I am indeed satisfied that the law was misstated in those cases. A core element of the crime of public nuisance is that the defendant's act should affect the community, a section of the public, rather than simply individuals. Obvious examples would be the release of smoke or fumes which affect a village or neighbourhood or the emission of loud noises which disturb the neighbourhood. In such cases the release or emission or—where it is repeated—each release or emission affects the public in the area. Of course, if one were to break it down, the general effect on the community

might well be seen to be made up of a collection of private nuisances occurring more or less simultaneously. Romer LJ made this point in *Attorney General v PYA Quarries Ltd* [1957] 2 QB 169, where the court granted an injunction against the defendants carrying on their business in such a manner as to cause splinters to be projected from the confines of their quarry or to occasion a nuisance to Her Majesty's subjects by dust or vibration. In the pleadings as originally framed the Attorney General had included various allegations about the damage caused to occupiers of the adjacent houses and land; that the vibrations were a source of danger to the houses, and that the dust settled on them and made them dirty and uncomfortable to live in. Counsel had later deleted these allegations on the ground that, in a public nuisance action, evidence of individual experiences should not be received, although such evidence would be highly relevant in cases of alleged private nuisance. Romer LJ rejected this argument, at p 187:

> "I cannot for myself accept this contention. Some public nuisances (for example, the pollution of rivers) can often be established without the necessity of calling a number of individual complainants as witnesses. In general, however, a public nuisance is proved by the cumulative effect which it is shown to have had on the people living within its sphere of influence. In other words, a normal and legitimate way of proving a public nuisance is to prove a sufficiently large collection of private nuisances."

Although the number of houses affected by the flying splinters of stone and by the dust and vibration presumably varied a bit from blast to blast, each blast tended to affect homes in the vicinity of the quarry and a picture of the overall effect of the blasting on the community could be built up from the evidence of individual residents about its effect on them.

48 As my noble and learned friend, Lord Nicholls of Birkenhead, points out, a telephone call or a letter, which is intended to be passed on and broadcast to the public, may be the means of effecting a public nuisance. Suppose, however, that someone makes a series of obscene telephone calls to people living in a village or neighbourhood. In that situation each call is heard, and is intended to be heard, only by the recipient. Of course, as the calls mount up, more and more residents will be affected and the general peace of the neighbourhood may be disturbed. But each telephone call affects only one individual, not the community in the village or neighbourhood. Therefore, it does not have that quality which is the hallmark of the crime of public nuisance. And no such individual call can become a criminal public nuisance merely by reason of the fact that it is one of a series. Otherwise, acts which were not criminal when originally done would become criminal at some unspecified point when the defendant had made enough calls for it to be said that, taken together, they were affecting the public in the neighbourhood. In my view, therefore, Judge Beezley set the law off down a wrong course in *R v Norbury* [1978] Crim LR 435, 435–436, when he ruled that a public nuisance was constituted by

> "a repetition over a long period and on a number of occasions of telephone calls of an obscene nature, intending to cause offence and alarm and resulting in such offence and alarm to a large number of Her

A Majesty's subjects, selected from a telephone directory or merely by chance dialling . . ."

In *R v Johnson (Anthony)* [1997] 1 WLR 367, the defendant was charged on an indictment containing one count of public nuisance, but the particulars referred to telephone calls made on hundreds of occasions to at least 13 women in the South Cumbria area. The defendant was convicted and, on
B appeal, argued that his conduct did not amount to the crime of public nuisance. The Court of Appeal rejected that argument. Applying the same reasoning as in *R v Norbury*, Tucker J said, at p 438C–D, that it was permissible to have regard to the cumulative effect of the calls in determining whether the appellant's conduct constituted a public nuisance. In the present case the Court of Appeal were, of course, bound by the decision in
C *R v Johnson* and duly applied it. For the reasons which I have given, I am satisfied that this approach was mistaken and that these decisions should be overruled.

49 Like the defendant in *R v Johnson*, Mr Rimmington was charged on an indictment containing one count of public nuisance. In his case the particulars referred to him sending 538 separate postal packages between 20 May 1992 and 13 June 2001. Details about the individual packages were
D set out in an extensive schedule. The first package in that schedule was received on 1 June 1992 and the next package that could be dated was received in October 1993. The recorded incidents are somewhat sparse until June 1995, after which there are many more packages, often apparently sent in batches posted about the same time but quite often in different areas. The recipients come from a variety of organisations scattered over different parts
E of London and the South East. Most of them would not know one another. In these circumstances it would be highly problematical, for Mr Rimmington or for a court, to decide at what point, if any, the cumulative effect of the letters meant that his conduct was materially affecting the reasonable comfort and convenience of a class of Her Majesty's subjects—and so, ultimately, to make the initial incident in 1992, retrospectively, one component of a single crime of public nuisance committed over nine years.
F A crime which was defined so as to apply in such an uncertain way would indeed be objectionable, both in terms of the well-recognised standards of English law and in terms of the Convention jurisprudence. Both are conveniently summarised in the passage from the judgment of Judge LJ in *R v Misra* [2005] 1 Cr App R 21, paras 29–34, which Lord Bingham has quoted. But, as I have explained, I am satisfied that the particulars in the
G indictment do not disclose a legally relevant charge of public nuisance. I accordingly agree that Mr Rimmington's appeal must be allowed.

50 The course of conduct which Mr Rimmington pursued in sending these letters was so depraved and offensive that it would be a matter of concern if the criminal law could not deal with it. But that is not the case. As his counsel noted, though with understandable diffidence, there are other offences which might cover the kind of conduct with which he was charged.
H Section 1 of the Malicious Communications Act 1988, as amended, makes it an offence to send another person a letter, electronic communication or article of any description which conveys a message which is indecent or grossly offensive, or which conveys a threat or information which is false and known or believed to be false. The offence is punishable on summary

conviction with a maximum of six months' imprisonment and a fine on scale 5. Similarly, by section 85(1) and (4) of the Postal Services Act 2000 it is an offence to send by post a packet enclosing any thing which is likely to injure a postal worker or which is indecent or obscene. The offence is triable either way: on summary conviction it is punishable by a fine, while on conviction on indictment it is punishable by imprisonment for up to 12 months and a fine. Mr Perry accepted, on behalf of the Crown, that some, at least, of the incidents alleged against Mr Rimmington would have fallen within the scope of one or other of the statutory provisions. So any decision by your Lordships that Mr Rimmington's conduct does not amount to public nuisance would leave it open to the Crown to deal with future offenders by charging them with the appropriate statutory offence.

51 Why then did the Crown not adopt that course in Mr Rimmington's case? Mr Perry gave two reasons. First, by the time that Mr Rimmington was unmasked as the writer of the letters, many of the incidents were so old that there was a bar on any prosecution under statute. Secondly, even where the offences were not time-barred, the sentence available on conviction under statute was regarded as insufficient to mark the seriousness of the appellant's conduct. And, if a number of separate offences were charged together in summary proceedings, the maximum sentence that could be imposed was limited to 12 months. In order to avoid these difficulties, it had been decided to charge Mr Rimmington on indictment with the common law crime of public nuisance.

52 When Parliament enacted the statutory offences, it did not expressly abolish the corresponding aspect of the common law offence of public nuisance. Therefore, if—contrary to my view—Mr Rimmington's conduct in writing the letters had amounted to a public nuisance, it would presumably have continued to do so even after the statutory offences were introduced. So a charge could not have been regarded as bad simply because it was framed in terms of the common law rather than in terms of the statute. To put the matter more generally, where Parliament has not abolished the relevant area of the common law when it enacts a statutory offence, it cannot be said that the Crown can never properly frame a common law charge to cover conduct which is covered by the statutory offence. Where nothing would have prevented the Crown from charging the defendant under the statute and where the sentence imposed would also have been competent in proceedings under the statute, the defendant is not prejudiced by being prosecuted at common law and can have no legitimate complaint.

53 Here, however, according to what Mr Perry told the House, the Crown had deliberately chosen the common law offence in order to avoid the time-bar which Parliament had enacted and to allow the judge, if he thought fit, to impose a heavier sentence than the one permitted under statute. The issue bears some resemblance to the issue in *R v J* [2005] 1 AC 562. There is no suggestion, of course, that the Crown acted in bad faith. On the contrary, it is easy to understand why they did what they did. In a particular case, such as this, a time-limit which prevents prosecution once a certain time has passed since the act was committed can appear to be arbitrary and to reward an offender for concealing his offences. The sentence available under the statute may also seem inadequate to reflect the gravity of the defendant's conduct. But Parliament has deliberately chosen to intervene and to prescribe a period within which conduct of this kind can

be prosecuted summarily under statute. This must be taken to reflect Parliament's judgment that, if the conduct has not been prosecuted within that time, the public interest is now against proceeding. That judgment may be based on various factors. Parliament may, for example, consider that after a certain period everyone should move on and prosecutors should turn their attention to other matters. Police and prosecution resources, it may be thought, are better spent on detecting and prosecuting recent, rather than stale, offences of this kind or recent, rather than old, incidents in a course of conduct. More serious matters should be given priority. Similarly, in the matter of sentence, Parliament has reached a view that certain conduct is appropriately covered by an offence which can be tried only summarily and which should attract no more than a particular level of sentence. Parliament has also fixed the maximum sentence to be imposed in summary proceedings, even where the defendant is convicted of more than one charge. Again, in any particular case, the sentence available under statute may appear to the prosecutor to be inadequate. But Parliament is entitled to place an offence in what it regards as the appropriate level in the hierarchy of offences and to limit the sentencing power of a court where the accused is not tried by jury.

54 It is not for the Crown to second-guess Parliament's judgment as to any of these matters by deliberately setting out to reject the applicable statutory offences and to charge the conduct in question under common law in order to avoid the time-limits or limits on sentence which Parliament has thought appropriate. It may be that, in the light of experience, Parliament's judgment can be seen to have been flawed or to have been superseded by events. Doubtless, the prosecuting authorities have channels through which they can—and perhaps should—draw any such perceived deficiencies to the attention of the Home Secretary. It is then up to ministers and, ultimately, Parliament to decide whether the law should be changed. But, unless and until it is changed, its provisions should be respected and the Crown should not devise a strategy to avoid them.

55 Lord Bingham has described the circumstances of Mr Goldstein's case. It is plain that he put the salt in the envelope intending it to be a humorous message to his friend, Mr Ehrlich, who would have understood the joke. He posted the letter in a period when, following events in the United States, there were fears about the possibility of anthrax germs being sent through the post. It is therefore not surprising that when, just before 6 a m, some of the salt spilled out of the torn envelope on to the hands of a sorter, Mr Owen, he raised the alarm. Indeed, Mr Goldstein accepted that the escape of the salt could have terrified Mr Owen. The Wembley sorting office was cleared and the police were called. They soon saw that the powder was salt but the sorters could not return to work for over an hour. For that reason, the first delivery of letters was somewhat later than usual. The management then decided to cancel the second delivery since, by the time the first delivery had been completed, the postal workers had finished their shift and would have had to be paid overtime to do the second delivery. The judge reminded the jury of evidence that over 35,000 businesses missed the second delivery and that some people had telephoned to complain. He was therefore directing the jury that, in deciding whether Mr Goldstein was guilty of public nuisance, they could take account of the inconvenience to the public caused by the cancellation of the second delivery.

56 In *R v Shorrock* [1994] QB 279, 289, the Court of Appeal held that a defendant landowner was responsible for a public nuisance which he knew or ought to have known (in the sense that the means of knowledge were available to him) would be the consequence of activities carried on by him on his land. In the present case the Court of Appeal held that a similar test should be applied to Mr Goldstein. Mr Goldberg argued that the House should disapprove the decision in *R v Shorrock* and bring the mens rea for public nuisance into line with the approach adopted in *R v G* [2004] 1 AC 1034. For my part, I was not persuaded by that submission. In *R v G* the House was considering the proper interpretation of "reckless" in section 1(1) and (2) of the Criminal Damage Act 1971 and, in para 28 of the leading speech, Lord Bingham made it as plain as he could that he was not addressing the meaning of "reckless" in any other statutory or common law context. The decision is therefore not in point. Particularly having regard to the essentially regulatory nature of much of the law of public nuisance, it seems to me that, even if it is unusual, the mens rea described in *Shorrock* is apt in situations where the offence truly applies. I would accept the reasoning in *R v Shorrock*. Applying the test in *R v Shorrock*, I am, however, satisfied that Mr Goldstein did not have the necessary mens rea to be convicted of public nuisance.

57 It was not unlawful for Mr Goldstein to put salt into a packet to be sent through the post. Nevertheless, if he had done so with the intention of provoking an anthrax scare and disrupting the post and if those events had come to pass, he might well have been guilty of public nuisance. But, according to the evidence, he had no such intention and, he said, he had never for a moment foreseen that the salt would leak out. Even if he had done so, however, it seems to me impossible to hold that he either knew or had the means of knowing that the events which happened in the Wembley sorting office and in the surrounding district would occur. In the heightened atmosphere of the time, he might have been able to foresee that there would be some disruption in the sorting office, but he had no means of knowing at what time of day his letter would be sorted or that the second delivery of post would be cancelled and cause inconvenience to the businesses in the area. Indeed, as the judge explained to the jury, the manager only decided to cancel it when he realised that they would have to pay overtime to the postal workers to do the work. The disruption to the public, which the jury were invited to consider, was therefore not an immediate consequence of Mr Goldstein's act, but the consequence of an independent commercial decision of the post office management which he had no means of anticipating when he posted the letter. To hold Mr Goldstein guilty of public nuisance on the basis of this (relatively minor) inconvenience to the public would be to stretch the offence beyond its legitimate limits. I accordingly agree that his appeal should be allowed and his conviction quashed.

BARONESS HALE OF RICHMOND

58 My Lords, I agree, for the reasons given by my noble and learned friend, Lord Bingham of Cornhill, that both these appeals should be allowed. It is not open to the courts, however tempted they might be by the history so attractively presented by John Spencer in his valuable article, "Public Nuisance—A Critical Assessment" [1989] CLJ 55, to abolish existing

offences. Nor it is open to the courts to "widen existing offences so as to make punishable conduct of a type hitherto not subject to punishment" (para 33, above). We are not, therefore, engaged in a law reform exercise. Our task is to define and re-establish the essential ingredients of the crime as they emerged after the publication of *Hawkins' Treatise of the Pleas of the Crown* in 1716. The essence of the crime which he and the later institutional writers identified was, as my noble and learned friend has shown, "the suffering of common injury by members of the public by interference with rights enjoyed by them as such" (para 6, above). It is not permissible to multiply separate instances of harm suffered by individual members of the public, however similar the harm or the conduct which produced it, and call them a common injury. Conduct which was not criminal when the first letter was sent would become criminal at some unknown future time when it was thought that enough such letters had been sent to constitute such a common injury. This must be wrong in principle. Nor can it be right to punish someone who had no reason to think that his letter would cause any harm to anyone, because he had no reason to think that the salt would leak out in circumstances where his joke would not be understood.

59 I am pleased to be able to reach both conclusions, because I was a signatory to the Law Commission's Report on Poison-Pen Letters (Law Com No 147) (1985). This resulted in the Malicious Communications Act 1985, which seems tailor-made to identify any culpable conduct in both these situations. This arose from the Commission's examination of the common law offence of criminal libel, as part of its programme of codification of the Criminal Law. Neither in that Report, nor in the preceding Working Paper on Criminal Libel (LCWP No 84) (1982), was it suggested that public nuisance might be available to cover campaigns of multiple malicious communications such as that conducted by Mr Rimmington. This is all the more remarkable, as the Commission had briefly considered public nuisance in the context of its work on public order offences, which eventually resulted in the Public Order Act 1986. The Commission had originally intended to include public nuisance in that work, as it had sometimes been used in public order situations, such as "sit-down" demonstrations in central London: see *R v Moule* [1964] Crim LR 303; *R v Adler* [1964] Crim LR 304; cf *R v Clark (No 2)* [1964] 2 QB 315. In its Working Paper on Offences against Public Order (LCWP No 82) (1982) at paras 1.9 to 1.12, however, the Commission announced that reviewing the offence, either as a whole or insofar as it penalised highway obstructions, would take the project far outside the realms of public order. The "best practicable approach" would be a separate review of the whole offence (para 1.12). Unfortunately, however, this has not been done. The Commission did remark (at para 1.10) that the offence had been used in a wide variety of situations, and referred to the then relatively recent cases of *R v Norbury* [1978] Crim LR 435 (making a large number of obscene telephone calls) and *R v Soul* 70 Cr App R 295 (assisting in effecting the escape of a patient from Broadmoor). So the offence of public nuisance, as recently employed in the courts, was certainly in the minds of the criminal law team at the Commission in 1982 when they were working on poison pen letters. Yet nowhere was it suggested that public nuisance might be the appropriate response to the more serious and prolonged "poison pen" campaigns, although these are by no means uncommon. I am relieved to be able to conclude that the Commission was

right to ignore it. It is of interest to note, however, that in its Report on Offences relating to Public Order (Law Com No 123) (1983) at para 1.8, the Commission did say that if the recommended offences were enacted "it will be preferable for public nuisance not to be charged in situations where there are disturbances to public order", thus foreshadowing the observations of my noble and learned friend, at para 30 above.

LORD BROWN OF EATON-UNDER-HEYWOOD

60 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bingham of Cornhill. I respectfully agree with all that he says and for the reasons he gives, I too would allow both these appeals.

61 I also agree with what Lord Nicholls of Birkenhead says in para 42 of his speech and with the speeches of Lord Rodger of Earlsferry and Baroness Hale of Richmond.

Appeals allowed.
Costs out of central funds.

Solicitors: Coninghams, Twickenham; Crown Prosecution Service; Barker Gillette; Crown Prosecution Service.

S H

A

The Law Reports

Queen's Bench Division

B

Court of Appeal

C

Regina (Johnson and others) *v* Havering London Borough Council (Secretary of State for Constitutional Affairs and another intervening)

[2007] EWCA Civ 26

D

YL *v* Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)

[2007] EWCA Civ 27

2007 Jan 11, 12; 30 Sir Anthony Clarke MR, Buxton and Dyson LJJ

E *Human rights — Public authority — Functions of public nature — Local authority under duty to provide accommodation for claimants — Local authority arranging for accommodation to be provided by private care home — Whether private care home exercising functions of public nature in providing accommodation — Whether transfer of local authority care home to private organisation unlawfully depriving residents of Convention rights — National Assistance Act 1948 (11 & 12 Geo 6, c 29), ss 21, 26 (as amended by Local Government Act 1972 (c 70), s 195(6), Sch 23, para 2(1), Children Act 1989 (c 41), s 108(5), Sch 13, para 11(1), National Health Service and Community Care Act 1990 (c 19), s 42(1) and as substituted by Community Care (Residential Accommodation) Act 1992 (c 49), s 1(1)) — Human Rights Act 1998 (c 42), s 6(1)(3)(b)*

F

In the first case the elderly claimants received residential care pursuant to section 21 of the National Assistance Act 1948[1] at care homes owned and run by their local authority. The local authority decided to transfer two of the homes as going concerns to the private sector and to close two others, after the residents had

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[1] National Assistance Act 1948, s 21, as amended: "(1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing— (a) residential accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them . . . (2) In making any such arrangements a local authority shall have regard to the welfare of all persons for whom accommodation is provided . . ."

H

S 26, as substituted: "(1) . . . arrangements under section 21 of this Act may include arrangements made with a voluntary organisation or with any other person who is not a local authority where—(a) that organisation or person manages premises which provide for reward accommodation falling within subsection (1)(a) . . . of that section, and (b) the arrangements are for the provision of such accommodation in those premises."

been suitably accommodated elsewhere, under arrangements made pursuant to section 26 of the 1948 Act. The claimants sought judicial review of the decision on the ground that such closure and transfer to the private sector would unlawfully deprive residents of effective protection for their human rights under, in particular, articles 3 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, contrary to section 6(1) of the Human Rights Act 1998[2]. In dismissing the claim, the judge held (i) that he was bound by Court of Appeal authority to hold that a private care home, in providing accommodation under such arrangements, did not exercise "functions of a public nature" within section 6(3)(b) of the 1998 Act and thus was not a "public authority" within section 6(1) against whom the residents could bring a direct action for breach of their Convention rights, but (ii) that the proposed transfer was not incompatible with the residents' Convention rights since they would continue to retain those rights as against the local authority even after transfer. The claimants appealed against both of the judge's conclusions. The Secretary of State for Constitutional Affairs, intervening, supported the claimants' contention with respect to conclusion (i) that the Court of Appeal authority was wrongly decided or no longer binding precedent, being inconsistent with subsequent guidance of the House of Lords.

In the second case the elderly claimant, YL, was placed by her local authority in a private care home under arrangements made pursuant to sections 21 and 26 of the 1948 Act. The owners of the care home subsequently sought to terminate the contract for her care and remove her from the home. YL, by the Official Solicitor as her litigation friend, sought declarations in the Family Division under CPR Pt 8 that it was in her best interest not to be removed, that the care home, in providing accommodation and care for her, was exercising public functions under section 6 of the 1998 Act, and that in removing her the care home would be acting incompatibly with her Convention rights. On the hearing of a preliminary issue the judge concluded that he was bound by the same Court of Appeal authority to hold that the care home, in providing care and accommodation for YL, was not exercising a public function for the purposes of section 6(3)(b) of the 1998 Act. YL appealed. The Secretary of State, intervening, supported her appeal.

On the appeals—

Held, dismissing the appeals, (1) that in the first case, assuming that on transfer a private care home was not a public authority, the change in the residents' legal position that occurred when homes were transferred from public to private control under arrangements made pursuant to section 26 of the 1948 Act did not amount to a breach of the residents' Convention rights, even though they would be unable to assert their Convention rights directly against the private care home; that residents would not suffer any significant loss of protection under article 3 by the transfer of immediate control of their residence from the public to the private sector, since lack of consideration or inadequate standards would not fall within the article, degrading treatment that was akin to inhumanity would almost certainly constitute a breach of the criminal law, and inhumane treatment generally would engage the local authority's responsibilities for the residents' welfare under section 21(2) of the 1948 Act and its responsibility to enter and inspect private care homes under section 26(5); that neither did the proposed transfer involve a diminution or breach of the residents' rights under article 8, since, first, the protections afforded by the fixed and rigorous standards imposed by the Care Standards Act 2000 and supervised by the Commission for Social Care Inspection well exceeded those guaranteed by article 8, and, secondly, the local authority remained responsible under section 21 of the 1948 Act for, and continued to have article 8 obligations towards, any resident whom a private care home sought to remove (post, paras 8, 11–12, 14–17, 85, 86).

[2] Human Rights Act 1998, s 6: "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right . . . (3) In this section 'public authority' includes . . . (b) any person certain of whose functions are functions of a public nature . . ."

(2) That existing Court of Appeal authority was not inconsistent with subsequent guidance of the House of Lords, was indistinguishable from the present case on the facts, and the court therefore remained bound by it to hold that a private care home, when accommodating residents under arrangements made with a local authority for the implementation of the authority's obligations under section 21 of the 1948 Act, was not exercising a public function for the purposes of section 6(3)(b) of the 1998 Act (post, paras 27, 63, 66, 85, 86).

R (Heather) v Leonard Cheshire Foundation [2002] 2 All ER 936, CA followed.

Young v Bristol Aeroplane Co Ltd [1944] KB 718, CA and *Kay v Lambeth London Borough Council* [2006] 2 AC 465, HL(E) applied.

Poplar Housing and Regeneration Community Association Ltd v Donoghue [2002] QB 48, CA and *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, HL(E) considered.

Decisions of Forbes J [2006] EWHC 1714 (Admin) and Bennett J [2006] EWHC 2681 (Fam) affirmed.

The following cases are referred to in the judgments:

A v B plc [2002] EWCA Civ 337; [2003] QB 195; [2002] 3 WLR 542; [2002] 2 All ER 545, CA

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37; [2004] 1 AC 546; [2003] 3 WLR 283; [2003] 3 All ER 1213, HL(E)

Buzescu v Romania (Application No 61302/00) (unreported) 24 May 2005, ECtHR

Costello-Roberts v United Kingdom (1993) 19 EHRR 112

Ferrazzini v Italy (2001) 34 EHRR 1068

Kay v Lambeth London Borough Council [2006] UKHL 10; [2006] 2 AC 465; [2006] 2 WLR 570; [2006] 4 All ER 128, HL(E)

M v Secretary of State for Work and Pensions [2006] UKHL 11; [2006] 2 AC 91; [2006] 2 WLR 637; [2006] 4 All ER 929, HL(E)

Marckx v Belgium (1979) 2 EHRR 330

Marzari v Italy (1999) 28 EHRR CD 175

Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595; [2002] QB 48; [2001] 3 WLR 183; [2001] 4 All ER 604, CA

R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2) [2000] 1 AC 119; [1999] 2 WLR 272; [1999] 1 All ER 577, HL(E)

R v Wandsworth London Borough Council, Ex p Beckwith [1996] 1 WLR 60; [1996] 1 All ER 129, HL(E)

R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd [2003] EWCA Civ 1056; [2004] 1 WLR 233, CA

R (Bernard) v Enfield London Borough Council [2002] EWHC 2282 (Admin); [2003] LGR 423

R (Heather) v Leonard Cheshire Foundation [2002] EWCA Civ 366; [2002] 2 All ER 936, CA

Storck v Germany (2005) 43 EHRR 96

Sychev v Ukraine (Application No 4773/02) (unreported) 11 October 2005, ECtHR

Van der Mussele v Belgium (1983) 6 EHRR 163

Von Hannover v Germany (2004) 40 EHRR 1

Williams v Glasbrook Bros Ltd [1947] 2 All ER 884, CA

Woś v Poland (Application No 22860/02) (unreported) 1 March 2005, ECtHR

X and Y v The Netherlands (1985) 8 EHRR 235

Young v Bristol Aeroplane Co Ltd [1944] KB 718; [1944] 2 All ER 293, CA

Young, James and Webster v United Kingdom (1981) 4 EHRR 38

The following additional cases were cited in argument:

A v A Health Authority [2002] EWHC 18 (Fam/Admin); [2002] Fam 213; [2002] 3 WLR 24

Botta v Italy (1998) 26 EHRR 241
Cameron v Network Rail Infrastructure Ltd (formerly Railtrack plc) [2006] EWHC 1133 (QB); [2007] 1 WLR 163; [2007] 3 All ER 241
Collins v United Kingdom (2002) 36 EHRR CD 6
Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1; [1997] 2 WLR 898; [1997] 3 All ER 297, HL(E)
DP and JC v United Kingdom (2002) 36 EHRR 183
Eldridge v British Columbia (Attorney General) [1997] 3 SCR 624
Evans v United Kingdom (Application No 6339/05) (unreported) 7 March 2006, ECtHR
Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 WLR 113; [2004] 3 All ER 411, HL(E)
Holy Monasteries v Greece (1994) 20 EHRR 1
MC v Bulgaria (2003) 40 EHRR 459
Malone v United Kingdom (1984) 7 EHRR 14
Osman v United Kingdom (1998) 29 EHRR 245
Pentiacova v Moldova (2005) 40 EHRR SE 209
R v East Berkshire Health Authority, Ex p Walsh [1985] QB 152; [1984] 3 WLR 818; [1984] 3 All ER 425, CA
R v Kensington and Chelsea Royal London Borough Council, Ex p Kujtim [1999] 4 All ER 161; [1999] LGR 761, CA
R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213; [2000] 2 WLR 622; [2000] 3 All ER 850, CA
R v Servite Houses, Ex p Goldsmith [2001] LGR 55
R (A) v Partnerships in Care Ltd [2002] EWHC 529 (Admin); [2002] 1 WLR 2610
R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening) [2004] EWHC 2911 (Admin); [2007] QB 140; [2005] 2 WLR 1401, DC
R (Amin) v Secretary of State for the Home Department [2003] UKHL 51; [2004] 1 AC 653; [2003] 3 WLR 1169; [2003] 4 All ER 1264, HL(E)
R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2005] UKHL 57; [2006] 1 AC 529; [2005] 3 WLR 837; [2006] 3 All ER 111, HL(E)
R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 AC 323; [2004] 3 WLR 23; [2004] 3 All ER 785, HL(E)
S (Minors) (Care Order: Implementation of Care Plan), In re [2002] UKHL 10; [2002] 2 AC 291; [2002] 2 WLR 720; [2002] 2 All ER 192, HL(E)
Sørensen and Rasmussen v Denmark (Application Nos 52562/99 and 52620/99) (unreported) 11 January 2006, ECtHR
West v Secretary of State for Scotland 1992 SC 385
Woodward v Abbey National plc (No 1) [2006] EWCA Civ 822; [2006] ICR 1436; [2006] 4 All ER 1209, CA
Z v United Kingdom (2001) 34 EHRR 97

The following additional cases, although not cited, were referred to in the skeleton arguments:

Appleby v United Kingdom (2003) 37 EHRR 783
Chapman v United Kingdom (2001) 33 EHRR 399
Consejo General de Colegios Oficiales de Economistas de España v Spain (1995) 82-B DR 150
D v East Berkshire Community NHS Trust [2003] EWCA Civ 1151; [2004] QB 558; [2004] 2 WLR 58; [2003] 4 All ER 796, CA
Douce v Staffordshire County Council [2002] EWCA Civ 506; 5 CCLR 347, CA
Glaser v United Kingdom (2000) 33 EHRR 1
HL v United Kingdom (2004) 40 EHRR 761
Loizidou v Turkey (1995) 20 EHRR 99
Moreno Gómez v Spain (2004) 41 EHRR 899

A *Observer, The, and The Guardian v United Kingdom* (1991) 14 EHRR 153
R v Devon County Council, Ex p Baker [1995] 1 All ER 73, CA
R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2003] 2 AC 295; [2001] 2 WLR 1389; [2001] 2 All ER 929, HL(E)
R (Cowl) v Plymouth City Council (Practice Note) [2001] EWCA Civ 1935; [2002] 1 WLR 803, CA
B *R (Reynolds) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797; [2003] 3 All ER 577, CA
R (West) v Lloyd's of London [2004] EWCA Civ 506; [2004] 3 All ER 251, CA
Steel and Morris v United Kingdom (2005) 41 EHRR 403
Wainwright v United Kingdom (2006) 44 EHRR 809
X (Minors) v Bedfordshire County Council [1995] 2 AC 633; [1995] 3 WLR 152; [1995] 3 All ER 353, HL(E)

C

R (Johnson and others) v Havering London Borough Council (Secretary of State for Constitutional Affairs and another intervening)

APPEAL from Forbes J

By a judicial review claim form filed on 19 October 2005 and amended statement of facts and grounds dated 9 February 2006, the claimants Elspeth
D Johnson (in substitution for Ivy Tabberer), Victor Thomas and Lillian Manning, who resided at care homes owned and controlled by Havering London Borough Council and who were provided by the council with care pursuant to section 21 of the National Assistance Act 1948, challenged the council's decision of 20 July 2005 that certain of the council's care homes should be transferred as going concerns to the independent sector, and that others should close when all residents had transferred to suitable alternative
E provision. The effective ground of challenge was that the closure and transfer to the private sector of the homes would lead to residents being deprived of effective protection for their human rights, which the council was obliged to guarantee, and would thus be unlawful under section 6(1) of the Human Rights Act 1998, as constituting a failure by the council to act compatibly with the Convention for the Protection of Human Rights and
F Fundamental Freedoms. The Secretary of State for Constitutional Affairs and the National Care Association ("NCA") were joined as interested parties. By order dated 11 July 2006 Forbes J dismissed the claim and refused the claimants, the Secretary of State and the NCA permission to appeal.

By an appellant's notice filed on 23 July 2006 and subsequently amended, and pursuant to permission given by the Court of Appeal (Waller and
G Hooper LJJ) on 5 December 2006, the claimants appealed on the grounds, inter alia, (1) that the judge had erred in concluding that transfer from local authority to private sector accommodation did not, in principle, lead to the residents' Convention rights being either diminished or removed, and that the residents would continue to retain their Convention rights protection under the Human Rights Act 1998 in the same way and to the same extent as
H previously; (2) that the judge's conclusion was wrong because, inter alia, after transfer to private care the claimants would no longer be able to rely on direct breaches of their substantive rights by the local authority, for example breaches of their rights under articles 2, 3, 8 and 14, but would only be able to rely on breaches of the local authority's positive obligations towards them, which constituted a fundamental and material diminution in the

nature of the rights and protection that the claimants would have in private care as compared with public care; and (3) that, in the alternative, the judge had been wrong to find that a private care provider, to whom the local authority intended to delegate its duties to the claimants under section 21 of the 1948 Act, pursuant to section 26, would not be a "public authority" under section 6(1) of the 1998 Act by virtue of the definition of "public authority" in section 6(3)(b).

By a respondent's notice filed on 19 December 2006 the Secretary of State supported the claimants' appeal to the extent that, having regard to the guidance given by the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 on the proper interpretation of section 6(3)(b) of the 1998 Act and to the jurisprudence of the European Court of Human Rights, the judge had erred in holding that he was bound by *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936 to conclude that care homes providing accommodation in the relevant circumstances did not exercise functions of a public nature within the meaning of section 6(3)(b) of the Human Rights Act 1998. The Secretary of State sought to uphold the judge's conclusion that in any event transfer of the council's care homes to the private sector would not in principle infringe the claimants' Convention rights.

The Disability Rights Commission and Help the Aged, intervening, made written submissions on the appeal.

The facts are stated in the judgment of Buxton LJ.

YL v Birmingham City Council and others (Secretary of State for Constitutional Affairs intervening)

APPEAL from Bennett J

The claimant, YL, an elderly person requiring residential care pursuant to section 21 of the National Assistance Act 1948, was placed by the first defendant, Birmingham City Council ("Birmingham"), in a private care home owned and run by the second defendant ("the care home"). On 28 August 2006 YL, acting through the Official Solicitor as her litigation friend, issued proceedings in the Family Division of the High Court under CPR Pt 8 seeking declarations that it was in her best interest not to be moved from the care home, that the care home, in providing accommodation and care for her, was exercising public functions under section 6 of the Human Rights Act 1998 and that to move her from the home would be contrary to her rights under articles 2, 3 and 8 of the Human Rights Convention. OL and VL, relatives of YL, were joined in the proceedings as the third and fourth defendants. On 12 September 2006 Ryder J directed that the question whether the care home, in providing care and accommodation for YL, was exercising a public function for the purposes of section 6(3)(b) of the 1998 Act, should be heard as a preliminary issue. By order dated 5 October 2006 Bennett J answered the question in the negative.

By an appellant's notice filed on 19 October 2006, and with permission given by the Court of Appeal (Buxton LJ) on 11 December 2006, YL appealed on the grounds that the judge had erred in his conclusion and failed to have proper regard to (i) the imperative to give a generous interpretation to "public function" for the purpose of section 6(3)(b) of the 1998 Act, as explained in *Aston Cantlow and Wilmcote with Billesley Parochial Church*

Council v Wallbank [2004] 1 AC 546, para 11, (ii) the nature of the functions being provided, being those required to be carried out by section 21 of the 1948 Act, and (iii) the case law of the European Court of Human Rights, which suggested that Convention obligations were not absolved by a transfer of functions to a non-state body. The court received written submissions from OL and VL in support of the appeal.

The facts are stated in the judgment of Buxton LJ.

Jessica Simor for the claimants in Johnson's case. The provision of care under sections 21 and 26 of theNational Assistance Act 1948 is in almost all cases the means by which a local authority discharges its positive obligation under articles 2, 3, 5 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms: see *R (Bernard) v Enfield London Borough Council* [2003] LGR 423, paras 26–29, 34. A local authority is required to ensure real and effective protection of the Convention rights of those for whom such care is provided: see 6(1) of the Human Rights Act 1998. This involves retaining the protection of the Act itself. The claimants presently have directly enforceable rights under the 1998 Act against the council, as a public authority, but not against a private care home, assuming that it does not exercise functions of a public nature under section 6(3)(b) of the 1998 Act: see *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936. By transferring the claimants' care to the private sector in circumstances where the private provider would not be bound by the 1998 Act, the council would prospectively negate or substantively diminish the claimants' rights, contrary to section 6(1) of the 1998 Act.

The existing statutory and regulatory scheme governing the provision of care, however high and rigorous its standards, will not adequately protect the claimants' Convention rights. Nor, contrary to the dicta of Lord Woolf CJ in the *Leonard Cheshire Foundation* case, at para 34, will contractual terms between the council and the care homes fully protect those rights after transfer: see the Report of the Joint Parliamentary Committee on Human Rights on "The Meaning of Public Authorities under the Human Rights Act" (HL Paper 39, HC 382), paras 41, 51, 66–67, 115–116, 120, 125–126, 153. In any event such contractual protections could not be effectively enforced either by the local authority or the individual resident: see *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, 16; *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55, 66 and *R v Kensington and Chelsea Royal London Borough Council, Ex p Kujtim* [1999] 4 All ER 161; and compare *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213.

A claimant may retain some rights against a local authority after transfer, but they will be different from and less valuable rights than those which he currently enjoys. Once a local authority has discharged its duty under section 21 of the 1948 Act through the provision of accommodation by a voluntary body or other person under section 26 its responsibility ceases. The private provider is not an agent of the council: see *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55. Most importantly, after transfer a claimant will no longer be able to rely on the local authority's direct interference with or failure to respect his rights, but will have to establish that the council has failed in its positive obligation to take reasonable steps to ensure that his

rights are safeguarded by the private provider: see *DP and JC v United Kingdom* (2003) 36 EHRR 183, para 109.

There is a distinction between positive and negative obligations under the Convention. *Evans v United Kingdom* (Application No 6339/05) (unreported) 7 March 2006 and *Sørensen and Rasmussen v Denmark* (Application Nos 52562/99 and 52620/99) (unreported) 11 January 2006 do not support the council's submission to the contrary.

The council and the Secretary of State are wrong in submitting that the claimants are complaining about the loss of an effective remedy under article 13 rather than the loss of rights. *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291 is distinguishable.

Section 6(2)(b) of the 1998 Act provides no answer to the unlawfulness of the council's proposed action. Section 26 of the 1948 Act is compatible with the Convention if the phrase public functions in section 6(3)(b) of the 1998 Act is read as including the functions carried out by private providers pursuant to section 26. Article 13 of the Convention, though not incorporated in the 1998 Act, is relevant when interpreting section 6: see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, paras 44, 160. Moreover, section 3 of the 1998 Act applies to the interpretation of its own provisions: see *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening)* [2007] QB 140, para 291. The correct approach to interpreting section 6(3)(b) is set out in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

In the event that a court orders specific performance of a contract between the council and a care home, sections 21 and 26 may be read compatibly with the Convention by requiring the private provider to enter into a contract with the resident under which the resident's Convention rights form enforceable contractual terms. If section 26 cannot be read compatibly with the Convention, the court should make a declaration of incompatibility under section 4 of the 1998 Act.

The decision of the Court of Appeal in the *Leonard Cheshire Foundation* case is wrong for the reasons set out by the Secretary of State.

Roger McCarthy QC and *Jason Coppel* for the council in Johnson's case. A private sector care provider under contract to a local authority under section 26 of the 1948 Act is not a public authority exercising functions of a public nature within section 6(3)(b) of the 1998 Act: see *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 and the *Leonard Cheshire Foundation* case [2002] 2 All ER 956. *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 did not overrule these cases: see *R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233, paras 14–15, 25. *R (A) v Partnerships in Care Ltd* [2002] 1 WLR 2610 is distinguishable on its facts.

However, the proposed transfer does not contravene section 6 of the 1998 Act since there is no diminution in the claimants' rights after transfer.

Section 21 of the 1948 Act obliges local authorities to make arrangements for those in their area who are in need of care and attention which is not otherwise available to them. Section 26 permits local authorities to discharge that obligation by making arrangements with private sector providers: see *R v Wandsworth London Borough Council, Ex p Beckwith*

A [1996] 1 WLR 60. The obligation to provide appropriate accommodation under the Act continues after placement in a private sector care home. Compliance with the Act ensures that the claimants' Convention rights are protected.

All care home providers, whether public or private, are obliged to comply with statutory and regulatory provisions governing the operation of care homes: see the Care Standards Act 2000; regulations 5, 12–25, 37 and 40 of B the Care Homes Regulations 2001 (SI 2001/3965) and the Department of Health Guidance on National Minimum Standards for Care Homes for Older People, 3rd rev ed (February 2003). The requirements of the statutory framework are more stringent than any provision of the Convention. The regulatory framework imposes obligations upon the private operator which go far beyond any separate obligations which might be contained in a C contract with the council. By selecting a solvent provider and funding placements the council has taken reasonable steps to ensure that the provider is unlikely to fall into financial difficulties which would lead to the future closure of homes and potentially affect the residents' rights under articles 2, 3 or 8.

The Convention rights of residents can also be protected by means of contractual clauses: see the *Leonard Cheshire Foundation* case [2002] D 2 All ER 936, para 34. The council's proposed contractual terms and the remedies available in the event of breach will secure substantive protection of residents after transfer by safeguarding their rights to life, freedom from ill-treatment and respect for private life and home. Any disadvantage accruing from the availability of contractual rather than judicial review remedies against a provider can be eliminated by the court exercising its E discretion to grant injunctive relief or award damages in any contractual dispute compatibly with the Convention under section 6(1) of the 1998 Act.

In any event, transfer to a private sector provider does not divest the council of its Convention obligations: see *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 and the *Leonard Cheshire Foundation* case [2002] 2 All ER 936. The claimants will continue to enjoy the same Convention rights against the council as they do at present, F and the council will continue to be obliged to take appropriate steps to safeguard the lives of the claimants, to protect them from inhuman and degrading treatment and to safeguard their private and family life, home and correspondence. In practice there is no distinction between the council's negative and positive obligations under the Convention: see *Evans v United Kingdom* 7 March 2006; *Sørensen and Rasmussen v Denmark* 11 January G 2006; *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112, paras 27–28; *Storck v Germany* (2005) 43 EHRR 96, 101, 103; *Woś v Poland* (Application No 22860/02) (unreported) 1 March 2005, para 72 and *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20. In effect the claimants complain not of a loss or diminution in rights, but of the lack of an effective remedy for a breach of human rights by the private provider, viz, the loss of article 13 rights. However, article 13 is not incorporated into the H 1998 Act and breach of article 13 is not a competent complaint for the purposes of a claim under the 1998 Act: see *In re S (Minors)* [2002] 2 AC 291, paras 59–60.

If, on the other hand, transfer is unlawful under section 6(1) of the 1998 Act the council effecting the transfer would be acting to give effect to

primary legislation which is incompatible with Convention rights, i e, section 26 of the 1948 Act. The council would accordingly be freed from liability under section 6(1) by the operation of section 6(2)(b) of the 1998 Act.

On the facts of the present case any private sector provider with whom the council enters into a contract of transfer will be a hybrid public authority within section 6(3)(b) of the 1998 Act, since the transferee will be "standing in the shoes of" or "taking the place of . . . local authorities": see *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, para 65 and *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, paras 6, 12, 16, 51–52, 63–64, 87, 160, 171. The claimants' challenge to the proposed transfer therefore fails. It is unnecessary to decide whether, as the Secretary of State submits, a mere section 26 placement confers public authority status on the private care home provider.

Philip Sales QC and *Cecilia Ivimy* for the Secretary of State intervening in both cases. Private care homes, when providing accommodation pursuant to arrangements with a local authority under sections 21 and 26 of the 1948 Act, are exercising "functions of a public nature" within section 6(3)(b) of the 1998 Act and are obliged to act compatibly with the Convention rights of the persons concerned. The *Leonard Cheshire Foundation* case [2002] 2 All ER 936 is not binding, being inconsistent with subsequent dicta of the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546: see *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 and *Woodward v Abbey National plc (No 1)* [2006] ICR 1436, paras 21–22.

Section 6 of the 1998 Act is to be interpreted in the light of the Convention and the jurisprudence of the European Court of Human Rights on state responsibility. The test of whether a non-governmental body exercises functions of a public nature is not the same as the test applied to determine whether its decisions are amenable to judicial review. The central question is whether the relevant body carries out a governmental function which would engage the responsibility of the United Kingdom before the Strasbourg courts. Contrary to the approach in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936; *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55, 77–79 and *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 (contrast *R (A) v Partnerships in Care Ltd* [2002] 1 WLR 2610), it is the function that the body performs that is determinative of that question, not whether the body exercises statutory powers or the extent to which it is enmeshed with the core public authority: see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, paras 6, 11–12, 41, 44, 51, 52, 63, 86–88, 130, 160–163; *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20; *R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233, para 25 and *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, paras 21–27, 33–34, 47, 88, 92, 97. An activity which is intrinsically more private than public is not a function of a public nature, even if it was a function previously performed by a core public authority: see *Cameron v Network Rail Infrastructure Ltd (formerly Railtrack plc)* [2007] 1 WLR 163, paras 29,

A 37. [Reference was also made to *West v Secretary of State for Scotland* 1992 SC 385, 412, 413.]

The proper interpretation of section 6(3)(b) is informed by decisions of the European Court of Human Rights: see *Holy Monasteries v Greece* (1994) 20 EHRR 1, para 49 and *Ferrazzini v Italy* (2001) 34 EHRR 1068. That court has held in a number of cases that the state is directly responsible for the acts of the private body to whom its Convention obligations have been delegated: see *Van der Mussele v Belgium* (1983) 6 EHRR 163, para 29; *Costello-Roberts v United Kingdom* 19 EHRR 112, para 28; *Marzari v Italy* (1999) 28 EHRR CD 175; *Z v United Kingdom* (2001) 34 EHRR 97; *Woś v Poland* 1 March 2005, paras 72–73; *Buzescu v Romania* (Application No 61302/00) (unreported) 24 May 2005; *Sychev v Ukraine* (Application No 4773/02) (unreported) 11 October 2005 and *Storck v Germany* 43 EHRR 96, paras 89, 108. It is the private body to which the state's functions are delegated which must be treated as a public authority: see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546. Accordingly, private care homes accommodating residents pursuant to arrangements made with a local authority are bound to observe the Convention rights of those residents accommodated. [Reference was made to *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624, paras 44, 50–51.]

Article 8 imposes positive as well as negative obligations on the state. There is no obligation on the state to provide all persons with a home (see *Kay v Lambeth London Borough Council* [2006] 2 AC 465, para 28) but the state must provide accommodation to the chronically ill: see *Botta v Italy* (1998) 26 EHRR 241, paras 33–34; *Marzari v Italy* 28 EHRR CD 175, 179–180 and *R (Bernard) v Enfield London Borough Council* [2003] LGR 423, para 31.

A private care provider, as a hybrid public authority, is entitled under article 8(2) to have regard to its own private interests in deciding whether to close a home even if a resident's article 8 rights are thereby compromised: see *Collins v United Kingdom* (2002) 36 EHRR CD 6. *Malone v United Kingdom* (1984) 7 EHRR 14 must be treated as a special case. [Reference was also made to *Pentiacova v Moldova* (2005) 40 EHRR SE 209.]

If private care providers are not hybrid public authorities the judge correctly held that the transfer of the care homes to the private sector did not breach the claimants' Convention rights. Statutory and regulatory standards and protections, as well as the contractual obligations of the council and the private care provider would ensure that there was no breach of residents' rights under articles 2, 3, 5 or 8: see the Care Standards Act 2000; the Care Homes Regulations 2001 and the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, para 34. The lack of a remedy under the 1998 Act against a private care home for a breach of the claimants' Convention rights does not constitute a diminution or removal of those rights. The claimants will have remedies in tort against the private care home for wrongs such as assault and false imprisonment. The criminal law also provides protection against infringement of residents' Convention rights: see *X and Y v The Netherlands* (1985) 8 EHRR 235 and *MC v Bulgaria* (2003) 40 EHRR 459, paras 153, 166. Further, a local authority remains subject to the duty imposed by section 21 of the 1948 Act, and residents retain their rights under that provision against the local authority. Thus, where accommodation becomes

unsuitable for residents' needs a local authority is obliged to provide suitable accommodation: see *R v Kensington and Chelsea Royal London Borough Council, Ex p Kujtim* [1999] 4 All ER 161. In addition, the council remains, after transfer, subject to its positive obligations under section 6(1) of the Human Rights Act 1998 to safeguard residents against infringements of their Convention rights.

If section 26 of the 1948 Act is incompatible with the Convention it cannot be read down under section 3 of the 1998 Act (see *In re S (Minors)* [2002] 2 AC 291, paras 82–86) and the council can invoke section 6(2)(b).

Cherie Booth QC and *Aileen McColgan* for the National Care Association intervening in Johnson's case. The classification of private sector care home providers as hybrid public authorities for the purposes of the Human Rights Act 1998 is unnecessary and unworkable. A proper legislative and regulatory framework already exists for the comprehensive protection of Convention rights of those in residential care: see the Care Standards Act 2000; the Care Homes Regulations 2001 and the National Minimum Standards for Care Homes for Older People. Besides, contracts between local authorities and private care homes provide for a measurable quality of care which is often higher than that required by the National Minimum Standards.

Private care home providers are not to be classified as public authorities under section 6(3)(b) of the 1998 Act. The *Leonard Cheshire Foundation* case [2002] 2 All ER 936, which approved *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 and is consistent with *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, is binding on the court. The wide scope of the expression public function in section 6(3)(b) advocated in the latter case is reflected in the *Donoghue* case [2002] QB 48, para 58. Institutional as well as functional factors are relevant in determining the meaning of "public authority": see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, paras 12, 56–61; *R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233; *Holy Monasteries v Greece* 20 EHRR 1 and *Woś v Poland* 1 March 2005.

Strasbourg jurisprudence is relevant when considering the approach to be taken to core, rather than hybrid, public authorities: see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, paras 6, 44, 51, 63, 87, 160. It is unnecessary to define a private body as a "public authority" in order to fix the state with responsibility for its actions: see *Osman v United Kingdom* (1998) 29 EHRR 245 and *Z v United Kingdom* 34 EHRR 97. The fact that the state cannot divest itself of responsibility by delegating its Convention obligations to private bodies or individuals does not require that private sector operators such as the National Care Association's members should be categorised as hybrid public authorities under section 6(3)(b) of the 1998 Act. That is not the effect of *Costello-Roberts v United Kingdom* 19 EHRR 112; *Woś v Poland* 1 March 2005; *Buzescu v Romania* 24 May 2005 or *Sychev v Ukraine* 11 October 2005, paras 53–54. [Reference was also made to *Young, James and Webster v United Kingdom* (1981) 4 EHRR 38.]

A The public function created by sections 21 and 26 of the 1948 Act is the making of arrangements for the provision of accommodation, not the provision of accommodation itself. Providing accommodation and personal care is essentially a private function, not a governmental or public function, even when those activities are carried out by a core public authority: see *R v East Berkshire Health Authority, Ex p Walsh* [1985] QB 152. Moreover, B section 6 is concerned with liability for acts rather than functions: see Dawn Oliver, "Functions of a Public Nature under the Human Rights Act 1998" [2004] PL 329.

"Functions of a public nature" in section 6(3)(b) of the 1998 Act should be narrowly construed, since private care homes which are classified as hybrid public authorities may be deprived of remedies under the 1998 Act for breaches by the state of their Convention rights in respect of both their C public and non-public activities: see Helen Quane, "The Strasbourg Jurisprudence and the Meaning of a 'Public Authority' under the Human Rights Act" [2006] PL 106. This is contrary to the assumption made in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 that a hybrid public authority would not be prevented from relying on the Convention against the state, at least in D respect of asserted breaches of its non-public functions.

If residents can raise article 8 claims against a private care home provider those claims would trump any interest of the provider in ceasing to operate the residential facility. The residual freedom in domestic law to do that which is not prohibited does not satisfy the requirement that interferences with article 8 rights should be "in accordance with the law": see *Malone v United Kingdom* 7 EHRR 14. The interferences permitted by article 8(2) are E interferences "by a public authority . . . for the protection of the rights and freedoms of others" and would not therefore include the care home provider's own interest in closing the home for personal reasons.

Simor replied.

Sales QC also replied.

F *Ian Wise* for YL. The private care home, in providing care for YL pursuant to arrangements made by Birmingham City Council under sections 21 and 26 of the National Assistance Act 1948, is performing a public function within section 6(3)(b) of the Human Rights Act 1998. The *Leonard Cheshire Foundation* case [2002] 2 All ER 936 held that a private care home exercising such functions was not a hybrid public authority. The G decision has been the subject of debate and criticism: see the Joint Parliamentary Committee on Human Rights's 7th Report of Session 2003–2004 on "The Meaning of Public Authorities under the Human Rights Act" (HL 39, HC 382) and Paul Craig, "Contracting Out, The Human Rights Act and the Scope of Judicial Review" (2002) 118 LQR 551. The decision is wrong but binding on the court: see *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 apply. YL's rights under articles 2, 3 and 8 are engaged by H the care home's decision to cease to accommodate her, but the court is unable to make an order that is enforceable unless it is established that the care home is exercising public functions. The appropriate course is for the court to dismiss the appeal and give permission to appeal to the House of Lords.

David Carter for Birmingham. In *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936 this court decided that a private care home which accommodated persons to whom a local authority owed a duty under section 21 of the 1948 Act was not a hybrid public authority. This court must follow its own decisions except in circumstances where there are two conflicting decisions of its own so that it has to choose which it will follow; where its decision, although not expressly overruled, cannot stand with a decision of the House of Lords; or where it is satisfied that the first decision was per incuriam: see *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. None of these circumstances apply in the present case. The *Leonard Cheshire Foundation* case stands with the decision of the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 for the following reasons. First, in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936 Lord Woolf CJ, at para 18, accepted that the "hybrid" category was a broad one: see also Lord Nicholls of Birkenhead in *Aston Cantlow* [2004] 1 AC 546, para 11. Secondly, the judgments in the *Leonard Cheshire Foundation* case and in *Aston Cantlow* are congruent with each other. Thirdly, despite being referred to in argument in *Aston Cantlow*, the House chose not to overrule, distinguish or comment on the decisions of this court in the *Leonard Cheshire Foundation* case and *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48. And fourthly, YL's argument was rejected by this court in *R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233, per Dyson LJ, at paras 15 and 25, and per Longmore LJ, at para 47. Moreover, save in exceptional circumstances (of which there are none in this case), this court cannot follow decisions of the European Court of Human Rights so as to depart from domestic precedent; judges must review Convention arguments and if they consider that a binding precedent is, or may be, inconsistent with Strasbourg authority, they may express their views and give permission to appeal: see *Kay v Lambeth London Borough Council* [2006] 2 AC 465, per Lord Bingham of Cornhill, at paras 43–44. Accordingly, this court cannot find that a private care home is not a public authority for the purposes of section 6 of the 1998 Act because it cannot depart from its own decision in the *Leonard Cheshire Foundation* case.

Ivan Hare for the care home in YL's case. The *Leonard Cheshire Foundation* case [2002] 2 All ER 936 is binding on the court, unless (i) it conflicts with another Court of Appeal decision, (ii) it cannot stand with a decision of the House of Lords, or (iii) the court is satisfied that the decision was given per incuriam: see *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. None of these qualifications apply. [Reference was made to *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, paras 6–10, 12, 41, 46, 49, 51, 59, 64, 85 and *R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233, para 25.]

The *Leonard Cheshire Foundation* case did not fail to distinguish between the test for amenability to judicial review and the terms of section 6 of the 1998 Act. The court applied section 6 of the 1998 Act, not the amenability to judicial review test. In any event, judicial review cases may assist in determining whether functions are of a public or private nature: see *Aston*

Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2004] 1 AC 546, para 52. Nor did the court err in using the term "standing in the shoes of the local authorities" endorsed in *Beer's* application [2004] 1 WLR 233, para 37. Both the *Donoghue* case [2002] QB 48, para 58, and the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, para 18, recognised that a wide construction of section 6(3)(b) should be favoured. There was no failure to interpret section 6 in the light of the Strasbourg jurisprudence. [Reference was made to *Costello-Roberts v United Kingdom* 19 EHRR 112; *Holy Monasteries v Greece* 20 EHRR 1 and *Woś v Poland* 1 March 2005.]

Under the Convention the responsibility of the state is engaged (1) by the actions of any governmental organisation established for public administration purposes and exercising public functions (see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, paras 48–49) and (2) where the state has a positive obligation to secure Convention rights, even between private individuals who are not exercising public functions (see *R (Amin) v Secretary of Syate for the Home Department* [2004] 1 AC 653 and *X and Y v The Netherlands* 8 EHRR 235, para 23). *Costello-Roberts v United Kingdom* 19 EHRR 112, para 27 is not authority for the proposition that where the state delegates its positive Convention obligations to a private body, the private body is to be treated as a public authority for 1998 Act purposes. In other cases the European court has identified specific factors indicating that the body concerned should be treated as a governmental organisation performing public functions. Those cases are fact-specific and can be distinguished from the present case: see *Buzescu v Romania* 24 May 2005; *Woś v Poland* 1 March 2005, paras 60–70; *Van der Mussele v Belgium* 6 EHRR 163, para 29 and *Sychev v Ukraine* 11 October 2005, paras 50–54.

On the facts the care home is not performing functions of a public nature. Birmingham remains liable to YL for the discharge of its duties under section 21 of the 1948 Act and in respect of any breach of her Convention rights in the discharge of those duties. The relationship between the care home and Birmingham is governed by contract, not statute. The care home cannot be required to provide accommodation for YL: see *A v A Health Authority* [2002] Fam 213, para 53. In the event of a dispute between the care home and YL over termination of the placement, YL's redress lies only in a private law claim in contract. The care home would not be amenable to judicial review as it is not a public body: see *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55. The only public feature present is the status and function of Birmingham in discharging its section 21 duty. It does not follow that the care home with which residents are placed pursuant to section 26 arrangements is performing functions of a public nature. Providing accommodation and personal care are essentially private functions which are to be distinguished from public functions such as the detention of patients in a mental hospital (see *R (A) v Partnerships in Care Ltd* [2002] 1 WLR 2610) or a prison run by a private company.

In any event YL's Convention rights are protected by the express contractual terms between Birmingham and the care home which ensure that the care home acts compatibly with residents' Convention rights.

Cur adv vult

30 January. The following judgments were handed down. A

BUXTON LJ

The nature of the appeals

1 The court is concerned with two appeals. In *Johnson's* case Mrs Johnson and others ("the claimants"), all of whom are resident in a care home maintained by Havering London Borough Council ("Havering") B under the provisions of section 21 of the National Assistance Act 1948, seek to prevent the transfer by Havering of the residents' and other care homes to private sector control, as a local authority is in principle empowered to do under section 26 of the 1948 Act. In *YL's* case the Official Solicitor represents a resident placed in a private sector care home by the responsible local authority, Birmingham City Council ("Birmingham") in respect of C whom the care home seeks, or originally did seek, to terminate the contract for her care and to remove her from the home. In *Johnson's* case it is contended that the transfer of control of the homes would in itself amount to a breach of the residents' rights under the European Convention on Human Rights, principally under article 8. In *YL's* case it is contended that to remove YL from the care home would be a breach of her rights under article 8. D

2 The claim in *Johnson's* case was rejected by Forbes J [2006] EWHC 1714 (Admin), and the claim in *YL's* case by Bennett J [2006] EWHC 2681 (Fam). The two appeals have been heard together because they were thought to raise the same point, as to the susceptibility to control under the Convention for the Protection of Human Rights and Fundamental Freedoms of private care homes that are used by local authorities under E section 26 powers: that question turning on whether and in what circumstances the homes are persons certain of whose functions are functions of a public nature under section 6(3)(b) of the Human Rights Act 1998. In *YL's* case that issue arises directly from the proposed action of the care home, and the present proceedings take the form of a preliminary point to determine whether the care home, the second defendant in the action F brought by the Official Solicitor, is: "in providing care and accommodation for [YL] . . . exercising a public function for the purposes of section 6(3)(b) of the [1998 Act]."

3 The way in which the central issue arises in *Johnson's* case is rather more elusive. Mrs Johnson's claim is based upon the contention that whilst she at present enjoys Convention rights, conspicuously but not exclusively article 8 rights, against Havering as a public authority, those rights will be G lost, or at least substantially diminished in content, if her home is transferred to a private body. Havering, supported by the Secretary of State intervening, denies that the change would involve a breach of the Convention, and that is the first issue that has to be addressed in *Johnson's* appeal. Both of those parties however further respond by contending that in any event nothing will be lost by the residents, because the new private owners of the homes will H themselves be subject to Convention obligations by reason of section 6(3)(b); and that point is, perhaps confusingly, also urged by the claimants as an alternative to the point set out at the beginning of this paragraph. That latter issue accordingly raises in principle the same question as the preliminary point in *YL's* case.

A **4** Because of what was seen as the general interest of the "public authority" issue under section 6(3)(b) a large number of organisations were good enough to intervene in the appeals in order to assist us in our task. The Secretary of State for Constitutional Affairs, although not in any way concerned with the transactions in *Johnson's* case, and not concerned with the general policy area involved, which is the responsibility of the Secretary of State for Health, was none the less given permission to intervene in that B case in the light of his policy responsibility for the implementation of the 1998 Act. As already noted, he argued that section 6(3)(b) would apply to the respective care homes once the residents were transferred to them; and it was the Secretary of State's desire to pursue that argument to this court, and indeed if needs be to the House of Lords, that caused another constitution of this court to grant permission to appeal to all parties. Since otherwise no C argument would have been advanced in that appeal contrary to the contentions of the claimants and of the Secretary of State, and there was of necessity no appearance on behalf of any individual care home because the policy complained of had not yet been implemented, the National Care Association ("NCA"), which represents the interests of private care homes, was given permission to intervene. We received submissions on its behalf from Ms Booth. In addition, submissions were received in writing from the D Disability Rights Commission, represented by Mr David Wolfe who had appeared before Forbes J, and Help The Aged, in the event equally represented by Mr Wolfe. Both of these bodies supported the position of the Secretary of State. All of these intervening submissions were taken into account in the court's consideration of *YL's* case, though as a matter of formal order the Secretary of State was given permission to intervene in that E appeal also.

5 As a result of these arrangements we received 184 pages of skeleton argument and bundles containing 106 authorities, and were addressed by eight teams of advocates over a period of two whole days.

The facts

F **6** It is important to record that there are many issues of fact and policy involved in both of the cases. We are only concerned with the threshold question, of whether issues under the Convention arise at all. If they do arise, there will remain much to be said and debated as to the facts, and in particular as to the justification under article 8(2) for the course proposed by the respective defendants. Put shortly, in *Johnson's* case Havering submitted a detailed account of its consideration of the future of its care homes, in the G light of the need to improve facilities and conditions both for residents and for staff, and of how it reached the conclusion that the preferred option was to close some homes and to transfer others to the private sector. In *YL's* case the point of departure of the proceedings was an unfortunate dispute as to the behaviour in the home of the husband and daughter of YL that in the view of those running the home rendered impossible the continuation of the family's connection with it. Since we are not concerned with the merits of H any of this it is not necessary to go further into the underlying facts. Anyone who thinks that more information is necessary can refer to the judgments of Forbes J and Bennett J, both of which, if I may respectfully say so, give a full and clear account of the respective backgrounds. We simply need to remember, in fairness to both defendants, that they have put forward full,

robust and potentially persuasive justifications for their decisions, quite apart from arguing the question of whether those decisions are in any event justiciable.

The form of this judgment

7 As already explained, there is an issue that arises in *Johnson's* case but not in *YL's* case as to whether the proposed transfer falls within the ambit of the Convention even if the receiving private home is not a public authority within section 6(3)(b) of the 1998 Act. I deal with that issue first; and then consider the "public authority" point that is potentially relevant in *Johnson's* case and is the only issue in *YL's* case. Under the latter head a major issue arises as to whether or not this court is bound by its previous decision in *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936.

Johnson's case: does the transfer of care homes from Havering to the private sector engage the Convention in any event?

The argument for the claimants and Forbes J's response to it

8 It is accepted that this argument fails, alternatively is otiose, if the private care homes are public authorities, as the Secretary of State contends. However, on the assumption that the homes are not public authorities, and therefore the residents cannot assert against them article 8 rights, or rights under any other article of the Convention, then the contention as put in the claimants' written submissions on the renewed application for permission to appeal is that

> "By transferring the [claimants] out of their care into the hands of private carers, [Havering] would be removing or diminishing the rights that they formerly guaranteed to the [claimants]. The [claimants] would no longer be able to rely on direct breaches of their substantive rights as against either [Havering] or the private carer, for example breaches of their rights under articles 2, 3, 8, 9, 10 and 14. The only enforceable rights they would have would be in relation to breaches of [Havering's] 'positive obligations' towards them. They would have no effective rights as against their carers. That constitutes a fundamental and material diminution, and indeed in certain cases, negation, of their existing rights. Accordingly, in discharging its statutory obligations to the [claimants] under sections 21 and 26 of [the 1948 Act], [Havering] would be failing to ensure real and effective protection of their rights and so be acting incompatibly with the Convention and unlawfully under section 6 of the [1998 Act]."

And the submissions went on to contend that Havering's proposal to require care homes by contract to respect the residents' rights would be ineffective in any event.

9 Forbes J took this point fairly robustly, the major part of his judgment being directed at the "public authority" issue. He said [2006] EWHC 1714 (Admin) at [44]:

> "the short answer to this particular issue is that after any such transfer, the claimants will still continue to enjoy the very same Convention rights as against the council as they do at present. The council, as a core public

A authority, has an obligation to act compatibly with the claimants' Convention rights (see section 6(1) of the 1998 Act), which may be enforced by anyone who is a 'victim' of any breach of those Convention rights. A transfer of the homes to the private sector does not absolve the council of its duty under section 6(1) to act compatibly with Convention rights, including the Convention rights of the claimants. Thus, if a transfer does take place, the council will continue to be obliged to take B appropriate steps, for example, to safeguard the lives of the claimants, to protect them from inhuman and degrading treatment and to safeguard their private and family life, home and correspondence. The real and effective protection of the claimants' rights will continue to be ensured by the council and, if necessary, by the courts. In short, transfer from local authority to private sector accommodation does not, in principle, lead C to the residents' Convention rights being either diminished or removed. In effect, the residents will continue to retain their Convention rights' protection under the 1998 Act in the same way and to the same extent as previously."

10 Ms Simor's response was to say that Forbes J's conclusion was simply wrong. After transfer, the residents might retain some rights against D Havering, but those would be different and less valuable rights compared with the rights that they enjoyed against Havering when Havering was directly their carer. Taking article 3 as an example, Ms Simor said in her submissions on the application for permission to appeal that at present the residents had a right not to be subjected to degrading treatment by Havering. After transfer, they had no such right against the care homes under article 3, E and only a right against Havering that the council would take appropriate steps, which it was far from certain would be effective, to safeguard the residents against immediate risks of degrading treatment.

Article 3

11 Although it played a prominent role in the grounds of appeal, it is F difficult to see that article 3 is the best example of the present point. We were warned against naively thinking, and evidence was given by the Official Solicitor and Help the Aged to support that warning, that treatment amounting to a breach of article 3 could not occur in a private care home. We do not need to enter upon that controversial ground. Article 3 addresses not lack of consideration or inadequate care standards, but the much more serious territory of degrading treatment that is akin to inhumanity. If a G resident in a care home, public or private, were to be treated in that way, then first almost certainly breaches of the criminal law would be involved; and secondly such breaches, and the inhumane treatment generally, would engage the responsibilities of the local authority for the welfare of the residents, under section 21(2) of the 1948 Act, and its responsibility to enter and inspect the private care home under section 26(5) of the 1948 Act. In H these extreme and hopefully hypothetical circumstances the potential problems for the residents would not lie in the absence of legal protection, but in the difficulty of the abused resident in accessing that protection: whether by taking proceedings herself against the home, or by informing the responsible local authority so that it could take action. Thus, to the extent that article 3 has any more than a theoretical role to play in such a case, the

resident does not suffer any significant loss of that protection by the transfer of immediate control of her residence from the public to the private sector.

Article 8 in the present case

12 Article 8 raises different issues. Havering submitted, to my mind entirely convincingly, that care homes, public or private, were subject to rigorous standards of services, quality of staff, extent of facilities, and record-keeping and other procedures for the protection of the residents, which are required by the Care Standards Act 2000, and supervised by the Commission for Social Care Inspection. Indeed, and ironically enough, it had been concern expressed by the Commission about the present standards in some of Havering's own facilities that had contributed to the decision now complained of to seek the assistance of the private sector. These rules, it was suggested, again convincingly, well exceeded in terms of day-to-day protection for residents anything that they could gain through the application of article 8. In this respect, therefore, the residents lost nothing in article 8 terms by the transfer.

13 Ms Simor sought to meet these objections in a number of ways, but her main contention was that even if the general public regime set higher standards than would the simple application of article 8, the proposed transfer would deprive the residents of a direct action against their actual carer under article 8, whether that action was taken in the domestic courts or in the European Court of Human Rights ("the European court"). And she pointed to one particular respect in which the content of the article 8 right would be diminished. Her clients' place of residence did indeed become their home, and was thus subject to core protection under article 8, including a right to be consulted about any proposal to alter the place of residence. If the body running the home should decide to cease to provide facilities, either generally or to a particular resident, a local authority in making such a decision would be subject to obligations under article 8 to protect the resident's home. Not so a private care home if, as the present hypothesis assumes, it is not a public authority under section 6 of the 1998 Act. It was that article 8 protection that the resident lost by the transfer of her home to the private sector.

14 There are two main objections to this argument, the first an objection of general principle, the second more a matter of practicality.

15 The nub of the complaint is that the residents will or may lose a remedy that they can deploy to assert the level of article 8 protection that they currently enjoy. But the argument that a change in the nature of the residents' remedies necessarily entails a breach of the residents' Convention rights would seem to have to assume that the state has an obligation to provide, and having provided to maintain, a particular level of article 8 protection. That assumption is faulty on two bases.

16 First, it is very doubtful whether article 8, even when read in positive rather than in negative terms, places on a member state an obligation to make welfare provision of the type and extent required by section 21 of the 1948 Act. Mr Sales showed us the judgment of the European court in *Marzari v Italy* (1999) 28 EHRR CD 175 where the positive obligations of the state were held to be engaged in order to provide housing for a person with a serious illness, on the basis that that was necessary to ensure respect for his private life. But as Sullivan J, correctly if I may respectfully say so,

A pointed out in *R (Bernard) v Enfield London Borough Council* [2003] LGR 423, such instances must necessarily be fact-specific, and not every breach of duty under section 21 of the 1948 Act will result in a breach of article 8. Since the article 8 requirements are less stringent, and manifestly less well-defined, than the requirements of domestic law, it would seem impossible to say that there is an *article 8* obligation to maintain a particular
B type or level of provision when discharging duties under section 21. And secondly, and in any event, even when article 8 places collateral obligations on the government in respect of the home that it has provided in performance of its domestic law duties, there is no reason to think that those obligations have a fixed content and, more particularly, no reason to think that a change in that content will *necessarily* entail a breach of article 8.

C 17 The practical issue is this. The resident whom the private home seeks to remove will remain the responsibility of the local authority under section 21 of the 1948 Act. That authority will continue to have article 8 obligations towards her, as well as its section 21 obligations, as indeed was made plain by this court in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, para 33. (It may be mentioned here that that is the position of YL; but because of the form of the proceedings adopted in her
D case, which seek only the declaration set out in para 2 above as to the status of the care home, that issue will not be explored when we come to her appeal.) That duty will compel the local authority to intervene and to offer resources and protection for the resident; as, it was pointed out, Birmingham had done in the case of YL, by providing funding for supervised access to enable visits from her relatives not to take a form that threatened her
E continued presence in the home. Since the local authority in that process has to secure the resident's Convention rights, it is just as vulnerable to suit as would be the home if those rights are infringed.

18 We must also remember that the issue with regard to article 8 is not the importance of the right to respect for the home, which is not in dispute, but the significance for respect of that value of the *difference* between the
F public and the private regimes. In that regard, we do well to bear in mind the recent survey of article 8 jurisprudence undertaken by Lord Walker of Gestingthorpe in his speech in *M v Secretary of State for Work and Pensions* [2006] 2 AC 91, paras 62–83. Addressing facts very different from those in the present case, Lord Walker none the less concluded in general terms that because the touchstone of article 8 is respect for the relevant rights, the interference with the citizen has to be of some seriousness before article 8
G will be engaged. Caution must be exercised before applying that insight as if it were a statutory rule. None the less, that approach reinforces the conclusion in this case that the change in the residents' legal position that occurs when the homes are transferred from public to private control is insufficient to amount to a breach of the Convention. Ms Simor said that before we could be satisfied that the change would not in itself entail a
H breach of the Convention we had to be satisfied that there was no respect, actual or prospective, likely or possible, in which the residents would have less protection under the new regime than under the old. Quite apart from the assumption of vested rights that that submission entails, it places on article 8 a weight that it will not bear.

Some wider considerations

19 For the reasons already given, I am not persuaded that the transfer proposed by Havering will involve a breach of the residents' rights under article 8. However, the claimants' argument, and the assumptions on which it proceeded, can in any event only succeed if it succeeds in avoiding two wider and more general objections, the first involving issues of policy and the second an important point of law.

20 First, the claimants' argument would place very far-reaching and surprising inhibitions on national policy. I can readily accept that, if national policy is indeed inconsistent with an article of the Convention, then it is no answer that the national government would wish to be free to act differently from the way that the Convention requires. But where the reach of an article is unclear, it is very relevant to enquire whether the jurisprudence and policy of the Convention intends the effect on freedom of governmental action that would follow from one asserted reading of that article.

21 In the present case, the argument that a change from public to private provision necessarily entails a breach of article 8 must further entail that any privatisation of services in respect of which the national government has or arguably has Convention responsibilities will in itself result in a breach of those responsibilities. The root objection, loss of direct action under the 1998 Act against the actual provider, must be the same in every case. As Havering pointed out, that at a stroke puts every local authority with social services responsibilities in breach of the 1998 Act, since all of them use private sector provision to a greater or lesser extent. It is notorious that privatisation, not just in the present field but over a very wide area of governmental activity, is a subject that attracts strong views. But those are *views*, to be adjudicated upon by the national democratic process, and a very good example of an area that the Convention will enter only with considerable diffidence.

22 The submissions on the application for permission to appeal addressed this objection (which had originally been advanced by the court as a reason amongst others for not granting permission to argue this appeal), by accepting that it might be right that no local authority could transfer a care home into private hands, but saying that that was not a reason for not accepting the claimants' argument. If the claimants' argument were otherwise unassailable that would be correct. As it is, the outcome to which that argument leads must cast doubt on whether the argument itself was correct in the first place.

23 Second, both Mr Sales and Mr McCarthy pointed out that it was English domestic law, confirmed by the House of Lords, that section 26 of the 1948 Act permits a local authority to discharge its section 21 duties by arrangements with private third parties, indeed if so advised in respect of all of those duties: see *R v Wandsworth London Borough Council, Ex p Beckwith* [1996] 1 WLR 60. Section 6(2)(b) of the 1998 Act provides that the obligation on a public authority not to act in a way which is incompatible with a Convention right does not apply to an act if

> "in the case of one or more provisions of . . . primary legislation which cannot be read or given effect in a way which is compatible with the

A Convention rights, the authority was acting so as to give effect to or enforce those provisions."

But the argument for the claimants is and has to be that it is *never* open to a local authority to exercise its section 26 powers; so section 26 cannot be read or given effect compatibly with the alleged Convention rights. The local authority is accordingly protected from its alleged breach of the Convention B by the fact that in privatising the homes it is giving effect to section 26. The only way out of that dilemma for the claimants, if their case is otherwise correct, would be a declaration of incompatibility in respect of section 26: which the claimants conspicuously did not seek from Forbes J.

24 Ms Simor's argument really did not come to terms with these two fundamental difficulties. They strongly reinforce the reasons already given C for holding that *Johnson's* case must fail.

25 That makes it unnecessary to go on, within *Johnson's* appeal, to consider whether Mrs Johnson is protected in any event by the status of the private care home as a public authority, as Havering and the Secretary of State contend. However, that is the issue, and because of the form of the order for the preliminary point the only issue, that this court has to determine in *YL's* case.

D

YL's case: is the private care home a public authority under section 6(3)(b) of the 1998 Act?

Introduction

26 As already noted, but it will be convenient to remind ourselves, we are concerned only with the preliminary issue of whether the care home, E when accommodating YL under arrangements made with Birmingham for the implementation (and funding by Birmingham) of Birmingham's obligations under section 21 of the 1948 Act, is exercising a public function for the purposes of the 1998 Act. The foregoing laborious exploration of the issues in *Johnson's* case has revealed continuing Convention (and other) obligations on the part of Havering, but the form of the question appears to F require those same obligations owed by Birmingham to be ignored in *YL's* case as that action is at present constituted. And what the practical effect would be of an affirmative answer to the question has equally been consigned to another day.

The task of this court

G **27** The question is answered in negative terms by the decision of this court in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936. The primary facts relating to the status of the care home in that case are not suggested to be relevantly different from the primary facts relating to the care home in which YL is accommodated. That therefore would appear to give a short answer to the preliminary point at any level below the House of Lords. However the Secretary of State submitted that the *Leonard Cheshire* H *Foundation* case was wrongly decided, not least because it was inconsistent with authority decided by the European court. It was recognised that such a claim was, in itself, of little assistance, because it is black letter law, recently confirmed by the House of Lords in *Kay v Lambeth London Borough Council* [2006] 2 AC 465, para 43, that the *domestic* rules of precedent

prevail even in cases concerned with Convention (or EU) rights, and a domestic case alleged to be wrongly decided in the light of European court jurisprudence retains its authority until dislodged by a domestic case of superior authority. But the Secretary of State said that that fate had indeed befallen the *Leonard Cheshire Foundation* case because that decision could not stand with the subsequent decision of the House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546.

28 These arguments require close attention to the reasoning of this court in the *Leonard Cheshire Foundation* case and in the case that preceded it and was to some extent relied on in it, *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48. In the account that follows of those cases emphasis will be placed on the aspects of them that are said to fall foul of the guidance in the *Aston Cantlow* case.

The Donoghue case

29 The defendant was granted a weekly, non-secure, tenancy by her local housing authority ("Tower Hamlets") pending a decision on whether she was intentionally homeless. The property was transferred to a housing association ("Poplar"), which when it sought to evict the defendant was met with a claim that as a registered social landlord it was performing a public function and thus was subject to the constraints of the Convention. That required an examination of the provisions of section 6(3)(b) of the 1998 Act, which provides that a "public authority" includes: "any person certain of whose functions are functions of a public nature" and section 6(5) which provides that "[in] relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private".

30 This court went into the application of those principles to Poplar in some considerable detail. It will be convenient first to set out what was said by Lord Woolf CJ in the judgment of the court, at paras 58–59:

> "58. . . . The fact that a body performs an activity which otherwise a public body would be under a duty to perform cannot mean that such performance is necessarily a public function. A public body in order to perform its public duties can use the services of a private body. Section 6 should not be applied so that if a private body provides such services, the nature of the functions are inevitably public. If this were to be the position, then when a small hotel provides bed and breakfast accommodation as a temporary measure, at the request of a housing authority that is under a duty to provide that accommodation, the small hotel would be performing public functions and required to comply with [the 1998 Act] . . .
>
> "59. The purpose of section 6(3)(b) is to deal with hybrid bodies which have both public and private functions. It is not to make a body, which does not have responsibilities to the public, a public body merely because it performs acts on behalf of a public body which would constitute public functions were such acts to be performed by the public body itself. An act can remain of a private nature even though it is performed because another body is under a public duty to ensure that that act is performed."

A **31** The court then went on, at para 65, to apply that approach to the case before it. Some of the sub-paragraphs of its reasoning may be quoted:

> "(i) While section 6 of [the 1998 Act] requires a generous interpretation of who is a public authority, it is clearly inspired by the approach developed by the courts in identifying the bodies and activities subject to judicial review. The emphasis on public functions reflects the
B approach adopted in judicial review by the courts and textbooks since the decision of the Court of Appeal . . . in *R v Panel on Take-overs and Mergers, Ex p Datafin plc* [1987] QB 815. (ii) Tower Hamlets, in transferring its housing stock to Poplar, does not transfer its primary public duties to Poplar. Poplar is no more than the means by which it seeks to perform those duties. (iii) The act of providing accommodation to rent is not, without more, a public function for the purposes of
C section 6 . . . (v) What can make an act, which would otherwise be private, public is a feature or a combination of features which impose a public character or stamp on the act . . . The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public . . . (vi) The closeness of the relationship which exists between Tower Hamlets and Poplar. Poplar
D was created by Tower Hamlets to take a transfer of local authority housing stock; five of its board members are also members of Tower Hamlets; Poplar is subject to the guidance of Tower Hamlets as to the manner in which it acts towards the defendant."

32 The court then continued, at para 66:

> "while activities of housing associations need not involve
E the performance of public functions, in this case, in providing accommodation for the defendants and then seeking possession, the role of Poplar is so closely assimilated to that of Tower Hamlets that it was performing public and not private functions. Poplar therefore is a functional public authority, at least to that extent. We emphasise that this does not mean that all Poplar's functions are public. We do not even
F decide that the position would be the same if the defendant was a secure tenant. The activities of housing associations can be ambiguous. For example, their activities in raising private or public finance could be very different from those that are under consideration here. The raising of finance by Poplar could well be a private function."

33 The *Donoghue* case [2002] QB 48 has been considered in some
G detail because it was referred to extensively, and to some extent adopted, in the case with which we are primarily concerned, the *Leonard Cheshire Foundation* case [2002] 2 All ER 936.

The Leonard Cheshire Foundation case

34 The claimants were residents in a care home ("Le Court") owned and
H operated by a well-known charity ("LCF"), the claimants having been placed there and paid for by their local authority in discharge of its duties to them under section 21 of the 1948 Act. They claimed that they had been assured by LCF that at Le Court they had "a home for life". LCF decided to reorganise its provision in that area, transforming Le Court into a smaller, high-dependency, unit, and transferring those residents who did not qualify

for that provision, including the claimants, to smaller, community-based, homes. The very skilled and experienced lawyers who represented the claimants did not feel able to assert that the assurances as to a home for life created any contractual liability, but they did contend that LCF, by reason of its performance of functions on behalf of or at the request of the local authority, was a "public authority" under section 6(3)(b) of the 1998 Act, and was therefore constrained in its dealings with the claimants in respect of their home for life by its obligations under article 8.

35 The approach of this court to that argument can again be best understood by setting out verbatim the relevant passage of the court's judgment, again delivered by Lord Woolf CJ, at para 35:

> "In our judgment the role that LCF was performing manifestly did not involve the performance of public functions. The fact that LCF is a large and flourishing organisation does not change the nature of its activities from private to public: (i) It is not in issue that it is possible for LCF to perform some public functions and some private functions. In this case it is contended that this was what has been happening in regard to those residents who are privately funded and those residents who are publicly funded. But in this case except for the resources needed to fund the residents of the different occupants of Le Court, there is no material distinction between the nature of the services LCF has provided for residents funded by a local authority and those provided to residents funded privately. While the degree of public funding of the activities of an otherwise private body is certainly relevant as to the nature of the functions performed, by itself it is not determinative of whether the functions are public or private . . . (ii) There is no other evidence of there being a public flavour to the functions of LCF or LCF itself. LCF is not standing in the shoes of the local authorities. Section 26 of the 1948 Act provides statutory authority for the actions of the local authorities but it provides LCF with no powers. LCF is not exercising statutory powers in performing functions for the appellants. (iii) In truth, all that [counsel for the appellants] can rely upon is the fact that if LCF is not performing a public function the appellants would not be able to rely upon article 8 as against LCF. However, this is a circular argument. If LCF was performing a public function, that would mean that the appellants could rely in relation to that function on article 8, but, if the situation is otherwise, article 8 cannot change the appropriate classification of the function. On the approach adopted in [the *Donoghue* case [2002] QB 48] it can be said that LCF is clearly not performing any public function."

36 The court therefore saw the activity of LCF, and its relationship with the residents, as the provision of services of a private nature that had been obtained from LCF by the local authority in discharge of the latter's public responsibility to persons qualifying for assistance under section 21 of the 1948 Act. As the court had put it in the *Donoghue* case [2002] QB 48, para 60, when commenting on the decision of the European court in *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112:

> "The case concerned a seven-year-old boy receiving corporal punishment from the headmaster of an independent school. The [European court] made it clear that the state cannot absolve itself of its

A Convention obligations by delegating the fulfilment of such obligations to private bodies or individuals, including the headmaster of an independent school. However, if a local authority, in order to fulfil its duties, sent a child to a private school, the fact that it did this would not mean that the private school was performing public functions. The school would not be a hybrid body. It would remain a private body. The local authority would, however, not escape its duties by delegating the performance to
B the private school. If there were a breach of the Convention, then the responsibility would be that of the local authority and not that of the school."

The Aston Cantlow case

37 The facts of the *Aston Cantlow* case [2004] 1 AC 546 were far
C removed from those in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936 or in our case. A parochial church council ("PCC"), a body created by the Church of England as part of its internal government, sought to recover from the lay rectors of the church for which the PCC was responsible payment to fund chancel repairs: an obligation of the lay rector to the church recognised in English domestic law over many centuries. The lay rectors did
D not dispute their domestic obligation, but contended that the common law liability was an unjustified interference with their enjoyment of the property which founded their status as lay rectors, and thus benefited from the protection of article 1 of the First Protocol to the Convention. In order to assert that defence in an English court they had to establish that the PCC was either a "core" public authority under section 6 of the 1998 Act, or a person certain of whose functions (in casu, the collection of tithe rents and chancel
E liabilities) were functions of a public nature, under section 6(3)(b).

38 The major part of the argument before the House of Lords addressed the first of these questions, in an attempt to establish that the PCC was a public authority, and thus that the whole of its activities were subject to control under the Convention. As Dyson LJ pointed out in *R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR
F 233, para 24, the only general guidance on hybrid authorities and what is a public function for the purposes of section 6(3) of the 1998 Act is to be found in two paragraphs of the speech of Lord Nicholls of Birkenhead in the *Aston Cantlow* case [2004] 1 AC 546, paras 11–12. That is a point of some importance, because Mr Sales's argument depended on applying the whole of the jurisprudence of the *Aston Cantlow* case, addressed as it almost entirely was to the question of whether the PCC, as a *body*, was a public
G authority, to the different question of whether certain *functions* of a care home were functions of a public nature.

39 Although the contention that the PCC was a public authority had prevailed in this court, it received somewhat short shrift in the House of Lords. The position of the Church of England as the "established church" did not confer on it a public status, and its internal machinery was directed
H at its pastoral mission and the management of its own affairs. Accordingly, in public law, and without any disrespect, the PCC had no different status from that of the committee of a golf club. And on the ancillary issue, of whether collection of the chancel liability was a public function, it would therefore be unlikely that a particular act of the PCC to promote the finances of the Church of England would be a function of a public nature. That was

indeed the view of the House. Two of their Lordship's speeches may be cited. Lord Nicholls said, at para 16:

> "I turn next to consider whether a [PCC] is a hybrid public authority. For this purpose it is not necessary to analyse each of the functions of a [PCC] and see if any of them is a public function. What matters is whether the particular act done by the plaintiff council of which complaint is made is a private act as contrasted with the discharge of a public function . . . If a [PCC] enters into a contract with a builder for the repair of the chancel arch, that could hardly be described as a public act. Likewise when a [PCC] enforces, in accordance with the provisions of the Chancel Repairs Act 1932, a burdensome incident attached to the ownership of certain pieces of land: there is nothing particularly 'public' about this. This is no more a public act than is the enforcement of a restrictive covenant of which church land has the benefit."

In similar vein, Lord Hope of Craighead said, at paras 63–64:

> "63. . . . As for the question of whether [the PCC] is a 'hybrid' public authority, I would prefer not to deal with it in the abstract. The answer must depend on the facts of each case. The issue with which your Lordships are concerned in this case relates to the functions of the PCC in the enforcement of a liability to effect repairs to the chancel. Section 6(5) of [the 1998 Act] provides that a person is not a public authority by virtue only of subsection (3) if the nature of the act which is alleged to be unlawful is private. The Court of Appeal said that the function of chancel repairs is of a public nature: [2002] Ch 51, 63, para 35. But the liability of the lay rector to repair the chancel is a burden which arises as a matter of private law from the ownership of glebe land.
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> "64. . . . The nature of the act is to be found in the nature of the obligation which the PCC is seeking to enforce. It is seeking to enforce a civil debt."

40 Thus, not only were the basic facts in the *Aston Cantlow* case [2004] 1 AC 546 different from those in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, but so was the nature of the question that the House was asked. In the *Leonard Cheshire Foundation* case the question was whether an intrinsically private act performed by a private body, the private care home's enforcement of its own contract with one of its residents, became a function of a public nature because the private body was assisting a public body in the discharge of that latter body's public functions: see in that respect in particular the passage from the judgment in the *Donoghue* case [2002] QB 48, para 65, set out in para 31 above. In the *Aston Cantlow* case no such issue arose. No clearly public function was involved. The only issue was whether the PCC, in pursuing its own interests on its own behalf, and not performing any function on behalf of anyone else, was thereby performing a public function. And some indication that the issues were indeed seen as different may be drawn from the fact that the House was shown both the *Donoghue* case and the *Leonard Cheshire Foundation* case (see the report of the argument at [2004] 1 AC 546, 550A), but no reference was made to either case in the extremely full and detailed speeches.

41 All of this might seem to suggest that the *Aston Cantlow* case [2004] 1 AC 546 is not likely to be a sure guide to the rights or wrongs of the

A *Leonard Cheshire Foundation* case [2002] 2 All ER 936. But it was strongly submitted to us, as it had been to the judges in the courts below, that a series of general observations in the *Aston Cantlow* case as to the proper approach to section 6(3)(b) of the 1998 Act, to which observations respectful attention must of course be given, showed that this court had not properly applied the law in the *Leonard Cheshire Foundation* case. Indeed, to quote Mr Sales's skeleton, that the approach of the House in the *Aston Cantlow* case was "in stark contrast" to the approach of this court in the *Donoghue* case [2002] QB 48 and the *Leonard Cheshire Foundation* case. To those submissions I now turn.

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Can the Leonard Cheshire Foundation case stand with the Aston Cantlow case?

C **42** The Secretary of State expressed himself in the somewhat extreme terms just set out because he was aware that any attempt to dislodge the decision of this court in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936 had to meet the test set out above, as laid down by this court in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. The test as stated is a stringent one, and intentionally so. The claimants made no attempt to show us any case in which two reasoned decisions of this court had been set aside because, in a subsequent decision of a House which was invited to but did not refer to those decisions, general statements were made that conflicted with the basis on which the Court of Appeal had proceeded. The court's own researches have not identified any such case. I also have in mind that in *Williams v Glasbrook Bros Ltd* [1947] 2 All ER 884, 885 Lord Greene MR, who had delivered the judgment in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, described the freedom of this court to depart from one of its own decisions as arising where "a subsequent case in the House of Lords is found either expressly or by implication to overrule an earlier decision of the Court of Appeal". If that statement is taken literally, it is very difficult to see how the *Aston Cantlow* case [2004] 1 AC 546 could have impliedly overruled the *decision* in the *Leonard Cheshire Foundation* case, because the issue that had to be decided in the one case was different from the issue that had to be decided in the other. And if that is thought too pedantic an objection, at the very least Lord Greene MR's understanding of the rule requires a closeness of subject-matter and a clear inconsistency of approach between the first case and the second that does not stand out from a comparison of the *Aston Cantlow* case with the *Leonard Cheshire Foundation* case.

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G **43** It may also be said by way of introduction that what binds us is the decision in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, and the legal steps that compelled that decision. Those steps were twofold. First, the identification of the legal principles that had to be applied to the primary facts. Second, the analysis or categorisation of the primary facts in the light of those principles. Both of those are conclusions of law, or at least conclusions of mixed law and fact, and we are not free to depart from either of them. So even though, as I will explain below, I would not have categorised the primary facts in the same way as did the court in the *Leonard Cheshire Foundation* case, I am not free to substitute my categorisation for that adopted by that court. And it will be apparent in any event that the *Aston Cantlow* case [2004] 1 AC 546 could not have anything to say

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relevant to the categorisation of the primary facts in the *Leonard Cheshire Foundation* case, because the facts in the two cases were different. A

44 I now turn to the errors, in terms of failure to apply the law set out in the *Aston Cantlow* case, that are said to have occurred in the *Donoghue* case [2002] QB 48 and the *Leonard Cheshire Foundation* case [2002] 2 All ER 936. The objections raised in the present case can, I hope, be fairly summarised as follows. I add some commentary in each case.

45 First, the Court of Appeal adopted an "institutional" rather than a "functional" analysis: that is, it emphasised the status of the body, the nature of its relationship with the state, and the degree to which it was controlled by the state. That was said to be inconsistent with, in particular, what was said by Lord Hope of Craighead in the *Aston Cantlow* case [2004] 1 AC 546, para 41: "It is the function that the person is performing that is determinative of the question whether it is, for the purposes of that case, a 'hybrid' public authority." The reference to the function under scrutiny picks up the terminology of section 6(3)(b) of the 1998 Act. This point was addressed in detail in Mr Sales's skeleton, but I have to say that the criticism in those terms of the general approach in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936 is very difficult to understand. B C

46 First, there is no sign that Lord Woolf CJ did not understand that the question that he was asked had to be answered in the context of and according to the functions that LCF was performing. That concept was used eleven times in the passage from his judgment [2002] 2 All ER 936, para 35, set out in para 35 above. And that there is some universal and required approach to that question is specifically denied by the Secretary of State. As Mr Sales said in his skeleton argument: D

> "their Lordships emphasised that there was no single test of universal application; the question of whether or not a body exercises public functions will turn on the facts of each case: see Lord Nicholls, at para 12, Lord Hope, at para 63, and Lord Scott of Foscote, at para 130." E

47 The guidance given in that context by Lord Nicholls, said by Mr Sales to be of critical importance, is to be found in the paragraph of his speech that is cited, para 12. Lord Nicholls said: F

> "What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service." G

It is very difficult to contend that that general analysis, and the factors to which it makes appeal, differs in clear terms, or indeed at all, from Lord Woolf CJ's view of the relevant factors that is set out in the passage from his judgment cited in para 35 above. In a later section of the judgment I will venture to suggest that some aspects of Lord Woolf CJ's *application* of those factors may be open to question: but that is very different from saying that his understanding of the questions that the law required to be asked was wrong in itself. H

A **48** I should also record that the foregoing analysis mirrors that of Dyson LJ in *R (Beer) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233.

49 Second, and a major complaint, Lord Woolf CJ applied the domestic law on amenability to judicial review, rather than applying the Convention jurisprudence relevant to the enquiry under section 6. That was inconsistent with the observations of Lord Hope in the *Aston Cantlow* case [2004] 1 AC 546, at para 52:

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> "the decided cases in the amenability of bodies to judicial review have been made for purposes which have nothing to do with the liability of the state in international law. They cannot be regarded as determinative of a body's membership of the class of 'core' public authorities . . . Nor can they be regarded as determinative of the question whether a body falls within the 'hybrid' class. That is not to say that the case law on judicial review may not provide some assistance as to what does, and what does not, constitute a 'function of a public nature' within the meaning of section 6(3)(b). It may well be helpful . . ."

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50 A fair reading of the judgments in the *Donoghue* case and the *Leonard Cheshire Foundation* case [2002] 2 All ER 936 does not bear out the charge. It is quite right that Lord Woolf CJ saw a commonality between the two areas, as recorded in para 31(i) above, a passage much criticised by Mr Sales. However, in so saying Lord Woolf was doing no more than reflecting the Parliamentary assumption that lay behind section 6(3)(b). When introducing the Bill that became the 1998 Act the then Home Secretary said that in deciding what was a public authority or function the judicial review jurisprudence was the "most valuable asset that we have to hand": see *Grosz, Beatson & Duffy, Human Rights: The 1998 Act and the European Convention* (2000), p 61, para 4-03, footnote 24, citing other statements to the same effect by government ministers in the House of Lords. Lord Hope, in the conditional way in which he expressed himself in the quotation set out in para 49 above, and in his acceptance that judicial review authority had a part to play, may well have had that history in mind. But Lord Woolf CJ did not think, any more than did Lord Hope, that judicial review authority was dispositive. If the extended reasoning set out in para 35 above is read without pre-conception, it will be seen to have concentrated on the general question of whether the relevant functions of LCF were "public", without being coerced on that issue by the domestic law of judicial review.

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51 I would also again respectfully adopt an observation of Dyson LJ in *R (Beer) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233, at para 29:

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> "[counsel has not] advanced any reasons peculiar to the public authority issue in support of the submission that, even if [the body's] decision is amenable to judicial review, nevertheless it was not made by [the body] in the exercise of a public function. In my judgment, she was right not to do so. On the facts of this case, and I would suggest on the facts of most cases, the two issues march hand in hand: the answer to one provides the answer to the other."

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52 In his oral submissions Mr Sales said that he did not contend that Lord Woolf CJ had applied judicial review authority to the exclusion of any other. The complaint rather was that judicial review had been treated as the

primary source of authority. That was certainly the most that a reading of the *Leonard Cheshire Foundation* case [2002] 2 All ER 936 would yield, but even if that analysis is correct it does not seem to me to suffice for the Secretary of State's purposes. There are two reasons for that. First, in order to meet the stringent requirements of *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 there has to be shown at the least a failure in the case under attack to apply a principle clearly established in the subsequent House of Lords authority. The placing of emphasis on one stream of authority rather than another is difficult to fit into that framework, particularly when the House has said that the stream of authority allegedly over-emphasised may well be helpful in the lower court's task. Second, it would in any event have to be demonstrated that the House had indeed either laid down such an established principle, or, as is contended for here, had imported such a principle from the jurisprudence of the European court. That was indeed asserted as a separate criticism of the *Leonard Cheshire Foundation* case. The argument raises sufficient difficulties of its own to justify treatment in a separate section of the judgment.

Authority in the European court and section 6(3)(b)

53 Under the authority of *Kay v Lambeth London Borough Council* [2006] 2 AC 465 (para 27 above), the *Leonard Cheshire Foundation* case [2002] 2 All ER 936 cannot be directly attacked as being inconsistent with European court authority. Mr Sales approached the problem more subtly, by arguing that the *Aston Cantlow* case [2004] 1 AC 546 required the domestic court to follow, or at least to be influenced by, Convention authority when determining questions under section 6(3), and that had not been done in the *Leonard Cheshire Foundation* case. To succeed in that criticism, to the extent of requiring this court to depart from the *Leonard Cheshire Foundation* case, it was necessary to demonstrate both that the *Aston Cantlow* case had laid down such a requirement in general terms, and that there was Convention jurisprudence relevant to the application of that requirement to the *Leonard Cheshire Foundation* case. Mr Sales set himself to establish both of those points in two, alternative, respects. First, he said that there were some cases in which the European court would treat private care homes as performing public functions, and that authority should be applied more generally to our case. Second, even if there was no such case, the *Aston Cantlow* case had assumed or required that analysis of section 6(3)(b) must be informed by the general nature of Convention law. I deal with each of those contentions in turn. It will be apparent that, for present purposes, the second approach is markedly weaker than the first.

54 The first approach rested strongly on what was said to be the test stated in the *Aston Cantlow* case [2004] 1 AC 546 of whether the United Kingdom would be answerable for functions of the alleged public authority before the European court. Thus in the *Aston Cantlow* case Lord Rodger of Earlsferry said, at para 160: "A purposive construction of that section accordingly indicates that the essential characteristic of a public authority is that it carries out a function of government which would engage the responsibility of the United Kingdom before the Strasbourg organs"; and at the end of the quotation set out in para 49 above Lord Hope of Craighead said, at para 52: "the domestic case law must be examined in the light of the

A jurisprudence of the Strasbourg court as to those bodies which engage the responsibility of the state for the purposes of the Convention."

55 The House did not offer any further analysis of how those tests would apply in the case of a body that was not of its nature a public authority, but which performed certain public functions. That is of importance in the present context, because in order to succeed in this B argument the Secretary of State has to show that if complaint were successfully made in the European court of conduct inconsistent with an article of the Convention by a private care home the United Kingdom government, the necessary respondent in Strasbourg, would be liable *because of the status of the care home as a public authority.* That is not likely to be the case, because in the posited circumstances there would be at least three potential routes to liability on the part of the United Kingdom C none of which require the establishment of the point that the Secretary of State seeks to establish in these proceedings.

56 First, a state may be liable for arranging its *legislative* system in such a way as enables or facilitates conduct inconsistent with the Convention by a private party. That was the basis on which the United Kingdom was held responsible for the operation of a closed shop by the (by then, private) D British Rail in *Young, James and Webster v United Kingdom* (1981) 4 EHRR 38.

57 Second, the state, in its *administrative* rather than its legislative capacity, cannot avoid one of its own Convention responsibilities by delegating that responsibility to a private body. That was the approach of the European court in *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112, the effect of which was, with respect, correctly stated by Lord Woolf CJ E in the passage from his judgment in the *Donoghue* case [2002] QB 48, set out in para 36 above. In *Costello-Roberts v United Kingdom* the complaint against the United Kingdom was that the corporal punishment had occurred in the course of the exercise by the United Kingdom of its obligation under article 2 of the First Protocol to secure educational provision for its citizens. But the obligation remained that of the state, and not of the private body. By F the same token, it is very unlikely that the European court, if faced with a complaint about occurrences in a private care home, would find it necessary to go further than to implead the state on the basis of its transfer or delegation of its responsibility under section 26 of the 1948 Act.

58 Third, and with particular reference to article 8, the state may be impleaded before the European court in a care home case because of the inadequacy of its *judicial* provision. That springs from the positive G obligation of the state, under article 8, to respect, and therefore to promote, the interests of private and family life. That obligation has been recognised in the Convention jurisprudence since *Marckx v Belgium* (1979) 2 EHRR 330, and a particularly strong expression of it is to be found in *X and Y v The Netherlands* (1985) 8 EHRR 235. The way in which that obligation is enforced in the domestic legal system has been described by Lord Woolf CJ H in *A v B plc* [2003] QB 195, at para 4:

> "under section 6 of the 1998 Act, the court, as a public authority, is required not to act 'in a way which is incompatible with a Convention right'. The court is able to achieve this by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of

confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those articles." A

On that basis, a transaction between private parties may be brought before the European court on the basis that the domestic judicial organs, as an emanation of the state, have failed to accord respect to article 8 rights. It may be noted that that was the route whereby the European court found itself adjudicating on the essentially private argument between Princess Caroline and "Bunte" that was pursued in *Von Hannover v Germany* (2004) 40 EHRR 1. B

59 It is also to be noted that most of the cases cited address delegation by the national state of its own responsibility under the Convention. Thus, for instance, *Costello-Roberts v United Kingdom* 19 EHRR 112, cited above, related to the state's obligation under article 2 of the First Protocol to secure the right to education; and *Buzescu v Romania* (Application No 61302/00) (unreported) 24 May 2005, *Woś v Poland* (Application No 22860/02) (unreported) 1 March 2005, *Van der Mussele v Belgium* (1983) 6 EHRR 163 and *Sychev v Ukraine* (Application No 4773/02) (unreported) 11 October 2005 were all of them concerned with various aspects of the state's obligations under article 6. A revealing passage may be cited in this context from *Woś v Poland*, where complaint was made of the exclusion of access to the Polish courts to challenge decisions made by a private foundation created to administer reparation payments made by Germany under an agreement with the Polish government. The Polish government argued that it could not be impleaded in the European court in respect of matters relating to the foundation, because the latter was not a governmental agency. The European court rejected that argument, saying, at para 73: C D E

"The court observes that the respondent state has decided to delegate its obligations arising out of the international agreements to a body operating under private law. In the court's view, such an arrangement cannot relieve the Polish state of the responsibilities it would have incurred had it chosen to discharge these obligations itself, as it well could have (see, mutatis mutandis, [*Van der Mussele v Belgium* and *Costello-Roberts v United Kingdom*])." F

60 Mr Sales also relied on a case that he said fell into a somewhat different category, *Storck v Germany* (2005) 43 EHRR 96, which concerned state responsibility under article 5 for detention in a private psychiatric hospital. Germany denied responsibility for a detention that had taken place in a private establishment without any coercive order by the state. Again the European court rejected that contention, explaining its approach in general terms, at para 89: G

"there are three aspects which could engage Germany's responsibility under the Convention for the applicant's detention in the private clinic in Bremen. Firstly, her deprivation of liberty could be imputable to the state owing to the direct involvement of public authorities in the applicant's detention. Secondly, the state could be found to have violated article 5(1) in that its courts, in the compensation proceedings brought by the applicant, failed to interpret the provisions of civil law relating to her claim in the spirit of article 5. Thirdly, the state could have breached its H

A positive obligation to protect the applicant against interferences with her liberty by private persons."

And in more detailed discussion the court referred again to *Van der Mussele v Belgium* 6 EHRR 163 and *Costello-Roberts v United Kingdom* 19 EHRR 112.

61 The upshot of all the European court authorities shown to us is that B there are various ways in which complaints about the conduct or policy of a private care home might be brought before that court, but none of them would involve or require any finding or assumption that the care home was itself a public authority. And there is certainly no stream of jurisprudence sufficiently clear and strong to the latter effect to require it to have been adopted in the *Donoghue* case [2002] QB 48 and the *Leonard Cheshire* C *Foundation* case [2002] 2 All ER 936.

62 The other basis on which it was, somewhat tentatively, suggested that the court in the *Leonard Cheshire Foundation* case should have been coerced into finding that the care homes were public authorities equally fails to meet the stringent standards of *Young v Bristol Aeroplane Co Ltd* [1944] KB 718. The authority referred to was *Ferrazzini v Italy* (2001) 34 EHRR 1068, in which at paras 26–28 some general remarks fell from the court as to D the need, in interpreting the Convention as a living instrument, to recognise the state's increasing involvement in matters that might on one level be classified as private in nature. But that was said in the context of considering the ambit of "civil" rights and obligations under article 6. It really does not touch the issue with which we are concerned, and certainly does not do so with the certainty that is required to support the Secretary of State's criticism E of the *Leonard Cheshire Foundation* case.

63 For those reasons the attempt to demonstrate that the *Leonard Cheshire Foundation* case [2002] 2 All ER 936 cannot stand with the *Aston Cantlow* case [2004] 1 AC 546 fails. The general approach of this court was not falsified; and it is not open to us to differ from the way in which that approach was applied by the earlier court to facts that in all relevant respects are the same as the facts of our case. And the arguments based on the *Aston* F *Cantlow* case can be criticised further by reference to the decision of this court in *R (Beer) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233, to which I now turn.

R (Beer) v Hampshire Farmers' Markets Ltd

64 The local authority established a number of farmers' markets under G Local Government Act powers, and subsequently decided to transfer the running of those markets to a limited company. B was excluded from participation in a market, and sought to quash that decision by judicial review, and also damages under the 1998 Act on the basis that when making its decision the company had been performing a function of a public nature and thus acting as a public authority under section 6(3)(b). Under the latter heading, counsel for B sought to dislodge any relevance that the *Leonard* H *Cheshire Foundation* case [2002] 2 All ER 936 might have to the question by appealing to the *Aston Cantlow* case, in broadly the same terms as those in which we have been pressed with that decision. However Dyson LJ, giving the leading judgment, did not accept that the *Aston Cantlow* case had disturbed the *Leonard Cheshire Foundation* case. Dyson LJ said, at para 25:

"[Counsel] submitted that [the *Donoghue* case and the *Leonard Cheshire Foundation* case] have been 'superseded' by the *Aston Cantlow* case. If by 'superseded' she means that the two earlier decisions are to be taken as having been overruled, then I do not agree. As I have said, apart from what Lord Nicholls said, at p 288, paras 11 and 12, the *Aston Cantlow* case contains no guidance as to what amounts to the exercise by a hybrid public authority of functions of a public nature. Provided that it is borne in mind that regard should be had to any relevant Strasbourg jurisprudence, then the passages which I have quoted from the judgments in the two earlier cases will continue to be a source of valuable guidance. Indeed, para 12 of Lord Nicholls's speech is redolent of the flavour of that guidance."

Sir Martin Nourse agreed with the whole of Dyson LJ's reasoning, and Longmore LJ specifically agreed with para 25, at para 47.

65 Viewing the matter in terms of strict precedent, we are not bound by the view expressed by the court in *R (Beer) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233. That is because, although the court was clearly influenced by the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, its actual decision, that the farmers' market was a public authority, was based on its analysis of the market being a close proxy for, and emanation of, the local authority, of a kind that was not present in the *Leonard Cheshire Foundation* case. But the observations about the relationship between the *Leonard Cheshire Foundation* case and the *Aston Cantlow* case [2004] 1 AC 546 were none the less a considered response to a question that was directly in issue before the court. As such, I would be most reluctant to reach a different conclusion unless driven to it. For the reasons already set out, I am not so driven.

Conclusion

66 For all the reasons stated, we are bound to follow both the reasoning and the decision in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, and therefore bound to say in answer to the preliminary point that the private care home when accommodating the claimant was not performing the functions of a public authority under section 6(3)(b) of the 1998 Act. The appeals of the Secretary of State and of YL must fail.

Apart from authority, what is the correct answer to the preliminary point?

67 I enter upon these considerations with no little diffidence, in view of the opinion expressed in their judgments by both the Master of the Rolls and Dyson LJ that the court should leave matters where they stand. However, in the course of the appeals it became clear that the issue in *YL's* case, and the second issue in *Johnson's* case, were they not decided by binding authority, raise some fundamental questions as to the operation of Convention rights and obligations in domestic law. In view of the importance of that issue, and in view of the detailed arguments that we have received, it does not seem sufficient to leave those questions unnoticed. I therefore go on with due deference to indicate the answer that I would have given to the preliminary point were we not constrained by the *Leonard Cheshire Foundation* case [2002] 2 All ER 936. Everything that follows is of course obiter and carries even less authority by representing the view of one member only of the court.

A 68 In drafting what became section 6 of the 1998 Act the Government sought to provide as much protection as possible for the rights of the individual against the misuse of power by the state: see the parliamentary material cited by *Grosz, Beatson & Duffy, Human Rights: The 1998 Act and the European Convention*, para 4-02. It was no doubt that consideration that led, for instance, Lord Nicholls in his speech in the *Aston Cantlow* case [2004] 1 AC 546, para 11, to urge a "generously wide scope
B [for] the expression 'public function' in section 6(3)(b)". Two comments are however necessary. First, the purpose of the 1998 Act was to introduce Convention jurisprudence into English domestic law. As we have already noted, it is difficult to find in that jurisprudence a parallel for the step that it is said should have been taken in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, of creating Convention liability just because of the
C status of the private home as a public authority. Second, the importation of the Convention jurisprudence demands the importation of the whole of that jurisprudence. I will say something further below about the implications of that point for the present case.

69 First, however, I address the application to the present case of the terms of section 6(3)(b) as if it were part of an ordinary English statute; so that the expression "functions of a public nature" has to be read according to
D the simple meaning of the words used. Two general observations may be made about how that approach was applied in the *Leonard Cheshire Foundation* case.

70 First, Lord Woolf CJ emphasised that the nature of the services provided to residents placed with LCF by local authorities was exactly the same as that provided to privately-paying residents. LCF was essentially a
E private organisation, and before the 1998 Act came into force it is doubtful whether it would even have been contemplated that it was performing any sort of public function: the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, at para 15. This analysis was strongly supported by the care home, in *YL's* appeal, and by the NCA intervening in *Johnson's* case. For the latter body Ms Booth stressed that the members of the NCA were not charities, like
F LCF, but businesses owned by private investors. They should have the freedom that any other private business might expect, to dispose of its resources in the way that seemed to it most profitable. Constraints imposed on that freedom by Convention rights held by the residents, what the Chief Executive of the NCA described in her evidence as "rights of occupation having priority over the right of the care home provider to freely deal with his business asset", were inconsistent with the private status of the care
G homes.

71 If I were free to do so, I would reject that consideration as dispositive as to whether on the facts of *Johnson's* case the care home is performing a public function in accommodating Mrs Johnson. Although no comprehensive figures were given, the Chief Executive said that the majority of placements in private care homes are publicly funded by local authorities
H under the 1948 Act. That was borne out by the evidence of the care home in *YL's* case, who said that of the 29,000 beds that it provides in the United Kingdom about 80% are funded by social services departments of local authorities. And that also reflects the position at the two care homes that we know about in any detail. At the time of the hearings in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, 38 of the 43 residents at Le

Court had been placed there by local authorities. We were told that at the care home where YL is resident 60 of the 72 residents are publicly funded. And on the other side of the coin, Birmingham told us of the some ten thousand persons for whom it provided residential accommodation, 9,000 were placed in private homes. These figures seriously undermine the claims of the homes to be providing an essentially private service. It seems clear that these care homes can only continue, whether as viable charities or as profitable businesses, because they are accepted by the public function as acceptable providers of a public obligation. That degree of close integration into, and dependence on, the work of local authorities in discharging their section 21 duties should be a strong indicator that the care of persons placed under section 26 is itself a "public" function.

72 Second, it is necessary to consider the nature of the service that the care homes provide. Lord Woolf CJ may have understated that point when he said in the *Leonard Cheshire Foundation* case [2002] 2 All ER 936, para 17: "The issue here can . . . be refined by asking, is LCF, in providing accommodation for the claimants, performing a public function?" That reference to accommodation, with a comparison with a small hotel providing bed and breakfast, was repeated in the *Donoghue* case [2002] QB 48, at para 58, quoted in para 30 above. That, with deference, undervalues what the care home does, and what the local authority seeks from it. The home is not just a hotel, but a *care* home. It would not adequately perform the local authority's duties to place persons where only accommodation was provided. In their range of provision, which is subject to stringent standards, the homes can indeed be argued to stand in the shoes of the local authority as it discharges its public duties under section 21. This is another factor that might be thought to point towards the care functions of the homes being of a public nature.

73 That said, however, different, more general, and with respect more cogent objections were also raised in the skeleton argument presented by Ms Booth and Ms McColgan. The argument can be explained in the following way. The 1998 Act is not an ordinary English statute. Rather, it is the vehicle through which the jurisprudence of the Convention, as understood by the European court, is made available in the English domestic legal order. Section 6(3)(b) was thus included in the Act in an attempt to replicate in the domestic jurisdiction the range of bodies in respect of whose activities within the United Kingdom liability would attach under the jurisprudence of the European court. It is not just a quibble to say that it is very difficult to find within that jurisprudence any direct parallel to a private body becoming a public authority, therefore a body for which the state is directly responsible in the European court, because it performs some public functions. And that is not least because, if, for instance, a private care home is in respect of some of its activities a public authority in Convention terms, the whole of the Convention jurisprudence, and the whole of those articles of the Convention set out in Schedule 1 to the 1998 Act, apply to that part of its activities. The monocular concentration on the assertion of the rights of the individual against the state that inspired section 6 (see para 68 above) causes no, or at least not much, difficulty when applying section 6(3)(b) in relation to what have been called the absolute obligations, such as that arising under article 3. But as the skeleton argument urged, it does cause considerable

A difficulty in relation to the qualified obligations in other articles: the most obvious example, in issue in the present case, being article 8.

74 Article 8(2) provides that a "public authority" may interfere with the exercise of the article 8 right when that is

> "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being
B of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others."

The public authority's actions that interfere with a citizen's private or family life have therefore to be judged by that standard. But the language and assumptions of article 8(2) are all redolent of the powers and discretions of
C public authorities in the full sense of the expression: that is, bodies that actually have power and responsibility to do something about national security or the protection of morals. This essentially public nature of the article 8 balance was indeed one of the reasons motivating those who, at the time of the passing of the 1998 Act, warned against facile assumptions that the language of the Convention could simply be applied to transactions between private individuals. So how is article 8(2) to be applied in the
D case of, for instance, a private care home that needs a resident to leave because the home is going into liquidation; or wishes a resident to leave for the kind of reasons that apply in the case of YL? The terms of article 8(2) really make no sense in the first case, and very little sense in the second; so if the care home is to be treated as a public authority, article 8 will have been translated into the domestic jurisdiction as conferring not
E conditional but absolute rights.

75 A particular difficulty has been seen in this connection in respect of the right of the care home to protect its own position, for instance by asserting its right to control its property under article 1 of the First Protocol. That difficulty arises as follows. When addressing the position of core public authorities, Lord Nicholls in the *Aston Cantlow* case [2004] 1 AC 546, at
F para 8 (a passage relied on by Mr Sales as in some way undermining the *Leonard Cheshire Foundation* case [2002] 2 All ER 936), pointed to the definition of "victim" in article 34 of the Convention: "any person, *non-governmental organisation* or group of individuals" (Lord Nicholls's emphasis). It therefore followed that a core public authority would be, or was likely to be, a body that was not a victim, and thus had no Convention rights of its own. But if that is so of core public authorities, it is very difficult
G to see why that is not so of hybrid public authorities in relation to the activities that confer on them their public status. True it is that in the *Aston Cantlow* case Lord Nicholls said, at para 11: "Unlike a core public authority, a 'hybrid' public authority, exercising both public functions and non-public functions, is not absolutely disabled from having Convention rights." But, with deference, that does not meet the objection in relation to those
H functions of the hybrid, in the present case the care of section 26 residents, that confer the status of a public authority. And it would therefore seem to follow that when making decisions of the sort indicated above the care home cannot take into account, under the rubric of the rights of others, its own Convention rights, because when discharging its public functions it has no such rights.

76 I find these considerations troubling. The argument presented by the NCA taken on its own proves too much, because the logic of it was that, at least in relation to an article such as article 8, a private body could never be a public authority. That cannot be right, granted that we have to apply section 6(3)(b) of the 1998 Act. But I do consider that in applying that section we have to have firmly in mind its instrumental nature, and the purpose that it serves, and not merely interpret the literal language in the terms suggested in paras 71–72 above. The question to be asked in any given case should, therefore, be whether it is necessary for the protection of the claimant's Convention rights that the body concerned should be held to be a public authority against which those rights can be directly asserted. The answer to that question will vary according to the article of the Convention that it is sought to assert. If it is seriously asserted that the body has indulged in conduct contrary to article 3, then to be able to make that assertion directly against the body will be the obvious course. But if the article in issue is article 8, with all the difficulties indicated above, the question of whether it is necessary and justified to treat the body as a public authority for the purposes of article 8 will be much more difficult to answer.

77 In *YL's* case, because the proceedings have taken the form of a preliminary point, the full implications of finding the care home to be a public authority have not been explored, and we certainly have not heard submissions on them. However, granted that this part of the judgment proceeds on the basis indicated in para 67 above, I feel able to observe as follows. Appeal is made to the Convention in the present case because in the "best interests" proceedings in which the issue arises the court would not have power to compel either the care home to continue to accommodate YL, or Birmingham to continue to maintain her there; it would appear, even if the professional advice was that to move her to another home would be seriously detrimental to her health or even to her life. It has been noted in the discussion of *Johnson's* case that Birmingham has in any event to protect the article 8 rights of any person for whom it is responsible under section 21: see para 17 above. Whether it is necessary or possible in any given case to go further, and impose on the care home what is in effect an absolute obligation to accommodate YL (as to which analysis see para 74 above), is much more questionable. To answer that question in the affirmative would seem to confer on YL the sort of absolute right that article 8 does not provide: see paras 15–16 above.

78 I therefore venture to suggest that the approach to the issue of whether a particular body is a (hybrid) "public authority" should respect the instrumental nature of section 6 of the 1998 Act, and its purpose in promoting access to the Convention jurisprudence. That does not exclude the conclusion that a hybrid body may be directly impleaded in the protection of some Convention rights but not of others. Nor does it exclude consideration of the necessity of imposing liability on a body even where that significantly distorts the balance required by some articles of the Convention. What is not likely to be helpful is to ask whether in performing a particular function a hybrid body falls under the Convention for all purposes and at all times, in the same way as the status of a core public authority is fixed without reference to the instant context.

79 It is unfortunately that last question that we are asked in this case. For the reasons indicated I would not give it a positive answer, but also

A I draw back from the implications of giving a negative answer that will be binding in all circumstances. Whether it is necessary to find that the care home is bound by any and if so which of the articles of the Convention must depend, first, on what would be legitimate relief in the "best interests" proceedings; and, second, on whether that relief can be provided without infringing any other Convention values. I appreciate that this may be an B unattractive invitation to further litigation, not only in this case but in many others. But I fear that that is the unavoidable outcome, however the courts proceed, once domestic enforcement of the Convention embraces the relativist values of articles 8 to 11; and once the bodies bound by those values pass from the core case of the national government to bodies with legitimate interests of their own to assert.

80 As already indicated, these considerations are not open to this court, C but it might be thought that they should be taken into account in any future investigation of the impact of article 8 on the care home sector.

Disposal

81 The appeals both in *Johnson's* case and in *YL's* case fail. In the hope that it may be of some assistance to the parties I go on and make some D observations about costs, and about any further appeals. These are of course subject to any appropriate argument that the parties wish to advance.

Costs

82 In *Johnson's* case Havering is entitled to its costs, subject to any issues arising in relation to Legal Services Commission liability. I would not E award any costs in favour of the Secretary of State, whose intervention, although valuable to the court, was confessedly directed at policy objectives that went wider than this case. We need to know more about the arrangements for the appearance of the NCA before determining the issue of its costs. While it is quite correct that the court welcomed that intervention, the intervention was originally proposed by the Secretary of State, the court understood at his expense, in order to give substance in the sense of F opposition to his own intervention. And the NCA made it plain that it had a strong interest in supporting the commercial interests of its members. I doubt whether it would be equitable to expect the claimants to meet the costs of the NCA as well as those of Havering.

83 In *YL's* case, and again subject to any issue arising in relation to Legal Services Commission liability, YL is liable for the costs of Birmingham G and of the care home. She will be jointly and severally liable with the Secretary of State, who by intervening in the appeal in support of a particular case became in practice a party to the appeal: *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet (No 2)* [2000] 1 AC 119, 134A. There will have to be an assessment of the latter costs, in order to ensure that there is no double recovery for the cost of litigating the same point. The third and fourth defendants played only a limited role in the H appeals, and I would make no order for costs in their cases.

Appeal to the House of Lords

84 The issue in *YL's* case is of public importance, at present determined by authority in this court that might benefit from reconsideration. I would

be minded to give permission to appeal both to YL and to the Secretary of State. I would not give permission to appeal on the first issue in *Johnson's* case. The second issue as to whether the homes are public authorities, remains live in *Johnson's* case because of the interest in it of the claimants. I would grant permission to appeal on that issue only. It will be for their Lordships' House to determine how many advocates they wish to hear in support of the point that arises in *YL's* case as in *Johnson's* case.

DYSON LJ

85 I agree that these appeals should be dismissed for the reasons given by Buxton LJ. I do not, however, wish to make any obiter observations as to what the answer to the preliminary point should be if the *Leonard Cheshire Foundation* case [2002] 2 All ER 936 were not binding on this court.

SIR ANTHONY CLARKE MR

86 I also agree that these appeals should be dismissed for the reasons given by Buxton LJ. Like Dyson LJ, I too do not wish to express any view as to what the position would be if the *Leonard Cheshire Foundation* case were not binding on this court. The purpose of the rules of precedent is that courts bound by previous decisions should not embark upon detailed debate on questions determined by such decisions. In these circumstances, it is only in very rare cases that I would think it appropriate to express a view upon such questions. This is not such a case.

Order accordingly.

Solicitors: Hossacks, Kettering; Assistant Chief Executive of Legal and Democratic Services, Havering London Borough Council, Romford; Treasury Solicitor; Lester Aldridge, Bournemouth; Irwin Mitchell, Sheffield; Legal and Democratic Services, Birmingham City Council, Birmingham; Lester Aldridge, Bournemouth.

I C

Neutral Citation Number: [2009] EWCA Civ 23

Case No: C1/2008/0649

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE DIVISIONAL COURT
(LORD JUSTICE MAURICE KAY AND MR JUSTICE WALKER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2009

Before :

LORD JUSTICE LAWS
LORD JUSTICE WALL
and
LORD JUSTICE STANLEY BURNTON

- -

Between :

Tabernacle	**Appellant**
- and -	
The Secretary of State for Defence	**Respondent**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr David Pievsky (instructed by Public Interest Lawyers) for the Appellant
Mr Gordon Nardell (instructed by **The Treasury Solicitor**) for the Secretary of State for Defence

Hearing dates : 26 November 2008

- -

Judgment
As Approved by the Court

Lord Justice Laws:

INTRODUCTION

1. This is an appeal, with permission granted by Waller LJ on 13th May 2008, against the decision of the Divisional Court (Maurice Kay LJ and Walker J) given on 6th March 2008 by which it dismissed the appellant's application for judicial review seeking to challenge the legality of paragraph 7(2)(f) of the Atomic Weapons Establishment (AWE) Aldermaston Byelaws 2007 (the 2007 Byelaws).

2. The appellant is a long-time member of the Aldermaston Women's Peace Camp (the AWPC). The AWPC protest against nuclear weapons. They do so in the vicinity of the Atomic Weapons Establishment at Aldermaston (the AWE). They have camped on land at Aldermaston, most recently in an area owned by the respondent Secretary of State within what the 2007 Byelaws call "the Controlled Areas". Paragraph 7(2)(f) of the 2007 Byelaws prohibits camping in the Controlled Areas from which, therefore, it bans the AWPC. The question in the case is whether this prohibition violates the appellant's right of free expression guaranteed by Article 10 of the European Convention on Human Rights (the ECHR).

THE FACTS

3. What follows is an outline. It will be necessary to say a little more about some of the facts in the context of particular submissions advanced by counsel and the conclusions I will arrive at.

4. The camp has been going for some 23 years. The women assemble on the land for the second weekend of each month. They stay from Friday evening until Sunday morning. They hold vigils, meetings and demonstrations, and hand out leaflets. Their protest is and always has been entirely peaceful.

5. The land occupied by the AWE includes what are called the Protected Areas and the Controlled Areas. Public entry into the Protected Areas, where the actual Research Establishment is situated, is forbidden. However the public has free access to the Controlled Areas, and it is there, as I have indicated, that the AWPC foregathers each month. We were told that the Controlled Areas have been open to the public at least since 1986.

THE LEGISLATION

6. The 2007 Byelaws have been in force since 31st May 2007. Their *vires* is s.14(1) of the Military Lands Act 1992. S.14(2) is also material. The relevant provisions are:

> "(1) Where any land belonging to a Secretary of State or to a volunteer corps is for the time being appropriated by or with the consent of a Secretary of State for any military purpose, a Secretary of State may make byelaws for regulating the use of the land for the purposes to which it is appropriated, and for securing the public against danger arising from that use, with

> power to prohibit all intrusion on the land and all obstruction of the use thereof …
>
> (2) Where any such byelaws permit the public to use the land for any purpose when not used for the military purpose to which it is appropriated, those byelaws may also provide for the government of the land when so used by the public, and the preservation of order and good conduct thereon, and for the prevention of nuisances, obstructions, encampments, and encroachments thereon, and for the prevention of any injury to the same, or to anything growing or erected thereon, and for the prevention of anything interfering with the orderly use thereof by the public for the purpose permitted by the byelaws."

7. Paragraph 6 of the 2007 Byelaws allows the public to have access to the Controlled Areas. It provides:

> "Subject to the provisions of these byelaws, members of the public are permitted to use all parts of the Controlled Areas not specially enclosed or entry to which is not shown by signs or fences as being prohibited or restricted, for any lawful purpose at all times when the Controlled Areas are not being used for the military purpose for which they are appropriated."

Paragraph 7(2) of the 2007 Byelaws opens with the words "No person shall within the Controlled Areas …", and there then follow twenty prohibited acts, listed under (a)-(t). I should read paragraph 7(2)(f), (g) and (j):

> "(f) camp in tents, caravans, trees or otherwise;
>
> (g) attach any thing to, or place any thing over any wall, fence, structure or other surface;
>
> …
>
> (j) act in any way likely to cause annoyance, nuisance or injury to other persons …"

Contravention of any provision of Byelaw 7 is a criminal offence: see Byelaw 9.

8. ECHR Article 10 provides:

> "(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 …
>
> (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."

I should also set out Article 11:

> "(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others …
>
> (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 …"

THE ISSUE

9. The appellant sought originally to challenge the legality of paragraph 7(2)(f), (g) and (j). The Divisional Court, having granted permission to seek judicial review and proceeded to determine the substantive judicial review claim, upheld the challenge to paragraph 7(2)(g) but dismissed the balance of the application relating to 7(2)(f) and (j). We are no longer concerned with (j). The appeal relates only to (f).

10. As I have foreshadowed the appellant's primary case is that paragraph 7(2)(f) of the 2007 Byelaws constitutes an unlawful interference with her right – indeed the right of every member of the AWPC – of freedom of expression guaranteed by ECHR Article 10. It is also said there is a violation of Article 11. That, I think, is on the facts not so much to be regarded as an autonomous claim, but rather as underlining the mode of free expression relied on: a communal protest in a camp established for the purpose.

11. It is of course common ground, having regard to s.6 of the Human Rights Act 1998 which I need not read, that in framing paragraph 7(2)(f) of the 2007 Byelaws the Secretary of State was obliged to respect the Article 10 rights of persons potentially affected by the prohibition thereby enacted. It is clear that paragraph 7(2)(f) constitutes in practice an interference with the rights of the AWPC pursuant to Article 10(1). So much is also common ground. The ultimate question in the appeal, therefore, is whether this byelaw is nevertheless justified by any of the considerations in Article 10(2).

THE SECRETARY OF STATE'S CASE

12. Although the Secretary of State is respondent to the appeal it is convenient first to explain his case. He bears the burden of justifying the accepted interference with the Article 10 right. As a preliminary, there are some foothills to cross.

The Legal Setting

13. In deciding whether the interference is justified the court has to consider whether paragraph 7(2)(f) serves the achievement of a legitimate aim and, if it does,

constitutes a proportionate means of doing so. The requirement of proportionality is derived from the rubric "necessary in a democratic society" in Article 10(2). It is well established that this standard can only be satisfied if the impugned measure is required to fulfil what the European Court of Human Rights has described as a "pressing social need": see, amongst a welter of authority, *Sunday Times v United Kingdom* (1979) 2 EHRR 245.

14. Moreover the weight of the Article 10(2) justification advanced by the State cannot – certainly in this case – be looked at in isolation. Whether paragraph 7(2)(f) imposes no more than a proportionate restriction of AWPC's free expression rights depends also on the particular nature and quality of the right's exercise with which the prohibition interferes. Here the Secretary of State's case has two specific aspects. First, Mr Nardell on his behalf submits that we should attach importance to the fact that the only source of the public's right (thus AWPC's right) to go on the Controlled Areas is to be found in the 2007 Byelaws themselves: paragraph 6, which I have set out. They are not, otherwise, public land at all. Mr Nardell says that all that has happened is that the Secretary of State has through the 2007 Byelaws granted the public a right to go on the Controlled Areas, but subject to conditions including that provided for by paragraph 7(2)(f). The State owes no positive obligation whatever to set aside any part of the property as a place for public protest. Moreover the Secretary of State has not previously admitted the public to the Controlled Areas for camping purposes, let alone political protest: the predecessor byelaws also prohibited camping. In all those circumstances, while as I have foreshadowed Mr Nardell accepts that paragraph 7(2)(f) constitutes an interference with AWPC's rights under Article 10, he says that the interference is weak.

15. The second aspect of the Secretary of State's case concerning the particular nature and quality of the Article 10 right's exercise (with which the paragraph 7(2)(f) prohibition interferes) is altogether broader. It consists in what Mr Nardell submits is an important distinction: between the so-called essence of the Article 10 right on the one hand, and the "manner and form" of its exercise on the other. Mr Nardell submits that paragraph 7(2)(f) only intrudes upon the latter, and this has, or should have, a significant bearing on the court's readiness to hold that paragraph 7(2)(f) is no more than a proportionate interference. Plainly there is not, nor could there be, any suggestion that the Secretary of State has sought to impose anything approaching a blanket ban on AWPC's rights of protest. They may protest as much as they like: all they are stopped from doing is camping in the Controlled Areas. Mr Nardell submits that such a restriction goes at most to the manner and form of AWPC's exercise of the right of free expression; and not to the right's essence.

16. The distinction between a right's essence and the manner and form of its exercise has been recognised in the Strasbourg jurisprudence: *Ziliberberg v Moldova* (Application 61821/00), *Ashingdan v UK* (1985) 7 EHRR 528 (paragraph 57), and *F v Switzerland* (1987) 10 EHRR 411. Of particular interest in the context of this case is an authority referred to by Mr Nardell in response to the reply skeleton argument put in by Mr Pievsky for the appellant, namely *Rai, Allmond & "Negotiate Now" v UK* (1995) 19 EHRR CD93. Mr Nardell would submits that this case tends to show – and does so in the then highly charged context of protest and demonstration concerning Northern Ireland – that restrictions on the manner of the Article 10 right's exercise may very well be regarded as proportionate provided they betray no bias or arbitrariness and do

not amount to a blanket prohibition. *Rai, Allmond* concerned an application to hold a political rally in Trafalgar Square by an organisation favouring negotiations without pre-conditions in Northern Ireland. The police considered that there would be no danger to public order, but the application was turned down having regard to the policy of successive governments since 1972 to refuse permission for public demonstrations or meetings in Trafalgar Square on the Northern Ireland issue. After the IRA bombing in Aldershot which killed seven civilians, the Secretary of State had in 1972 stated that

> "... the Government had to decide whether it would be fitting to permit the use of the Square by any organisation that had declared its support for the perpetrators of violence of that kind and they had no hesitation in deciding that it would be an affront to the British people to do so. The Government having made the decision, it would be wrong to attempt to distinguish between different organisations..."

17. In Strasbourg the applicants submitted that their assembly was banned in Trafalgar Square because it was "controversial" and liable to shock or offend rather than for any reason of public safety. The Commission, which concluded that the applicants' complaint was manifestly ill-founded, held that the question whether the applicants' policy was merely "controversial" was within the government's margin of appreciation, and said this (CD98):

> "Having regard to the fact that the refusal of permission did not amount to a blanket prohibition on the holding of the applicants' rally but only prevented the use of a high profile location (other venues being available in central London)... the restriction in the present case may be regarded as proportionate and justified as necessary in a democratic society within the meaning of Article 11(2) of the Convention."

18. One might compare *Chorherr v Austria* (1993) 17 EHRR 358, in which persons displaying placards and distributing leaflets at a military ceremony were arrested and convicted of "causing a breach of the peace by conduct likely to cause annoyance". The court, holding there had been no violation of Article 10, stated:

> "31. ... [The] margin of appreciation extends in particular to the choice of the - reasonable and appropriate - means to be used by the authorities to ensure that lawful manifestations can take place peacefully...
>
> 32. … [W]hen he chose this event for his demonstration against the Austrian armed forces, Mr Chorherr must have realised that it might lead to a disturbance requiring measures of restraint, which in this instance, moreover, were not excessive. Finally, when the Constitutional Court approved these measures it expressly found that in the circumstances of the case they had been intended to prevent breaches of the peace and not to frustrate the expression of an opinion...

> 33. In the light of these findings, it cannot be said that the authorities overstepped the margin of appreciation which they enjoyed in order to determine whether the measures in issue were 'necessary in a democratic society' and in particular whether there was a reasonable relationship of proportionality between the means employed and the legitimate aim pursued."

19. Mr Nardell would submit that the learning shows not only 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; it shows also that once the court is satisfied that the case is in the former territory and not the latter, it will be much readier to allow the State what may be a generous margin of appreciation to take restrictive measures for practical or prudential reasons. As Professor Barendt has said (*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 an information."

One may compare the decision of the Divisional Court in *Blum v DPP & Orsv DPP* [2007] UKHRR 233 in which it was held that a requirement for prior authorisation of a demonstration would not generally be repugnant to ECHR Article 11.

20. On Mr Nardell's case the space given by the Strasbourg court to manner and form restrictions is, moreover, all of a piece with another dimension of the court's jurisprudence. This is the care taken in the authorities to avoid a position in which invocation of a Convention right might seem to, or might in fact, confer an immunity from the effects of ordinary State regulation for proper purposes. *Chapman v UK* (2001) 10 BHRC 48 (Application No 272385/95) is a good example. The applicant was a gypsy. The local authority refused planning permission for her mobile home to be stationed on a piece of land she had purchased, and served enforcement notices which were upheld at a public inquiry. Further applications for planning permission for a bungalow were refused, and the refusals again upheld at public inquiries. The court at Strasbourg held that the authority's decisions constituted an interference with the applicant's right to respect for her private life, family life and home pursuant to ECHR Article 8; but the interference had the legitimate aim of protecting the rights of others, the national authorities enjoyed a margin of appreciation as to how that should be achieved, and they had weighed in the balance the various competing interests. Accordingly the decisions arrived at were proportionate to the legitimate aim of preserving the environment. At paragraph 96 the court observed that

> "the fact of belonging to a minority with a traditional lifestyle different from that of the majority does not confer an immunity from general laws intended to safeguard the assets of the community as a whole, such as the environment..."

21. Mr Nardell submits that all these aspects of the case-law provide the setting for the Secretary of State's justification of the interference with the AWPC's rights constituted by paragraph 7(2)(f) of the 2007 Byelaws. Their effect is that while the justification must be real and not fanciful, and of course serve a legitimate aim, it

must be judged by reference to a very broad margin of appreciation enjoyed by the Secretary of State.

The Secretary of State's Justification of paragraph 7(2)(f) of the 2007 Byelaws

22. What then is the Secretary of State's justification for paragraph 7(2)(f)? It is offered in the witness statement of Mr Timothy Pinchen, who is employed by the Ministry of Defence dealing with estate management issues across various parts of the Defence Estate. The essence of his evidence is crisply summarised by Maurice Kay LJ giving the judgment of the Divisional Court:

> "23. … As a matter of policy, there is a general prohibition on unauthorised camping across the Defence Estate. It is only allowed with express permission. The reasons include operational and security concerns. Dealing specifically with Aldermaston, Mr Pinchen says that camping in the vicinity of the security fence is not appropriate for security reasons. If it were allowed, additional surveillance would be necessary. Camping can be used as a base, a cover or a distraction in relation to terrorist or similar activities. There are no publicly accessible sanitation facilities anywhere in the Controlled Areas. AWE have received numerous complaints about the AWPC and its occupants, ranging from the leaving of human excreta in the area to passing motorists beeping their horns … The claimant denies all allegations of antisocial behaviour and we are content to accept that, in general, the members of the AWPC do not behave badly. They have been camping there or thereabouts for many years and the prohibition on camping in the Byelaws has existed since at least 1986. We have previously explained why it has not been enforced over the years."

The reference to a previous explanation is to paragraph 5 of the Divisional Court's judgment:

> "It seems that the 1986 Byelaws were never used against the AWPC, probably because there was for a time some doubt as to whether the women were on land belonging to the Secretary of State and, more recently, because of apprehension about the impact of the Human Rights Act 1998."

23. I should notice some further specific points made by Mr Pinchen. At paragraph 48 of his statement he says that camping on the verges "is in dangerous proximity to high volume traffic... [and] provides a distraction to motorists". At paragraph 52 he refers to an area called "Bluebell Wood" which has been used for camping, but is also "regularly used by residents for recreational and access purposes as there is no footpath along the verge of the busy road. Last year there was an attack on the unauthorised camp by, it is believed, local residents."

24. In light of all these matters Mr Nardell would pray in aid a series of legitimate aims or purposes, among those listed in ECHR Article 10(2), which are promoted by

paragraph 7(2)(f): national security, public safety, the prevention of disorder or crime, and the protection of the rights of others. And given the broad margin of appreciation to be accorded to the Secretary of State for the reasons which (on Mr Nardell's case) I have explained, the court should not undercut the Secretary of State's deployment of paragraph 7(2)(f) as a proportionate measure supporting those aims.

25. Given all these considerations Mr Nardell submits that paragraph 7(2)(f) of the 2007 Byelaws constitutes no violation of the appellant's rights under ECHR Article 10; and if it does not, there is no free-standing case under Article 11.

THE APPELLANT'S CASE

The Legal Setting

26. Mr Pievsky for the appellant does not dispute, nor could he, that the Strasbourg court has accepted a distinction between manner and form on the one hand and the essence of a Convention right on the other. He also concedes that the prevention of public disorder may in appropriate cases justify such measures as a requirement of prior authorisation or even the prohibition of a protest; though he submits that the feared disorder must be imminent. He does not, however, accept that in principle the law allows a wider discretionary area of judgment in relation to the manner and form, as opposed to the essence, of a political protest. ("Discretionary area of judgment" is a better phrase than "margin of appreciation": as is well known the latter is a Strasbourg term of art reflecting the international court's distance from the facts and circumstances of decision-making in the States Parties.)

27. In any event, however, Mr Pievsky roundly submits that we are not in "manner and form" territory. His case is that the AWPC camp is not merely the setting or the context – the manner and form – of his client's protest: it is an inherent part of the protest itself. It has a symbolic effect. Attending a peace camp is a traditional and well-recognised form of political expression. There are many well-known instances. Waller LJ granting permission to appeal considered that "the byelaw as construed catches a form of peaceful protest used in many places..." It is undoubted that acts as well as words may constitute political expression: see for example *Vajna v Hungary* (Application 33629/06). In his reply skeleton argument Mr Pievsky puts it thus (paragraph 4):

> "Defacing a flag, deliberately using a seat on a bus supposedly reserved for citizens of a different race, in order to defy a racist law on segregation, going on a hunger strike, carrying out a silent vigil, and attending a peace camp are well-known ways in which political messages about fundamentally important political matters can be very powerfully expressed – albeit silently."

28. As for the contention that the appellant's ECHR rights are the less because (in light of paragraph 6 of the 2007 Byelaws) all that has happened is that the Secretary of State has granted public access to the Controlled Areas subject to conditions, this is, on Mr Pievsky's argument, a *non sequitur*. He submitted in terms that government property is held for the public good; the Secretary of State has no legitimate private axe to grind. I apprehend Mr Pievsky would say that once it is accepted that the appellant

enjoys Article 10 rights with the AWPC, the fact that the government landowner has granted access to the land means only that the AWPC is not a trespasser.

29. Mr Pievsky also submits that the Secretary of State has given no weight to the subject-matter of the AWPC protest: nuclear weapons. Where the acts or speech in question relate to "a debate on a matter of general concern and [constitute] political and militant expression … a high level of protection of the right to freedom of expression is required under Article 10": *Lindon and others v France* (2008) 46 EHRR 35.

30. In all these circumstances Mr Pievsky submits that the interference with his client's rights constituted by paragraph 7(2)(f) of the 2007 Byelaws, far from being weak or insubstantial, goes to the right's core or essence; and the discretionary area of judgment which the domestic court should allow the Secretary of State (whatever the margin of appreciation which might be contemplated by the international tribunal) should be severely circumscribed. Paragraph 7(2)(f) could only be vindicated by a substantial objective justification, amounting to an undoubted pressing social need.

The Secretary of State's Justification of paragraph 7(2)(f) of the 2007 Byelaws

31. Mr Pievsky has advanced arguments in reply to all of the points put forward by Mr Pinchen. As for concerns about security, it has not been suggested that the AWPC have ever proposed to enter the Protected Areas, and (as my Lord Wall LJ suggested in the course of argument) the perimeter fence is presumably patrolled in any event. Then there is a point about sanitation: the appellant has given evidence, which I do not think is contradicted, as to the availability of adequate sanitation facilities. Moreover the 2007 Byelaws include provisions relating to nuisance and waste and there has been no suggestion of any breach. Next there is Mr Pinchen's evidence of "numerous complaints about the AWPC and its occupants", some of them taking a particularly unpleasant form. The Divisional Court accepted that "in general, the members of the AWPC do not behave badly", and the evidence overall shows that their activities down the years have been consistently peaceful.

32. On this last aspect of the case, the reaction of other members of the public to the presence and the activities of the AWPC, Mr Pievsky understandably relies on the decision of the Divisional Court in *Redmond-Bate v DPP* [1999] EWHC Admin 732. That case concerned an episode in which one or more of three women, Christian fundamentalists, were preaching from the steps of Wakefield Cathedral. A crowd gathered. Some of the people in the crowd showed themselves hostile to the women. A police officer at the scene feared a breach of the peace. He asked the women to stop preaching. They refused. He arrested them for breach of the peace. One of the women was subsequently convicted of obstructing a police officer. Her appeal to the Crown Court was dismissed. She launched a further appeal, by way of case stated, to the High Court; and this appeal was successful. Sedley LJ (with whom Collins J agreed) said this:

> "18. ... The question for PC Tennant was whether there was a threat of violence and if so, from whom it was coming. If there was no real threat, no question of intervention for breach of the peace arose. If the appellant and her companions were (like the street preacher in *Wise v Dunning*) being

> so provocative that someone in the crowd, without behaving wholly unreasonably, might be moved to violence he was entitled to ask them to stop and to arrest them if they would not. If the threat of disorder or violence was coming from passers-by who were taking the opportunity to react so as to cause trouble (like the Skeleton Army in ***Beatty v Gilbanks***), then it was they and not the preachers who should be asked to desist and arrested if they would not."

33. In all these circumstances Mr Pievsky submits that the Secretary of State has not begun to demonstrate a substantial objective justification for paragraph 7(2)(f) of the 2007 Byelaws, amounting to an undoubted pressing social need.

THE DECISION OF THE DIVISIONAL COURT

34. The Divisional Court's conclusions are expressed in paragraph 25:

> "The questions become: has the Secretary of State established that the prohibition on camping is necessary in a democratic society and that it satisfies a pressing social need by reference to the reasons set out in Articles 10(2) and 11(2). Has he accordingly established the proportionality of the prohibition …? In our judgment, the answer to both questions is in the affirmative. We attach some significance to the fact that the prohibition only limits freedom of association and of expression <u>on the property of the Secretary of State</u>. Importantly, a prohibition on camping only impacts on one form of association and expression. Mr Pievsky is eloquent on the significance of camping to his client and her colleagues but we see his point more in terms of poetry than of true principle. In our judgment, the evidence of Mr Pinchen and the matters to which we have referred enable the Secretary of State to justify the prohibition on camping."

CONCLUSIONS

The Legal Setting

35. In my judgment the supposed distinction between the essence of a protest and the manner and form of its exercise has to be treated with considerable care. In some cases it will be real, in others insubstantial. All depends on the particular facts; and it is worth remembering that the Strasbourg court has always been sensitive to factual nuance.

36. As I have said it is plain in this case that the Secretary of State has not sought to impose anything approaching a blanket ban on AWPC's rights of protest. They may protest as much as they like: all they are stopped from doing is camping in the Controlled Areas. In that sense it may be said that paragraph 7(2)(f) of the 2007 Byelaws only goes to the manner and form of the exercise of the appellant's rights under ECHR Article 10. It is not on its face directed towards the suppression of free speech, on the part of the AWPC or anyone else. It merely prohibits camping, which

happens to be the mode or setting chosen by the AWPC for its protest. It happens also (Mr Pinchen, paragraph 37) that there is a general prohibition of unauthorised camping across the Defence estate.

37. But this "manner and form" may constitute the actual nature and quality of the protest; it may have acquired a symbolic force inseparable from the protesters' message; it may be the very witness of their beliefs. It takes little imagination to perceive, as I would hold, that that is the case here. As I have said, the AWPC has been established for something like 23 years. Some of those involved may have been steadfast participants the whole time. Others will have come and gone. But the camp has borne consistent, long-standing, and peaceful witness to the convictions of the women who have belonged to it. To them, and (it may fairly be assumed) to many who support them, and indeed to others who disapprove and oppose them, the "manner and form" *is* the protest itself.

38. In my judgment, therefore, the fact that the camp can be categorised as the mode not the essence of the protest carries little weight. And the fact that the Secretary of State is himself the source of the public's right to go on the Controlled Areas carries none. Mr Pievsky's submission that government property is held for the public good is obviously correct; indeed, nothing could be more elementary. The Secretary of State has, as I have said, no legitimate private axe to grind. It follows that the Secretary of State's grant of a general permission to go on the Controlled Areas would only have resonance if the case were like a private landowner's grant, whereby he reserved certain rights to himself. In such a case the reserved rights would of course limit the permission in the landowner's own legitimate interests. There is no analogy here.

39. In light of all these considerations I consider that if he is to show compliance with his obligations under the Human Rights Act the Secretary of State must demonstrate a substantial objective justification for paragraph 7(2)(f) of the 2007 Byelaws, amounting to an undoubted pressing social need. The byelaw's interference with the appellant's rights is far from being weak or insubstantial. The Secretary of State does not enjoy so broad a margin of discretionary judgment as Mr Nardell submits.

The Secretary of State's Justification of paragraph 7(2)(f) of the 2007 Byelaws

40. Against that background I turn to the Secretary of State's justifications for the interference with the appellant's Article 10 rights constituted by paragraph 7(2)(f) of the 2007 Byelaws. Mr Pinchen helpfully explains that the making of the 2007 Byelaws followed a Byelaws Review which began in 2004 as a rolling exercise. Various recent legal developments were considered, and the Review led to "a number of adjustments to the generic byelaws template" (Mr Pinchen, paragraph 20). There was correspondence with the AWPC in which the AWPC (and their lawyers) asserted Convention rights. At length the Byelaws were made.

41. In my judgment the Secretary of State's justifications are insubstantial. First of all, the fact that no steps were taken to put a stop to the camp over the 23 years of its existence to my mind speaks loud. I have already referred to the explanation offered for the fact that the 1986 Byelaws were never used against the AWPC: "there was for a time some doubt as to whether the women were on land belonging to the Secretary of State and, more recently, because of apprehension about the impact of the Human Rights Act 1998" (Divisional Court judgment, paragraph 5). I am afraid I think this

is extremely feeble. I acknowledge that the AWPC has occupied different locations over the years, and there seems even today to be a degree of uncertainty, if not confusion, as to where the boundaries of the Controlled Area have precisely lain. But if the Secretary of State in truth entertained substantial objections to the presence of the camp, he was surely able to deploy appropriate resources to ascertain the exact position and take legal steps to deal with it. And acting on expert advice he would, no less surely, have adopted a clear stance on the Human Rights Act, which has now been in force for eight years and more.

42. Mr Pievsky's responses to the individual justifications canvassed in Mr Pinchen's evidence are all generally persuasive. Paragraph 7(2)(f) was not framed in the face of high-profile public concerns, as in *Rai, Almond* (1995) 19 EHRR CD93; or threats of violent public disorder, as in *Chorherr v Austria* (1993) 17 EHRR 358; or defiance of the general law, as in *Chapman v UK* (2001) 10 BHRC 48. In my judgment the Secretary of State has viewed, or treated, the AWPC's presence at Aldermaston for all the world as if it were no more nor less than a nuisance. I accept he appears to have regarded it as more than that, and I certainly accept that Mr Pinchen's evidence accurately describes the Secretary of State's perception of the matter. But the individual points made – the security fence, traffic problems, lavatories, the bad behaviour of other members of the public – are, in objective terms, nuisance points.

43. Rights worth having are unruly things. Demonstrations and protests are liable to be a nuisance. They are liable to be inconvenient and tiresome, or at least perceived as such by others who are out of sympathy with them. Sometimes they are wrong-headed and misconceived. Sometimes they betray a kind of arrogance: an arrogance which assumes that spreading the word is always more important than the mess which, often literally, the exercise leaves behind. In that case, firm but balanced regulation may be well justified. In this case there is no substantial factor of that kind. As for the rest, whether or not the AWPC's cause is wrong-headed or misconceived is neither here nor there, and if their activities are inconvenient or tiresome, the Secretary of State's shoulders are surely broad enough to cope.

44. For all these reasons, in my judgment the effect of paragraph 7(2)(f) of the 2007 Byelaws is to violate the appellant's rights guaranteed by ECHR Articles 10 and 11. I would accordingly allow the appeal. If my Lords agree, we should hear argument as to the appropriate form of relief.

Lord Justice Wall :

45. I do agree. Since I have had the great advantage of reading in draft the judgment of my Lord, Laws LJ and since I find myself in complete agreement with it, I propose to add only a short judgment of my own; (1) because of what I see as the importance of the case; and (2) because we are differing from the Divisional Court on the critical issue.

46. I would like to make two short points. The first is that I was unimpressed, on the facts of this case, by the argument advanced on behalf of the Secretary of State in paragraph 6 of Mr. Pinchen's witness statement that the prohibition on camping was

merely a means of redirecting the protest, and not of extinguishing it. In Mr Pinchen's words: -

> The MOD recognises that members of the public may have strongly held opinions about military activity, not least about the development and manufacture of nuclear weapons…… It entirely respects the entitlement of individuals to express views and participate in protest activity about those matters. The MOD's aim in making and enforcing byelaws for Controlled "Areas is not to prevent people from participating in such activity, but to impose on all who wish to use the Controlled Areas the regulation considered necessary to enable the Ministry to offer public access in a way that is compatible with the operational requirements of the establishment".

47. In my judgment, this paragraph is vulnerable to attack on a number of fronts. I will identify only two. In the first place, it seems to me to give take no cognisance of the nature of the protest, as explained by the appellant in paragraph 7 of her second witness statement: -

> "I would like to emphasise how fundamental camping is to the AWPC's protests at Aldermaston. As AWPC's name suggests, its very nature is the camp. Without the camp AWPC simply would not exist……."

48. In the second place, there is absolutely no evidence that the presence of the AWPC over many years has been incompatible "with the operational requirements of the establishment". Had it been, Mr. Pinchen's statement would, no doubt have provided a great deal of detail. As it is, his statement, as I read it, is highly unspecific.

49. I therefore find myself in respectful disagreement with paragraph 25 of the judgment of the Divisional Court, which my Lord has set out and which I will not repeat. Whatever one's views of the AWPC (which are, as my Lord says, neither here nor there) the penultimate sentence of that paragraph strikes me as unduly dismissive, and in my judgment the evidence of Mr. Pinchen comes nowhere near demonstrating a "pressing social need". In this regard, I gratefully adopt and associate myself with my Lord's analysis of Mr. Pinchen's evidence which I cannot better and need not repeat.

50. My second point is that, in my judgment, this is a case about freedom of expression under ECHR Article 10, and freedom of association and assembly under Article 11. For the Secretary of State, Mr Nardell spent a considerable amount of time taking us through the decision of the ECtHR in *Chapman v UK* which my Lord discusses in paragraph. 20 of his judgment. *Chapman* is, of course, a case concerned with ECHR Article 8, and speaking for myself, I found wholly unpersuasive Mr. Nardell's argument that the margin of appreciation allowed in such a case could be translated to a case such as the present, involving as it does, Articles 10 and 11.

51. I have given these short reasons, which are I think entirely parasitic on my Lord's judgment, to explain how, in part at least, I reached the clear conclusion at the end of the argument that this appeal should succeed. It follows, of course, that I am extremely grateful to have the reasons for allowing the appeal so fully and clearly articulated by my Lord.

Lord Justice Stanley Burnton:

52. I agree both with the judgment of Laws LJ and that of Wall LJ.

A

Court of Appeal

*Regina (Weaver) *v* London and Quadrant Housing Trust (Equality and Human Rights Commission intervening)

[2009] EWCA Civ 587

B

2009 Feb 23, 24; June 18

Rix LJ, Lord Collins of Mapesbury, Elias LJ

Human rights — Public authority — Functions of public nature — Registered social landlord seeking possession order on mandatory grounds against assured tenant — Whether registered social landlord "public authority" exercising "functions of a public nature" when terminating tenancy — Whether "nature of the act . . . private" — Whether decision of registered social landlord susceptible to judicial review — Human Rights Act 1998 (c 42), s 6(3)(b)(5)

C

A registered social landlord served on its assured tenant a notice seeking possession for rent arrears under ground 8 of Part I of Schedule 2 to the Housing Act 1988[1], as amended, under which it was mandatory for the court to grant possession. The tenant sought judicial review of the landlord's decision to evict her, claiming that it had acted in breach of a legitimate expectation generated by guidance issued by the Housing Corporation and thereby infringing her rights under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2]. To establish her case, the tenant needed to show that in the exercise of its eviction powers the landlord was a public authority within the meaning of section 6(3)(b) of the Human Rights Act 1998 and susceptible to judicial review, and that the act of terminating her tenancy was not a private act within the meaning of section 6(5) of the 1998 Act. The landlord enjoyed a substantial public subsidy and its allocation and management of housing stock was subject to statutory regulation. It was common ground that the landlord, although not a core public authority, was a hybrid authority in the sense that it had the power to obtain parenting orders and anti-social behaviour orders, which were functions of a public nature. The Divisional Court of the Queen's Bench Division dismissed the claim based on legitimate expectation but made a declaration that the management and allocation of housing stock by the landlord (including decisions concerning the termination of a tenancy) was a function of a public nature, with the effect that it was to be regarded as a public authority in that respect for the purpose of section 6(3)(b) of the 1998 Act, and that accordingly the landlord was amenable to judicial review on conventional public law grounds in respect of its performance of that function.

D

E

F

On appeal by the landlord—

G

Held, dismissing the appeal (Rix LJ dissenting), that, it being conceded that certain of the landlord's functions were public functions, the relevant question for determination was whether the act of terminating the tenancy was a private act within the meaning of section 6(5) of the 1998 Act, focusing on the context in which the act occurred and considering both the source and nature of the landlord's activities; that in determining the question in section 6(5) it was necessary to consider whether the act was in pursuance of, or at least connected with, performance of functions of a public nature; that a number of factors cumulatively established

H

[1] Housing Act 1988, Sch 2, Pt I, ground 8, as amended: "Both at the date of the service of the notice under section 8 of this Act relating to the proceedings for possession and at the date of the hearing— (a) if rent is payable weekly or fortnightly, at least eight weeks' rent is unpaid . . . and for the purpose of this ground 'rent' means rent lawfully due from the tenant."

[2] Human Rights Act 1998, s 6(3)(b)(5): see post, para 26.

sufficient public flavour to make provision of social housing by the landlord a public function, namely that the landlord (i) received significant capital payments from public funds to provide subsidised social housing to meet the needs of the poor, which was a publicly desirable objective and could properly be described as a governmental function, (ii) worked in close harmony with local government and helped to fulfil the latter's statutory obligations, in particular through allocation agreements which severely circumscribed the landlord's freedom to allocate properties, and (iii) was itself subject to regulations designed to further the objectives of government policy in housing the poor; that an act done in pursuance of a public function was not necessarily a private act merely because it involved the exercise of rights conferred by private law, since so to hold would significantly undermine the protection which Parliament intended to afford the potential victim of a hybrid authority; that the act of terminating the tenancy of a person in social housing, though probably not the termination by a social landlord of a tenancy at market rent, was necessarily involved in the regulation of the landlord's public function and was thus itself a public act subject to Convention rights considerations; and that, accordingly, the Divisional Court's declaration would stand (post, paras 51–57, 66–72, 73–77, 79, 84, 85, 95, 100–102).

R v Servite Houses, Ex p Goldsmith [2001] LGR 55, *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, CA, *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, HL(E) and *YL v Birmingham City Council (Secretary of State for Constitutional Affairs intervening)* [2008] AC 95, HL(E) considered.

Decision of the Divisional Court of the Queen's Bench Division [2008] EWHC 1377 (Admin); [2009] 1 All ER 17 affirmed.

The following cases are referred to in the judgments:

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37; [2004] 1 AC 546; [2003] 3 WLR 283; [2003] 3 All ER 1213, HL(E)

Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening) [2008] UKHL 57; [2009] AC 367; [2008] 3 WLR 636; [2009] 1 All ER 653, HL(E)

Hazell v Hammersmith and Fulham London Borough Council [1992] 2 AC 1; [1991] 2 WLR 372; [1991] 1 All ER 545, HL(E)

Kay v Lambeth London Borough Council [2006] UKHL 10; [2006] 2 AC 465; [2006] 2 WLR 570; [2006] 4 All ER 128, HL(E)

Lake v Lake [1955] P 336; [1955] 3 WLR 145; [1955] 2 All ER 538, CA

Novoseletskiy v Ukraine (2006) 43 EHRR 53

Peabody Housing Association Ltd v Green (1978) 38 P & CR 644, CA

Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595; [2002] QB 48; [2001] 3 WLR 183; [2001] 4 All ER 604, CA

R v Servite Houses, Ex p Goldsmith [2001] LGR 55

R (Ahmad) v Newham London Borough Council [2009] UKHL 14; [2009] PTSR 632; [2009] 3 All ER 755, HL(E)

R (Heather) v Leonard Cheshire Foundation [2002] EWCA Civ 366; [2002] 2 All ER 936, CA

Wandsworth London Borough Council v A [2000] 1 WLR 1246, CA

Wandsworth London Borough Council v Winder [1985] AC 461; [1984] 3 WLR 1254; [1984] 3 All ER 976, HL(E)

YL v Birmingham City Council (Secretary of State for Constitutional Affairs intervening) [2007] UKHL 27; [2008] AC 95; [2007] 3 WLR 112; [2007] 3 All ER 957, HL(E)

No additional cases were cited in argument.

A The following additional cases, although not cited, were referred to in the skeleton arguments:

Akumah v Hackney London Borough Council [2005] UKHL 17; [2005] 1 WLR 985; [2005] 2 All ER 148, HL(E)

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA

B *R v Ministry of Defence, Ex p Smith* [1996] QB 517; [1996] 2 WLR 305; [1996] ICR 740; [1996] 1 All ER 257, CA

R v Northavon District Council, Ex p Smith [1994] 2 AC 402; [1994] 3 WLR 403; [1994] 3 All ER 313; 92 LGR 643, HL(E)

R v Panel on Take-overs and Mergers, Ex p Datafin plc [1987] QB 815; [1987] 2 WLR 699; [1987] 1 All ER 564, CA

APPEAL from the Divisional Court of the Queen's Bench Division

C By a judicial review claim form dated 25 June 2007 the claimant, Susan Weaver, sought judicial review of a decision dated 27 March 2007 by the defendant, the London and Quadrant Housing Trust, to serve notice seeking possession of 33, Stanborough Close, Hampton, Middlesex TW12 3YA based solely on ground 8 in Part I of Schedule 2 to the Housing Act 1988, as amended by section 101 of the Housing Act 1996 (mandatory possession for D non-payment of rent). The Divisional Court of the Queen's Bench Division (Richards LJ and Swift J) on 24 June 2008 dismissed the claim but made a declaration (a) that the management and allocation of housing stock by the defendant (including decisions concerning the termination of a tenancy) was a function of a public nature, with the effect that the defendant was to be regarded as a public authority in that respect for the purpose of section 6(3)(b) of the Human Rights Act 1998; and (b) that the defendant E was accordingly amenable to judicial review on conventional public law grounds in respect of its performance of that function.

By an appellant's notice dated 14 July 2008 the defendant appealed with permission of the Divisional Court and sought to substitute a declaration that the defendant's allocation and management of its housing stock was not a function of a public nature, that the defendant was not to be regarded as a F public authority in that respect for the purpose of section 6(3)(b) of the 1998 Act, and that the defendant was not amenable to judicial review on conventional public law grounds. The grounds of appeal, inter alia, were that (1) the Divisional Court had been wrong, on a true interpretation of section 6(3)(b) of the 1998 Act and on the facts, to find that the management and allocation of housing stock by the defendant, including the decision to G serve notice seeking possession, was a function of a public nature and that the defendant was accordingly a public authority; alternatively, that the defendant's act of serving a notice seeking possession in respect of the claimant's tenancy was an act of a private nature for the purposes of section 6(5) of the 1998 Act; and (2) the Divisional Court had been wrong to conclude that the defendant was amenable to judicial review on any or all conventional grounds since, inter alia, there was clear and consistent H authority that a housing association was not subject to the principle of public law applicable on judicial review, the defendant's power to serve a notice seeking possession arose from the contract of tenancy with the tenant and was not sufficiently or at all "underpinned" by statute and, even if the defendant were a public authority for the purposes of section 6(3)(b) of the

1998 Act, it did not follow that conventional public law grounds for judicial review were or should be applicable to it. A

The Equality and Human Rights Commission intervened in the appeal.

The facts are stated in the judgment of Elias LJ.

Andrew Arden QC and *Christopher Baker* (instructed by *Devonshires*) for the landlord.

Richard Drabble QC and *Matthew Hutchings* (instructed by *Brian McKenna & Co*) for the claimant. B

Jan Luba QC (instructed by *Solicitor, Equality and Human Rights Commission*) for the commission, intervening by written submissions.

The court took time for consideration.

18 June 2009. The following judgments were handed down. C

ELIAS LJ

1 The appellant in this case, the London and Quadrant Housing Trust ("the trust"), provides social housing, which means housing at less than the market rate, to those in need. The trust is a registered social landlord ("RSL"), being registered under the Housing Act 1996. The principal question in issue is whether, when terminating the tenancy of someone in social housing, the trust is subject to human rights principles. The Divisional Court (Richards LJ and Swift J) [2009] 1 All ER 17 held that it was. The trust appeals that ruling and contends that it was not. D

2 The case comes before the court in somewhat unusual and not altogether satisfactory circumstances. The respondent, Mrs Susan Weaver, who was the claimant before the Divisional Court, is an assured tenant of the trust. She was served with an order for possession for rent arrears. She wished to challenge that order on the basis that the trust had acted in breach of a legitimate expectation arising out of guidance issued by the Housing Corporation. She also contended that to evict her from her home would interfere with her rights under article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, that argument was advanced in a way which also depended upon her being able to establish the legitimate expectation. E F

3 Even if a legitimate expectation could be established on the facts, the argument could successfully be advanced only if the trust, in the exercise of its eviction powers, was a public body attracting the operation of judicial review principles. The article 8 argument depended upon establishing that the trust was a public authority within the meaning of section 6(3)(b) of the Human Rights Act 1998 and that the act of termination was not a private act within the meaning of section 6(5). The trust contended that no legitimate expectation was created, and that in any event it was exercising purely private functions when it dealt with issues relating to the allocation and management of housing, and that all its acts in performance of those functions, including the termination of the tenancy, were private acts. Accordingly, it was subject to neither human rights nor judicial review principles. G H

4 The Divisional Court found that there had been no legitimate expectation created and therefore the case failed on the facts on both grounds. Strictly it was unnecessary for the court to determine the wider

A question raising the public law status of the trust. However, the court did so. It held, contrary to the submissions of the trust, that the trust was a public authority under section 6(3)(b) arising from the exercise of its function of allocating and managing its housing, and that the act of terminating the tenancy was not a private act under section 6(5). The court also held that it was susceptible to judicial review principles in the exercise of that function.

B **5** Notwithstanding that they had succeeded in defending the particular application, the trust wished to appeal that finding in relation to its status in public law. The Divisional Court granted permission to appeal and facilitated this by making a formal declaration, which could be the subject of challenge, in the following terms:

> "(a) that the management and allocation of housing stock by the defendant (including decisions concerning the termination of a tenancy) is
C a function of a public nature, with the effect that the defendant is to be regarded as a public authority in that respect for the purposes of the Human Rights Act 1998, section 6(3)(b); (b) that the defendant is accordingly amenable to judicial review on conventional public law grounds in respect of its performance of the above function."

6 I make two observations about the way the appeal has come before us.
D The first is that, as Lord Collins of Mapesbury and Rix LJ note, Mrs Weaver no longer has any interest in the appeal and as a consequence the issue has come before the court in a somewhat abstract and academic form. We have, however, had the benefit of argument from Mr Richard Drabble QC on behalf of Mrs Weaver (who has the benefit of a protected costs order) as well as some very helpful written submissions from Mr Jan Luba QC on behalf of
E the intervener, the Equality and Human Rights Commission. The second observation relates to the form of the declaration. It focuses on whether the trust is a public body falling within section 6(3)(b) of the 1998 Act by virtue of its housing and allocation management functions. This reflects the way in which the issue was argued before the Divisional Court. It does not, however, satisfactorily encapsulate the real issue in the case which is whether the termination of this tenancy was a private act within section 6(5).
F I return to this point later in the judgment.

Social housing and registered social landlords

7 In order to understand the background of this case I shall first consider the role of RSLs in the provision of social housing, and then consider the particular features of the trust.

G **8** Social housing providers seek to provide affordable housing to those who cannot secure their housing needs in the market. It is government policy to provide such housing. Those on lower incomes are able to rent properties at below market value. RSLs provide about one half of the social housing in England and Wales.

9 RSLs were at all material times regulated in various ways by the
H Housing Corporation. This is an executive non-departmental public body responsible to the Secretary of State. It can determine standards of performance with respect to the provision of housing by RSLs; collect information as to the levels of performance achieved by them; and lay down guidance with respect, inter alia, to the management of housing accommodation. Although there is no specific obligation to follow the

guidance, one of the functions of the Housing Corporation is to ensure that an RSL is properly managed, and in that context it may have regard to the extent to which guidance is followed.

10 Housing management guidance is the subject of consultation and approval by the Secretary of State. RSLs are subject to detailed guidance on a number of matters, including the terms of tenancies, the principles upon which the level of rents should be determined, and the way in which the power of eviction should be exercised. It was the guidance on evictions which was said to give rise to the legitimate expectation relied upon by the claimant in this case.

11 There is also statutory regulation through sections 8 to 10 of the Housing Act 1996 restricting the power of RSLs to dispose of land or housing (although there is a wide range of exceptions); in general the consent of the Housing Corporation is required to any disposal.

12 RSLs also typically receive grants from the Housing Corporation in respect of expenditure incurred in connection with their housing functions. Generally grants are made to assist in the acquisition of specific housing stock. There is a bidding process in which interested RSLs submit bids, and the Housing Corporation assesses value for money and financial viability. Once the grant is made, the money has to be kept in the public domain. If the properties acquired with the grant are disposed of, the moneys received must be repaid, unless they are reinvested in further new homes available for social housing. A review of social housing legislation in 2007 found that the ratio of private finance to public funding was in the region of 2:1.

13 RSLs also have an important role in assisting local authorities to carry out their statutory housing policies. This is not simply a matter of choice but is the subject of legislation. A local authority must allocate houses in accordance with certain priorities. They are required by law to make an allocation scheme, and RSLs are the only body which they are statutorily obliged to consult before adopting a scheme. Section 170 of the 1996 Act requires RSLs to co-operate with local authorities if requested "to such extent as is reasonable in the circumstances" by offering accommodation to those with priority under the local authority's allocation scheme. Typically this co-operation is achieved by nomination agreements made between the authority and the RSL. In this way the RSL is deeply involved in assisting the local authorities in their obligations towards the homeless. Over half (some 54%) of RSL lettings in England are made to local authority nominees. A further 10% are made through allocations made pursuant to a common scheme in which the RSL and local authority are partners.

14 This relationship between RSLs and local authorities is reinforced by the fact that ownership of many local authority houses is being voluntarily transferred to RSLs, subject to the tenant's consent. Some 10% of the trust's housing has been acquired in that way.

15 Mr Luba referred us to the following passage in para 2 of Annex 5 of the statutory *Homelessness Code of Guidance for Local Authorities* (July 2006) which succinctly summarises the increasingly important role which RSLs play in the field of social housing in the following terms:

> "Virtually all provision of new social housing is delivered through RSLs and, under the transfer programme, ownership of a significant

A proportion of housing authority stock is being transferred from housing authorities to RSLs, subject to tenants' agreement. This means that, increasingly, RSLs will become the main providers of social housing. Consequently, it is essential that housing authorities work closely with RSLs, as well as all other housing providers, in order to meet the housing needs in their district and ensure that the aims and objectives of their homelessness strategy are achieved."

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16 RSLs also have certain statutory powers, identical to those enjoyed by local authorities but not private landlords, empowering them to take action in respect of the conduct of their tenants. For example, they may apply for anti-social behaviour orders under Part I of the Crime and Disorder Act 1998, or for a parenting order under the Anti-Social Behaviour Act 2003 in respect of the parents of children causing a nuisance.

C

The Housing and Regeneration Act 2008

17 Parts 1 and 2 of the Housing and Regeneration Act 2008 have restructured the system for providing social housing as from 1 December 2008. That Act has also for the first time provided a statutory definition of social housing and it is now a statutory prerequisite of registration as an RSL under section 112 of the 2008 Act that the body demonstrates that it provides accommodation at rents below market rates to those in housing need. The Act has split the roles of funding and regulation which were both formerly carried out by the Housing Corporation. Funding is now the province of the Homes and Communities Agency and regulation is by the Regulator of Social Housing. However, the essential elements of the scheme remain the same as in the 1996 Act. The Secretary of State retains ultimate control since both bodies are funded by her and subject to guidance and specific directions from her: see sections 46 to 47 and 197.

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18 It is not necessary to set out the effects of the 2008 Act in any detail. We are not directly concerned with it; this case must be determined by considering the position of the trust under the 1996 Act. However, it is potentially significant to this extent: Mr Andrew Arden QC realistically accepts that if the termination of a tenancy is not a private act under the 1996 Act, then inevitably it will not be under the tighter regulatory regime of the 2008 Act.

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The trust

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19 The trust was founded in 1973. It is a society registered under the Industrial and Provident Societies Act 1965, and thereby has corporate status. It is also a charity and is a housing association within the meaning of section 1 of the Housing Associations Act 1985. It is the parent body of a large group of companies some, but not all, of which are themselves either charitable bodies and/or registered social landlords.

20 The rules of the trust set out its powers and objects and provide for its business to be conducted by its board and its shareholders. None of the board members is a representative of a local authority or other public body, and no such authority or body has any controlling influence over the board.

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21 The trust carries out a wide range of activities which include arranging and managing lettings, the acquisition of land, building homes for

sale (either outright or with shared ownership), managing leasehold accommodation and managing market-level rented accommodation.

22 The trust provides a number of different types of accommodation and services, under different tenures (including long leasehold), to various different groups. Most of its housing stock (including the accommodation provided to Mrs Weaver) was purchased in the open market. About 10% of its housing stock has been transferred from local authority ownership by way of large scale voluntary transfer.

23 The trust is funded by the income it receives from rents, private borrowing and grants. The grants are principally social housing grants allocated by the Housing Corporation under section 18 of the Housing Act 1996. In the two financial years 2004 to 2006 the group, of which the trust is the parent, borrowed £268·7m by way of grants. This, however, accounts for less than half of the group's capital finance, and the proportion of public finance is expected to drop to around 30% over the next five financial years, which would be fairly typical of the RSL sector as a whole. Private sources of finance include commercial loans and the proceeds of housing sales.

24 Control over the housing stock rests with the trust but this is subject to allocation arrangements it makes with the local authorities. It has a number of nomination agreements. In the year ending March 2006 some 64% of its new lettings were the result of nominations from local authorities.

25 The legal relationship between the tenant and the trust is typically defined by the tenancy agreement and the standard tenancy conditions. In general the tenants hold their tenancy under a weekly agreement although there are some longer leases. The standard conditions set out the tenant's responsibilities in relation to paying the rent, and include a warning that if the rent is not paid, the trust may apply to the court and seek eviction. That was the reason the trust sought to evict Mrs Weaver in this case. She was more than eight weeks in arrears.

The statutory provisions

26 Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. By subsection (3): " 'public authority' includes . . . (b) any person certain of whose functions are functions of a public nature." This is subject to subsection (5): "In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private."

27 The effect of these provisions is that some bodies, conventionally referred to as "core authorities", are public authorities for all purposes. They must at all times act in accordance with Convention rights; subsection (5) is inapplicable to such bodies. By contrast, subsection (3)(b) identifies and brings within the scope of the 1998 Act what is termed a "hybrid authority", i e one which exercises both public and private functions. Where its acts are in issue, the relevant question is whether the nature of the act is private. If it is, then subsection (5) provides that it will not be deemed to be a public authority with respect to that particular act.

28 Accordingly, once it is determined that the body concerned is a hybrid authority—in other words that it exercises functions at least some of which are of a public nature—the only relevant question is whether the act in issue is a private act. Even if the particular act under consideration is

A connected in some way with the exercise of a public function, it may none the less be a private one. Not all acts concerned with carrying out a public function will be public acts. Conversely, it is also logically possible for an act not to be a private act notwithstanding that the function with which it is most closely connected is a private function, although it is difficult to envisage such a case. Such situations are likely to be extremely rare.

B **29** The concept of "functions" is not altogether straightforward, nor is the distinction between functions and acts. The difficulty was adverted to by Lord Neuberger of Abbotsbury in *YL v Birmingham City Council (Secretary of State for Constitutional Affairs intervening)* [2008] AC 95, para 130. He expressed the view that the former was more conceptual and noted that a number of acts may be involved in the performance of a function. In *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1, 29E
C Lord Templeman said that the word "functions", at least as to be construed in section 111 of the Local Government Act 1972, embraced "all the duties and powers of a local authority; the sum total of the activities Parliament has entrusted to it". This would suggest that a function is a subspecies of those duties and powers; although whether and when a specific power or duty can be equated with a function is more problematic. The Divisional Court, in its declaration, referred to the act of termination of a tenancy as a "function".

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The authorities

30 There are two decisions of the House of Lords which inform the approach which courts should take when determining whether a body is a public body within the meaning of the 1998 Act, namely *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004]
E 1 AC 546 and *YL's* case [2008] AC 95, to which I have just referred. These decisions also deal with what is in my view the clearly related question whether a particular act is a private act within the meaning of section 6(5).

31 The *Aston Cantlow* case [2004] 1 AC 546 raised the question whether a parochial church council was a core public authority. The church council sought to compel the freehold owners of former rectorial land to pay
F for repairing the chancel of the local parish church. There was no doubt that under domestic law there was a civil obligation on the owners to meet this liability, and the only question was whether it could be said to infringe their human rights. The church council sought to enforce payment by exercising powers conferred upon them by section 2(2) of the Chancel Repairs Act 1932. The owners alleged that the obligation involved an infringement of their right to the peaceful enjoyment of their property and constituted a
G breach of article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. This submission depended upon establishing that the parochial church council was a public authority under the 1998 Act. Their Lordships concluded by a majority (Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Hobhouse of Woodborough, Lord Rodger of Earlsferry; Lord Scott of Foscote dissenting) that it was not. It was neither a core nor a hybrid authority because it
H exercised no public functions, and therefore no human rights issue arose.

32 In *YL's* case [2008] AC 95 the issue was whether a private company operating a care home for profit, Southern Cross Healthcare Ltd, was a hybrid public authority (it being accepted that it was not a core public authority.) As in this case, the actual decision in issue was whether a

decision to evict a tenant from the care home was subject to the principles of human rights law. The claimant was 84 years old and suffered from Alzheimer's disease. Southern Cross wished to remove her from the care home because of the inappropriate behaviour of her relatives. She had been placed in the care home by the local authority in accordance with their statutory duty to arrange for her care under section 21 of the National Assistance Act 1948. The authority paid her rent. If Southern Cross were a hybrid authority, then the claimant could seek to rely upon article 8 rights unless the act of eviction was deemed to be a private one falling within section 6(5) of the 1998 Act. The House of Lords held by a bare majority (Lord Scott of Foscote, Lord Mance and Lord Neuberger of Abbotsbury; Lord Bingham of Cornhill and Baroness Hale of Richmond dissenting) that it was not a hybrid authority and that the article 8 argument could not be relied upon. It is to be noted that each of the judges in the majority agreed with each other's decision. (The actual decision in that case has now been reversed by statute: see the Health and Social Care Act 2008, section 145(1). However, plainly this does not in any way affect the binding nature of the reasoning of the majority of their Lordships.)

33 It is pertinent to note that it seems to have been assumed in *YL's* case that the issue whether it was a hybrid public authority rested upon whether its function of providing a place at the care home for applicants paid for by the local authority was a public function.

34 It is not necessary to analyse in detail the individual speeches of their Lordships in these two cases, not least because the principles which they establish are relatively clear and were not in dispute before us. The real issue lies not in identifying the principles, but rather in determining the result of their application to the particular circumstances of this case.

35 In my judgment, the following principles can be gleaned from these cases.

(1) The purpose of section 6 of the 1998 Act is to identify those bodies which are carrying out functions which will engage the responsibility of the United Kingdom before the European Court of Human Rights. As Lord Nicholls put it in the *Aston Cantlow* case [2004] 1 AC 546, para 6: "The purpose is that those bodies for whose acts the state is answerable before the European Court of Human Rights shall in future be subject to a domestic law obligation not to act incompatibly with Convention rights." Lord Rodger, at para 160, Lord Hope, at para 52, Lord Hobhouse, at para 87, and Lord Scott, at para 129, were to the same effect. (Unfortunately, as Lord Mance pointed out in *YL's* case [2008] AC 95 after analysing the Strasbourg jurisprudence, the case law from the European Court of Human Rights provides no clear guidance for gleaning how that test should be applied in a case such as this, where there is no formal delegation of public powers.)

(2) In conformity with that purpose, a public body is one whose nature is, in a broad sense, governmental. However, it does not follow that all bodies exercising such functions are necessarily public bodies; many functions of a kind historically performed by government are also exercised by private bodies, and increasingly so with the growth of privatisation: see Lord Nicholls in the *Aston Cantlow* case, at paras 7–8. Moreover, this is only a guide since the phrase used in the Act is *public* function and not *governmental* function.

A (3) In determining whether a body is a public authority, the courts should adopt what Lord Mance in *YL's* case described, at para 91, as a "factor-based approach". This requires the court to have regard to all the features or factors which may cast light on whether the particular function under consideration is a public function or not, and weigh them in the round. There is, as Lord Nicholls put it in the *Aston Cantlow* case, at
B para 12, "no single test of universal application". Lord Bingham in *YL's* case [2008] AC 95 observed, at para 5, that "A number of factors may be relevant, but none is likely to be determinative on its own and the weight of different factors will vary from case to case".

(4) In applying this test, a broad or generous application of section 6(3)(b) should be adopted: per Lord Nicholls in the *Aston Cantlow* case, at para 11, cited by Lord Bingham in *YL's* case, at para 4, and by Lord Mance, at
C para 91.

(5) In the *Aston Cantlow* case [2004] 1 AC 546 Lord Nicholls said, at para 12, that the factors to be taken into account: "include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service." Some of these factors
D were the subject of more detailed analysis in *YL's* case. I shall briefly deal with them.

(6) As to public funding, it was pointed out that it is misleading to say that a body is publicly subsidised merely because it enters into a commercial contract with a public body: *YL's* case [2008] AC 95, per Lord Scott, at para 27 and Lord Neuberger, at para 141. As Lord Mance observed, at para 105:

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> "Public funding takes various forms. The injection of capital or subsidy into an organisation in return for undertaking a non-commercial role or activity of general public interest may be one thing; payment for services under a contractual arrangement with a company aiming to profit commercially thereby is potentially quite another."

F To similar effect, Lord Neuberger opined, at para 165, that

> "it seems to me much easier to invoke public funding to support the notion that service is a function of 'a public nature' where the funding effectively subsidises, in whole or in part, the cost of the service as a whole, rather than consisting of paying for the provision of that service to a specific person."

G (7) As to the second matter, the exercise of statutory powers, or the conferment of special powers, may be a factor supporting the conclusion that the body is exercising public functions, but it depends why they have been conferred. If it is for private, religious or purely commercial purposes, it will not support the conclusion that the functions are of a public nature: see Lord Mance in *YL's* case, at para 101. However, Lord Neuberger
H thought, at para 167, that the "existence of a relatively wide-ranging and intrusive set of statutory powers . . . is a very powerful factor in favour of the function falling within section 6(3)(b)" and he added, at para 167, that it will often be determinative.

(8) The third factor, where a body is to some extent taking the place of central government or local authorities, chimes with Lord Nicholls's

observation that generally a public function will be governmental in nature. This was a theme running through the *Aston Cantlow* speeches, as Lord Neuberger pointed out in *YL's* case, at para 159. That principle will be easy to apply where their powers are formally delegated to the body concerned.

(9) The fourth factor is whether the body is providing a public service. This should not be confused with performing functions which are in the public interest or for the public benefit. As Lord Mance pointed out in *YL's* case, at para 105, the self-interested endeavour of individuals generally works to the benefit of society, but that is plainly not enough to constitute such activities public functions. Furthermore, as Lord Neuberger observed, at para 135, many private bodies, such as private schools, private hospitals, private landlords and food retailers, provide goods or services which it is in the public interest to provide. This does not render them public bodies, nor their functions public functions. Usually the public service will be of a governmental nature.

36 Their Lordships also identified certain factors which will generally have little, if any, weight when determining the public status. First, the fact that the function is one which is carried out by a public body does not mean that it is a public function when carried out by a potentially hybrid body. The point was powerfully and cogently made by Lord Scott in *YL's* case [2008] AC 95, paras 30–31. He highlighted the anomalies and absurdities that would result if this were the case. Second, it will often be of no real relevance that the functions are subject to detailed statutory regulation. Again, as Lord Neuberger pointed out in *YL's* case, at para 134:

> "the mere fact that the public interest requires a service to be closely regulated and supervised pursuant to statutory rules, cannot mean the provision of the service, as opposed to its regulation and supervision, is a function of a public nature. Otherwise, for example, companies providing financial services, running restaurants, or manufacturing hazardous materials, would ipso facto be susceptible to be within the ambit of section 6(1)."

37 Third, it is only of limited significance that the function will be subject to the principles of judicial review. The purpose of attaching liability under section 6 of the 1998 Act is different to the purpose of subjecting a body to administrative law principles, and it cannot be assumed that because a body is subject to one set of rules it will therefore automatically be subject to the other. So although the case law on judicial review may be helpful, it is certainly not determinative: see Lord Hope in *Aston Cantlow* [2004] 1 AC 546, para 52, cited with approval by Lord Mance in *YL's* case [2008] AC 95, para 87.

38 It is also necessary to mention a Court of Appeal decision, *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 in which the court held that the RSL under consideration in that case was a public authority with respect to the exercise of its functions. This was, however, principally because the body was set up at the behest of a local authority which exercised considerable control over its activities. In *YL's* case [2008] AC 95 both Lord Mance, at para 87, and Baroness Hale, at para 61, observed that this was not a proper basis for reaching that conclusion since the court focused on the historical ties and did not apply a functional test. However, they did not indicate whether the decision itself

A was correct notwithstanding the defective reasoning. Accordingly, I do not gain any assistance from that case.

What is a private act?

39 In both the *Aston Cantlow* case and *YL's* case there was some discussion whether, even if the relevant functions were public functions, the
B particular acts in issue were private acts. In the *Aston Cantlow* case [2004] 1 AC 546, all of their Lordships except Lord Scott expressed the view that the act of enforcing liability by the parochial church council was a private act. Lord Nicholls observed, at para 16, that the acts taken by the church council to compel the repair of the church was no more a public act than would be the enforcement of a restrictive covenant. Lord Hope held that the liability to repair the chancel arose as a matter of private law from the
C ownership of glebe land. He said, at para 64, that the "nature of the act is to be found in the nature of the obligation which the [parochial church council] is seeking to enforce. It is seeking to enforce a civil debt". Lord Hobhouse's speech was to the same effect on this point, at para 90. Lord Rodger also considered that enforcing the liability was not a public function. He appears to have treated the act and the function as the same. Lord Scott dissented on
D this point. He held that the parochial church council was a hybrid public authority because the act of enforcing the liability to pay was a public function. Again, he did not draw any distinction between the concepts of function and act in this context.

40 In *YL's* case [2008] AC 95 the majority held that the act of moving the claimant out of the home was a private act. Again, emphasis was placed on the private source of power in issue. Lord Scott, with whose opinion
E Lords Mance and Neuberger agreed, commented, at para 34, that the notice to terminate the tenancy agreement was a "contractual provision in a private law agreement" which in his view "could not be thought to be anything other than private". Lord Mance, although not expressly referring to section 6(5), likewise held, at para 120, that the "source and nature of Southern Cross' activities differentiates them from any 'function of a public
F nature' ". Lord Neuberger did not address this issue directly.

41 I would draw these tentative propositions from this analysis. First, the source of the power will be a relevant factor in determining whether the act in question is in the nature of a private act or not. Second, that will not be decisive, however, since the nature of the activities in issue in the proceedings is also important. This leads on to the third and related
G proposition, which is that the character of an act is likely to take its colour from the character of the function of which it forms part.

The decision of the Divisional Court

42 It was conceded before the Divisional Court that the trust is a hybrid authority on the basis that certain of its functions, in particular the power to obtain parenting orders and anti-social behaviour orders, are public
H functions. None the less the argument developed before the court (and which is reflected in the form of declaration granted) focused on whether the trust was a public authority by virtue of its housing and management functions. The key issue was perceived to be whether those functions constituted the exercise of a function or functions of a public nature. There

was relatively little focus on section 6(5) and the question whether the termination of the tenancy was a private act.

43 In determining whether the allocation and management of housing was a public function, Richards LJ [2009] 1 All ER 17, with whose judgment Swift J agreed, first analysed the decision of the House of Lords in *YL's* case, focusing solely on the speeches of their Lordships in the majority. In the light of that analysis, he identified certain features of the way in which the RSL carries out its functions which he considered to be germane to the decision he had to reach.

44 He accepted that the management and allocation of housing stock is not itself an inherently governmental activity, as indeed Mr Drabble had conceded. Plainly, this is something that private landlords also do. However, he considered that the context in which the RSL operates makes it different from the ordinary commercial provider; its non-profit-making and charitable objects, whilst not indicative of being a public authority, at least placed the organisation outside the commercial sphere.

45 Furthermore, he thought it relevant that it operates in a particular public sector of social rented housing where there is extensive state regulation and where the RSL operates in close harmony with the local authority. RSLs make a significant contribution to meeting the Government's objectives with regard to affordable housing.

46 Richards LJ recognised that their Lordships in *YL's* case [2008] AC 95 had said that merely because a body was subject to detailed regulation that did not mean that it operated in the public sector. However, the regulation of the level of rents and the fact—which the Divisional Court said was particularly important—that there was a very significant public subsidy of RSLs, and more specifically of this trust, designed to contribute towards government policy of providing low cost housing, were powerful factors in favour of treating the allocation and management functions as public functions.

47 Again, from time to time there is the voluntary transfer of housing stock to RSLs from the public sector. In this case some 10% or so of the trust's housing stock fell into that category. There is also the duty of co-operation imposed by section 170 of the 1996 Act which in practice limited the freedom to allocate and gave effect to the public interest.

48 The Divisional Court considered that as a consequence of these factors taken in the round, the function of management and allocation of housing stock should be subject to the principles of the Convention.

49 Finally, the Divisional Court considered whether it might be said that the termination of the particular tenancy should be treated as an act of a purely private nature even if the general functions of management and allocation were of a public nature. This was dealt with very briefly. Richards LJ considered [2009] 1 All ER 17, para 62 that it would be "artificial to separate out the act of terminating a tenancy, or indeed other acts in the course of management of a property, from the act of granting a tenancy".

50 It was for these reasons that the court granted the declaration in the terms which it did.

Discussion

51 As I have indicated, the general scheme of the legislation is clear. If the authority is a core public authority, all its functions are public

A functions, as are all acts pursuant to those functions. It is a hybrid authority if only some of its functions are public functions. Even then, the particular act will not be subject to Convention principles if it is a private act.

52 Once the point was conceded and that concession was accepted by the court, the only relevant question is whether the relevant act—in this case the termination of the tenancy—is a private act. (It could, perhaps, have been suggested that the powers to obtain parenting orders or anti-social behaviour orders were simply powers and not functions, but that argument was never advanced.)

53 In my judgment, therefore, strictly the Divisional Court focused on the wrong question when it posed the issue whether the act of management and allocation of housing was a public function such as to render the trust a hybrid public authority. In view of the concession, this point was not in issue and paragraph (a) of the declaration is to that extent misleading. It suggests that it is the exercise of the housing and management functions which renders the trust a hybrid public body whereas it was one in any event; and it fails directly to address the key question, and strictly the only question which had to be answered in order to determine whether the claimant's human rights were engaged, namely whether the act of termination was a private act (although the declaration does state that acts of termination are public functions).

54 Mr Drabble submitted that the approach adopted by the Divisional Court was the proper one because it has not been accepted by the trust that it was a hybrid body with respect to its housing allocation and management functions. However, section 6 is not structured so as to ask whether the particular function in the context of which the disputed act takes place is a public function. Moreover, it may sometimes be an irrelevant question. For example, there may be cases where the court is persuaded that whether a particular function of a hybrid body is public or not is immaterial, since it is satisfied that the particular act in dispute is a private act in any event. In those circumstances, the function question does not strictly arise and need not be resolved.

55 However, I do not thereby suggest that the analysis of the Divisional Court was to no purpose. I accept that in order to determine whether the act of termination is a private act or not, it is necessary to focus on the nature of the act in the context of the body's activities as a whole. In most, if not all, cases that is likely to require a consideration of the nature of the function or functions to which the act is contributing. Plainly the power to seek an ASBO was of no assistance in answering whether the termination of the tenancy was a private act or not.

56 By contrast, the question whether the provision by the trust involved the exercise of a function of a public nature was, in my view, highly material to that question. In short, in my judgment the scrutiny which the Divisional Court gave to the housing functions of the trust was relevant to the question whether the act of termination was private or not, but not to the question whether the trust was a hybrid public authority.

57 It is plain that the Divisional Court did in fact in this case focus on the function of allocating and managing housing at least in part in order to assist it to reach a conclusion on the proper characterisation of the act of termination. I consider that it was right to do so. It may be that to describe that context by reference to allocation and management was not wholly apt:

perhaps allocation alone would have sufficed. But I do not think anything significant turns on that. The important point, in my view, is to consider the act of termination in the wider context of the housing function being carried on by the trust, whatever shorthand is used to describe that context.

The contending arguments

58 The contending arguments can be relatively shortly stated. Mr Drabble submits that the analysis of the relevant facts demonstrates that most RSLs are in significant part publicly funded in order to fulfil an important function of government. It is an essential policy of government to provide social or subsidised housing, and RSLs are a vital instrument through which that policy is achieved. They are closely regulated and controlled in what rents they can fix and even the way in which they should carry out terminating tenancies. Whilst they do not stand in the shoes of local authorities, they work in very close harmony with them.

59 The obligation to co-operate results in significant limitations on the decision to allocate. Even absent any such duty, the decision who should be allocated the benefit of social housing, the terms on which he is offered it, and the decision to remove someone from it by terminating his tenancy, all involve the exercise of rights which, although private in form, are public in substance. They determine which particular individuals can benefit from the allocation of public funds. All these factors are in play with respect to this particular trust.

60 Furthermore, the act of termination is closely and inextricably linked to the function of allocation. It would be highly artificial to separate it out and treat it as a private act merely because the tenancy itself was a contract. The Divisional Court was correct to say that the character of the function effectively defined the character of the act.

61 Mr Arden, counsel for the trust, says that this argument is misconceived. The fundamental and elementary point, which Mrs Weaver does not challenge, is that the provision of housing is not a governmental function. That has very recently been confirmed by Baroness Hale of Richmond in *R (Ahmad) v Newham London Borough Council* [2009] PTSR 632 in which she pointed out that no one has a right to a house, and a local housing authority is under no general duty to provide housing accommodation. Many private and public bodies fulfil the function of providing housing.

62 Nor, says Mr Arden, is the case advanced by the fact that there is regulation of certain aspects of the way in which the trust allocates and manages its housing functions. There has long been detailed regulation of tenancies both in the private and public sectors. Until 1988 rent officers would fix rents at levels which were often below what the market would bear, even in the private sphere. That would not have converted private landlords into bodies exercising public functions. Similarly, control over evictions has been exercised for decades. *YL's* case [2008] AC 95 has emphasised that the mere fact of regulation tells us very little, if anything, of a body's status under section 6. It depends upon the nature and purpose of the regulation. This is not a case where the local authority has delegated its statutory powers to the trust. The fact that both happen to be providing social housing is not enough to render the trust's functions public.

A **63** In order to constitute a public body it is necessary for the state to have control over the exercise of the body's powers. Here it does not; it is for the trust to determine who it shall house and on what terms. It may reach an agreement with the local authority about allocations, but this does not alter the fundamental point that it controls its own affairs and enters into its own contracts.

B **64** The tenant has no public law rights as against the trust. Termination of the tenancy may confer fresh duties on the local authority, such as a duty to house a homeless person, and there may be claims against central government for housing benefit. But the relationship between the tenant and the trust is entirely located in private law. It is governed by the terms of the tenancy (with such statutory overlay to confer security as Parliament has afforded) and these terms are not affected either by the nature of the trust or C the functions it performs.

65 For this reason, even if it can be said that the trust is performing public functions with respect to the allocation and management of property generally, it is not doing so when it terminates a tenancy. This is par excellence the exercise of a private power in precisely the same way as the termination of the tenancy in *YL's* case was so characterised by Lord Scott.

D *Conclusions*

66 The essential question is whether the act of terminating the tenancy is a private act. When considering how to characterise the nature of the act, it is in my view important to focus on the context in which the act occurs; the act cannot be considered in isolation simply asking whether it involves the exercise of a private law power or not. As Lord Mance observed in *YL's* case E [2008] AC 95, both the source and nature of the activities need to be considered when deciding whether a function is public or not, and in my view the same approach is required when determining whether an act is a private act or not within the meaning of section 6(5). Indeed, the difficulty of distinguishing between acts and functions reinforces that conclusion.

67 In this case there are a number of features which in my judgment F bring the act of terminating a social tenancy within the purview of the Human Rights Act 1998.

68 A useful starting point is to analyse the trust's function of allocating and managing housing with respect to the four criteria identified by Lord Nicholls in the *Aston Cantlow* case [2004] 1 AC 546, para 12, reproduced above at para 35(5). First, there is a significant reliance on public finance; there is a substantial public subsidy which enables the trust to achieve its G objectives. This does not involve, as in *YL's* case, the payment of money by reference to specific services provided but significant capital payments designed to enable the trust to meet its publicly desirable objectives.

69 Second, although not directly taking the place of local government, the trust in its allocation of social housing operates in very close harmony with it, assisting it to achieve the authority's statutory duties and objectives. In this context the allocation agreements play a particularly important role H and in practice severely circumscribe the freedom of the trust to allocate properties. This is not simply the exercise of choice by the RSL but is the result of a statutory duty to co-operate. That link is reinforced by the extent to which there has been a voluntary transfer of housing stock from local authorities to RSLs.

70 Third, the provision of subsidised housing, as opposed to the provision of housing itself, is, in my opinion a function which can properly be described as governmental. Almost by definition it is the antithesis of a private commercial activity. The provision of subsidy to meet the needs of the poorer section of the community is typically, although not necessarily, a function which government provides. The trust, as one of the larger RSLs, makes a valuable contribution to achieving the government's objectives of providing subsidised housing. For similar reasons it seems to me that it can properly be described as providing a public service of a nature described in the Lord Nicholls's fourth factor.

71 Furthermore, these factors, which point in favour of treating its housing functions as public functions, are reinforced by the following considerations. First, the trust is acting in the public interest and has charitable objectives. I agree with the Divisional Court that this at least places it outside the traditional area of private commercial activity. Second, the regulation to which it is subjected is not designed simply to render its activities more transparent, or to ensure proper standards of performance in the public interest. Rather the regulations over such matters as rent and eviction are designed, at least in part, to ensure that the objectives of government policy with respect to this vulnerable group in society are achieved and that low cost housing is effectively provided to those in need of it. Moreover, it is intrusive regulation on various aspects of allocation and management, and even restricts the power to dispose of land and property.

72 None of these factors taken in isolation would suffice to make the functions of the provision of housing public functions, but I am satisfied that when considered cumulatively, they establish sufficient public flavour to bring the provision of social housing by this particular RSL within that concept. That is particularly so given that their Lordships have emphasised the need to give a broad and generous construction to the concept of a hybrid authority.

Is termination of a tenancy a private act?

73 That still leaves the central question whether the act of termination itself can none the less be treated as a private act. Can it be said that since it involves the exercise of a contractual power, it is therefore to be characterised solely as a private act? It is true that in both the *Aston Cantlow* case [2004] 1 AC 546 and *YL's* case [2008] AC 95 it is possible to find observations which appear to support an affirmative answer to that question. As I have said, in *YL's* case Lord Scott considered that the termination of the tenancy in that case was a private act, essentially because it involved the exercise of private rights. And in the *Aston Cantlow* case their Lordships focused on the private law source of the right being exercised in concluding that it was a private act.

74 Those decisions certainly lend force to the argument that the character of the act is related to and may be defined by the source of the power being exercised. Where it is essentially contractual, so the argument goes, it necessarily involves the exercise of private rights.

75 In my judgment, that would be a misreading of those decisions. The observations about private acts in the *Aston Cantlow* case and *YL's* case were in a context where it had already been determined that the function being exercised was not a public function. I do not consider that their

A Lordships would have reached the same conclusion if they had found that the nature of the functions in issue in those cases were public functions.

76 In my judgment, the act of termination is so bound up with the provision of social housing that once the latter is seen, in the context of this particular body, as the exercise of a public function, then acts which are necessarily involved in the regulation of the function must also be public acts. The grant of a tenancy and its subsequent termination are part and B parcel of determining who should be allowed to take advantage of this public benefit. This is not an act which is purely incidental or supplementary to the principal function, such as contracting out the cleaning of the windows of the trust's properties. That could readily be seen as a private function of a kind carried on by both public and private bodies. No doubt the termination of such a contract would be a private act (unless the body C were a core public authority).

77 In my opinion, if an act were necessarily a private act because it involved the exercise of rights conferred by private law, that would significantly undermine the protection which Parliament intended to afford to potential victims of hybrid authorities. Public bodies necessarily fulfil their functions by entering into contractual arrangements. It would severely limit the significance of identifying certain bodies as hybrid authorities if the D fact that the act under consideration was a contractual act meant that it was a private act falling within section 6(5).

78 Assume, for example, that a local authority delegated some of its statutory functions to a private organisation, such as allocating housing to the homeless. As Lord Mance pointed out in *YL's* case [2008] AC 95, the express delegation of public functions in this way would certainly bring the E delegatee within the range of bodies for whom the Government would be liable under Strasbourg jurisprudence. It surely could not be said that the exercise of contractual powers necessarily involved in the performance of those functions and central to the concerns of the tenant, such as the termination of a tenancy, involved the exercise of private rights which thus escaped the purview of the 1998 Act. In my judgment that would plainly be in breach of Convention principles.

F 79 It follows that in my view the act of terminating the tenancy of Mrs Weaver did not constitute an act of a private nature, and was in principle subject to human rights considerations. That may provide relatively limited protection in view of the decision of the House of Lords in *Doherty v Birmingham City Council (Secretary of State for Communities and Local Government interveneing)* [2009] 1 AC 367, following *Kay v* G *Lambeth London Borough Council* [2006] 2 AC 465. But the claimant and others in a like situation are entitled to such protection as is available to them applying human rights principles.

80 A point which then arises is whether the protection afforded by the 1998 Act will extend to all tenants of the trust who are in social housing or only those in properties which were acquired as a result of state grants. I agree with the Divisional Court that it should be all those in social housing. H The effect of the grant is not merely to assist the trust (and other RSLs similarly placed) in being able to provide low cost housing to the tenants in the properties acquired by the grant; it necessarily has a wider impact, and bears upon its ability to provide social housing generally. Furthermore, it would be highly unsatisfactory if the protection of human rights law

depended upon the fortuitous fact whether a tenant happened to be allocated to housing acquired with a grant or not.

81 It does not follow, however, that all tenants of the trust will receive the same protection. Mr Drabble conceded, I think probably correctly, that human rights principles will not apply to those tenants of the trust (a relatively small proportion, it seems) who are not housed in social housing at all. If the tenants are paying market rents in the normal way, then no question of subsidy arises. It is not obvious why the tenant should be in any different position to tenants in the private sector where human rights principles are inapplicable.

82 The effect of drawing this distinction does not lead to the unattractive consequence which would have resulted had the care home been held to have been a hybrid authority in *YL's* case, namely that two persons, each subject to the same level of care in the same care home, could be subject to different degrees of legal protection. Indeed, the distinction between those in social housing and those paying market rates merely mirrors the current distinction between those housed in local authority accommodation, who do have human rights protection with respect to evictions, and those housed in the private sector who do not.

Judicial review

83 Both the *Aston Cantlow* case [2004] 1 AC 546 and *YL's* case [2008] AC 95 emphasised that it does not necessarily follow that because a body is a public body for the purposes of section 6, it is therefore subject to public law principles. The Divisional Court held, however, that in this case the two questions had to be determined the same way. Mr Arden does not now seek to contend otherwise. In my judgment, he was right not to do so.

Disposal

84 Accordingly, I would dismiss this appeal. In my judgment the trust is a hybrid public authority and the act of terminating a tenancy is not a private act. It does not follow, however, that every RSL providing social housing will necessarily be in the same position as the trust. The determination of the public status of a body is fact-sensitive. For example, a potentially important difference is that apparently some RSLs have not received any public subsidy at all, and arguably—and I put it no higher than that—their position could be different.

LORD COLLINS OF MAPESBURY

85 I agree with Elias LJ that the appeal should be dismissed.

86 There are two preliminary comments to be made. The first relates to the question whether this appeal is likely to have any practical importance. In practice complaints by tenants of human rights violations on the part of local authorities or housing associations are most likely to centre on article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In *Kay v Lambeth London Borough Council* [2006] 2 AC 465 the House of Lords held that the right of a public authority landlord to enforce a claim for possession would in most cases be justifiable under article 8(2). While that decision stands (*Kay v United Kingdom* is pending in the European Court of Human Rights) the practical implications

of extending the protection of the Convention to tenants of RSLs must be very limited.

87 The second point relates to the context, or more accurately the lack of context, in which this appeal came to be heard. Before the Divisional Court Mrs Weaver lost comprehensively on the merits of her claim. She wholly failed in her claim that the trust had evicted her in breach of a legitimate expectation arising out of guidance issued by the Housing Corporation, and that to evict her from her home would interfere with her rights under article 8. It was held that the claimed legitimate expectation that Housing Act 1988, Schedule 2, ground 8 (arrears of rent) would not be used was far too tenuous and general to be enforceable in public law, and there was in any event no breach of it. Mrs Weaver had not given evidence that she had the expectation alleged or that she knew of the term of the contract from which the expectation is said to have arisen. The expectation was simply an artificial construct derived from the standard terms and conditions and attributed to her, rather than a genuinely held expectation of her own. The finding that there was neither a legitimate expectation nor a breach of any legitimate expectation disposed of the argument under article 8.

88 In reaching its conclusions the Divisional Court held that the trust was subject to the Human Rights Act 1998 by virtue of section 6(3)(b) and (implicitly) that the act of termination of the tenancy was not a private act: section 6(5). As Elias LJ has pointed out, strictly it was unnecessary for the court to determine the wider question raising the legal status of the trust.

89 Normally the trust would not have been in a position to appeal from that part of the reasoning, because of the fundamental rule of procedure that appeals lie against judgments or orders only, and not against reasons: *Lake v Lake* [1955] P 336; Supreme Court Act 1981, section 16. But because the trust wanted to contest the Divisional Court's conclusion on that issue even if Mrs Weaver did not appeal (and not merely by way of a respondent's notice if she did appeal), the Divisional Court granted declarations (a) that the management and allocation of housing stock by the trust (including decisions concerning the termination of a tenancy) was a function of a public nature, with the effect that the trust was to be regarded as a public authority in that respect for the purposes of the Human Rights Act 1998, section 6(3)(b); and (b) that the trust was accordingly amenable to judicial review on conventional public law grounds in respect of its performance of that function.

90 Whether a declaration should have been granted was of course a matter for the discretion of the Divisional Court, and there was no party at that stage, or on this appeal, with an interest in arguing that no such declaration should have been made. But the consequence of this procedural device is that this court is asked to determine the question of principle divorced from any plausible factual scenario in which the question might arise. In effect this court (by contrast with the Divisional Court) is being asked to give an advisory opinion. As Heydon J of the High Court of Australia has said in the context of findings which are not needed for the decision:

> "It is difficult to solve every aspect of a problem satisfactorily and conclusively when only one element of it is presented for concrete decision. Obiter dicta tend to share in the vice of, and even become, advisory opinions": (2006) 122 LQR 399, 417.

91 The problem is particularly acute here, because this court is being asked to determine in the abstract an issue on which the Divisional Court did not focus explicitly, namely whether in the present context, even if the trust is a "person certain of whose functions are functions of a public nature" within the meaning of section 6(3)(b), nevertheless it is not a public authority for present purposes because, in the words of section 6(5); "In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private". The question is this: even if certain of the functions of the trust are functions of a public nature, is the termination of a tenancy in accordance with its terms a private act?

92 Richards LJ touched on the public or private character of the termination of the tenancy. First, in the only explicit reference to section 6(5) he set out the relevant parts of section 6 at [2009] 1 All ER 17, para 25. Second, he referred to the argument by Mr Richard Drabble QC for Mrs Weaver, at para 45, that the acts of deciding to grant or terminate tenancies of social housing were decisions concerning the allocation of public housing resources and, as such, were not purely private in nature; that a decision to terminate a tenancy led to the withdrawal of a public funded resource from the tenant affected; that it was well established that decisions about eviction could have a public law character so as to be subject to the control of public law: e g *Wandsworth London Borough Council v Winder* [1985] AC 461 and *Wandsworth London Borough Council v A* [2000] 1 WLR 1246. Third, he referred in his conclusions, at para 60, to the fact that, on existing authority (*Peabody Housing Association Ltd v Green* (1978) 38 P & CR 644 and *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55), a decision by an RSL to terminate a tenancy was considered to be a matter of private, not public, law and not to be susceptible to judicial review; but he thought it better to leave the question of amenability to judicial review out of account when considering the issue of public authority, not least to avoid a danger of circularity of reasoning.

93 His conclusion on this aspect was, at para 62, that, if the allocation of housing stock by the trust was a public function, then it would be wrong to separate out "management" decisions concerning the termination of a tenancy as acts of a purely private nature. The allocation and management of the housing stock were to be regarded as part and parcel of a single function or as closely related functions. It would be artificial to separate out the act of terminating a tenancy from the act of granting a tenancy. The termination of a tenancy led to the withdrawal of a publicly funded or subsidised resource from the tenant and was likely to trigger fresh duties of the local authority, and had been recognised in the context of judicial review as involving decisions capable of having a public law character. If the trust was a public authority in relation to the grant of a tenancy, then it was equally a public authority in relation to the termination of the tenancy.

94 It seems to me that the concession in the present case that the trust is a "hybrid authority" which exercises both public and private functions does not assist in the application of section 6(5). It was conceded only that the trust is a hybrid authority on the basis that some of its functions are public functions, such as the power to obtain parenting orders (Anti-social Behaviour Act 2003, sections 26B and 26C, inserted by the Police and Justice Act 2006, section 24) and anti-social behaviour orders (Crime and Disorder Act 1998, Part I). In addition, the intervener, the Equality and Human

A Rights Commission, refers in its written submission to powers enjoyed by RSLs which are not otherwise available to private landlords, including the power to apply to a court to demote a tenant from assured status to the status of a demoted tenant (Housing Act 1988, section 6A, inserted by the Anti-social Behaviour Act 2003, section 14(4)) and the ability to grant Family Intervention Tenancies (in conjunction with which occupiers undertake behaviour support programmes) (Housing Act 1988, Schedule 1, B Part I, paragraph 12ZA, inserted by the Housing and Regeneration Act 2008, section 297(2)).

95 Consequently, I do not consider that the reference to "functions of a public nature" in section 6(3)(b) becomes wholly irrelevant once that concession is made and that the focus is simply on section 6(5). It seems to me to be plain that the act in question must be an act in pursuance of the C entity's relevant functions of a public nature. The fact that the trust is conceded to perform functions of a public nature in relation to anti-social behaviour orders not only does not assist in determining whether the nature of the act of termination of a tenancy is private or public, but it deflects attention from what I consider to be an essential prerequisite to consideration of the question in section 6(5), namely that the act is in pursuance of, or at least connected with, performance of functions of a D public nature.

96 That does not conclude the matter, of course, because many acts which are in pursuance of performance of functions of a public nature will be private acts. Even if the provision of social housing were a public function, it could not be suggested that the termination of a contract with a builder to repair one of the houses in the housing stock was other than a E private act.

97 In *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 this court held that the housing association was a public authority for the purposes of section 6(3)(b). The court said, at para 58:

> "The renting out of accommodation can certainly be of a private F nature. The fact that through the act of renting by a private body a public authority may be fulfilling its public duty, does not automatically change into a public act what would otherwise be a private act . . ."

It said, at para 65(v), that the "more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public". In the result, the court held that the eviction of the tenant G engaged article 8(1) but that the obligation to make the eviction order under section 21(4) of the Housing Act 1988 was within article 8(2). But the authority of this decision has been undermined by *YL v Birmingham City Council (Secretary of State for Constitutional Affairs intervening)* [2008] AC 95, where it was said that it relied too heavily on the historical links between the local authority and the RSL, rather than upon the nature of the function itself which was the provision of social housing: Lord Mance, at H para 105 and Baroness Hale of Richmond, dissenting, at para 61.

98 In *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, para 16 Lord Nicholls of Birkenhead contrasted a private act with the discharge of a public function. Lord Hope of Craighead, at para 41, said that whether section 6(5) of the 1998 Act

applied to a particular act depended on the nature of the act which was in question in each case, and concluded, at para 64, that the nature of the act was to be found in the nature of the obligation which the parochial church council ("PCC") was seeking to enforce; it was seeking to enforce a civil debt, and the function it was performing had nothing to do with the responsibilities which were owed to the public by the state; accordingly section 6(5) applied and in relation to the act in question the PCC was not a public authority. Lord Hobhouse of Woodborough, at para 89, also emphasised the fact that the act was the enforcement of a civil liability, which was a private law obligation.

99 So also in *YL v Birmingham City Council (Secretary of State for Constitutional Affairs intervening)* [2008] AC 95 Lord Scott (with whom Lord Neuberger of Abbotsbury and Lord Mance agreed) emphasised that the notice was served in purported reliance on a contractual provision in a private law agreement, and, at para 34, "its nature could not be thought to be anything other than private". Baroness Hale, dissenting, thought that an act in relation to the person for whom the public function is being put forward cannot be a private act for the purposes of section 6(5), at para 73.

100 Elias LJ is of the view that the source of the power will be a relevant factor in determining whether the act in question is in the nature of a private act or not. I would go somewhat further. It is not easy to envisage circumstances where an act could be of a public nature where it is not done in pursuance, or purportedly in pursuance, of public functions.

101 I also agree with Elias LJ that the following features in particular are highly relevant to the question whether the functions of the trust are public functions (although none of them on its own is in any sense conclusive): the substantial public subsidy which enables the trust to achieve its objectives; the way in which the allocation agreements circumscribe the freedom of the trust to allocate properties; and the nature of the regulation to which the trust is subject. In addition, the vast majority of RSL tenants enjoy statutory protection as regards the circumstances in which a social housing tenancy may be terminated. Secure, assured and assured shorthold tenancies (the vast bulk of RSL tenancies) can only be determined by a process of service of statutorily prescribed notices, court proceedings and a court order which ends the tenancy: cf *Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2009] 1 AC 367, para 100, per Lord Walker of Gestingthorpe. Although I do not attach significance to the concession that the trust is a hybrid authority because it can obtain anti-social behaviour orders, I do attach some significance to that power in conjunction with the other powers relied on by the Equality and Human Rights Commission and referred to above.

102 Consequently it does not follow that the termination of a tenancy is necessarily a private act simply because it originates from the exercise of contractual rights. In any event, I do not read *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 and *YL v Birmingham City Council (Secretary of State for Constitutional Affairs intervening)* [2008] AC 95 as doing more than treating the private law source of the right and obligation as a factor in determining whether the act is a private act or a public act. In my judgment the act of termination is inextricably linked to the provision of social housing as part of the trust's

A public function. Consequently I have come to the conclusion that the Divisional Court's decision on this point was right.

RIX LJ

103 I have read Elias LJ's judgment in draft, and am most grateful to him for setting out the material in this case so clearly. I have the misfortune, however, to disagree with him, and with Lord Collins of Mapesbury, as to
B the disposal of this appeal.

104 There is something rather perplexing about this litigation. Mrs Weaver claimed judicial review of the trust's decision to seek to terminate her tenancy on ground 8 of Schedule 2 to the Housing Act 1988. That is a ground, premised on arrears of rent of more than eight weeks, which provides the landlord with a mandatory basis for recovering
C possession; as contrasted with grounds 10 or 11, which grant to the court a discretion whether or not to enforce possession. Mrs Weaver alleged that the trust's use of ground 8 instead of the discretionary grounds for possession was in breach of legitimate expectation and in breach of her rights under the Convention for the Protection of Human Rights and Fundamental Freedoms. It was common ground that if her argument based on legitimate
D expectation failed, she could not succeed in reliance on article 8 of the Convention.

105 Her case on legitimate expectation sought to rely on the assumed presence in the trust's standard terms and conditions of its assured tenancy agreement of the following statement: "In providing a housing service we will comply with the regulatory framework and guidance issued by the Housing Corporation." The relevant guidance was to be found in Housing
E Corporation Regulatory Circular 07/04, issued in July 2004 under section 36 of the Housing Act 1996, and then in its replacement Circular 02/07. The key passage, under the heading "Clarification of the corporation's expectations: evictions", provides at 3.1.4: "Before using ground 8, associations should first pursue all other reasonable alternatives to recover the debt."

F 106 In the Divisional Court Richards LJ held [2009] 1 All ER 17, paras 85–87 and 89–90:

> "85. . . . the claimed legitimate expectation is far too tenuous and general in character to be enforceable in public law, and there was in any event no breach of it.
>
> "86. The claimant herself has not given evidence that she had the
> G expectation alleged or even that she knew of the term of the contract from which the expectation is said to have arisen . . . Thus the expectation is simply an artificial construct derived from the standard terms and conditions and attributed to the claimant, rather than a genuinely held expectation of her own . . .
>
> "87. As to the representation itself . . . I do not think that it can be read as a clear, unambiguous and unqualified promise or commitment to do
> H everything set out in the guidance issued by the Housing Corporation. The guidance is by its nature guidance, not prescription. The regulatory provisions to which I have referred place the Housing Corporation in a strong position to ensure that it is substantially followed, but there is nothing that turns it into the equivalent of a statutory rulebook, and the

Housing Corporation looks not just at whether the guidance has been followed but at whether alternative action has been taken to achieve the same objectives . . . The statement in [the trust's] standard terms and conditions cannot have been intended to give the guidance a status it does not have under the statute or in the Housing Corporation's own practice. At most, Mr Arden's description of it as a 'target duty' is more apt. Moreover, if the statement has the character of a promise, there is no reason why it should not be treated as a contractual promise, since it features in the contractual terms and conditions; but it is no part of the claimant's case that the statement is contractually binding. If it lacks the qualities to give it contractual force notwithstanding that it is located in a contract, I am not satisfied that it can properly be treated as having the qualities that justify its enforcement in public law as a legitimate expectation . . ."

"89. Thus, even if I were to accept the existence of a legitimate expectation in terms of the relevant guidance, that is a promise or commitment on the part of [the trust] to pursue all reasonable alternatives to recover the debt before using ground 8, I would not find a breach of it on the facts of this case . . . I do not accept that the pursuit of all reasonable alternatives requires possession proceedings to be brought first on ground 10 or 11 before reliance can be placed on ground 8 . . .

"90. Looking at the overall history of [the trust's] dealings with the claimant, I am not persuaded that [the trust] failed to use all reasonable alternatives to recover the debt before using ground 8. In particular, in the light of the history of substantial and repeated defaults, [the trust] was in my view entitled to take the view that reliance on ground 10 or 11 did not provide a reasonable alternative means of recovering the debt, and its reliance on ground 8 was in the circumstances in accordance with the relevant guidance and justified . . ."

107 Richards LJ then turned to the "Convention issues" but said, at para 94, that his finding that there was neither a legitimate expectation nor a breach of any legitimate expectation "sinks the argument". As for a further more fundamental argument that the very statute under which the possession order was sought was incompatible with article 8, Richards LJ said, at para 97, that it would be better not to express any view on it, since it arose on an artificial assumption and would necessarily be obiter.

108 I have set out the public law contentions and the Divisional Court's holdings on them because it seems to me that it is necessary to put the argument before us in context. That context was the complaint that the trust's decision to use ground 8 (rather than another method of obtaining possession) to evict Mrs Weaver was illegitimate in public law and Convention terms because a provision of the tenancy promised, although not as a contractually binding undertaking, to use other methods first. The argument failed at every point. What is significant for present purposes is that it was said that the trust did not live up to the legitimate expectations raised by its own contract. The complaint was not even that the trust sought to obtain possession, but that it sought to do so by one lawful method—lawful that is subject only to the more fundamental argument, not reached by the Divisional Court, which would have attacked the statutory basis of ground 8—before first trying to do so by another lawful

A method which should, for reasons engendered by its own contract, have been preferred.

109 Mrs Weaver has not sought to appeal from those decisions which the Divisional Court reached having first found that the trust was a public authority within section 6(3)(b) of the Human Rights Act 1998. She is no longer interested in this litigation.

B **110** It is, however, the Divisional Court's decision, along its route towards dismissing Mrs Weaver's claim, that the trust was a public authority within section 6(3)(b), that is the subject matter of the present appeal by the trust. The only way such an appeal could have been promoted was to grant a declaration regarding the position under section 6(3)(b), and that is what the Divisional Court did. Its declaration is set out, at para 5, above. It may be noted that the declaration is solely by reference to C section 6(3)(b), and makes no mention of section 6(5). It may also be noted that the declaration is by reference to a single "function", namely "the management and allocation of housing stock . . . (including decisions concerning the termination of a tenancy)". It is said that such a function "is a function of a public nature". It appears that decisions concerning the termination of a tenancy are part of what is called the function of D "the management and allocation of housing stock".

111 The declaration was fashioned to reflect the argument before the Divisional Court and its reasoning on that argument. The rival submissions of the parties before the Divisional Court are encapsulated in the following passages taken from the judgment of Richards LJ [2009] 1 All ER 17, paras 44–45:

E "44. Applying *YL's* case, Mr Drabble submitted that [the trust] is to be seen as carrying out a governmental function, namely the management and allocation of state-subsidised housing . . .

"45. Further, the particular acts of deciding to grant or terminate tenancies of social housing are decisions concerning the allocation of public housing resources and, as such, are not purely private in nature . . ."

F Those were the submissions made on Mrs Weaver's behalf. On behalf of the trust, Mr Arden submitted, at paras 48 and 51:

"48. . . . certain of the functions of an RSL may be public functions: for example, its statutory function in relation to anti-social behaviour orders or functions carried out pursuant to specific statutory delegations by local housing authorities . . . These specific situations are to be distinguished, G however, from the RSL's function of managing and allocating its own housing stock."

"51. Even if the allocation of housing is a public function, Mr Arden submitted that the termination of a tenancy is not: it is a management decision and is governed by the terms of the contract . . ."

112 On these rival submissions Richards LJ decided as follows, at paras H 62–63:

"62. Reference to the termination of a tenancy brings me to a final point on this issue, which is that if the allocation of housing stock by [the trust] is a public function, then it would in my view be wrong to separate out 'management' decisions concerning the termination of a tenancy as

acts of a purely private nature. The allocation and management of the housing stock are to be regarded as part and parcel of a single function or as closely related functions. It would be artificial to separate out the act of terminating a tenancy, or indeed other acts in the course of management of a property, from the act of granting a tenancy. Moreover, as Mr Drabble submitted, the termination of a tenancy leads to the withdrawal of a publicly funded or subsidised resource from the tenant and is likely to trigger fresh duties of the local authority, and has been recognised in the context of judicial review as involving decisions capable of having a public law character. If [the trust] is a public authority in relation to the grant of a tenancy, then it is equally a public authority in relation to the termination of the tenancy.

"63. For those reasons I accept the claimant's case that [the trust] is for relevant purposes a public authority within section 6(3)(b) of the Human Rights Act . . ."

113 Although Richards LJ nowhere in that passage mentioned section 6(5) (indeed, it is mentioned only very briefly in passing in para 25 of his judgment), I would be prepared to accept that in his critical para 62, where he considered whether terminating a tenancy or decisions concerning termination were "acts of a purely private nature", he was implicitly having regard to section 6(5)'s provision that "In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private". However, his reasoning was that it was artificial to separate the act of termination from the act of granting a tenancy. If, therefore, the latter was a public function, or part of the overall public function of "management of a property", then the former was as well.

114 In the light of the arguments addressed to this court, I am not surprised that section 6(5) figured so sparingly in the Divisional Court's judgments, for before this court too the submissions essentially focused on section 6(3)(b) rather than on section 6(5). This was despite the fact that Mr Arden conceded (albeit Elias LJ has suggested, perhaps wrongly) that RSLs were hybrid public authorities within section 6(3)(b) because of their power to obtain ASBOs and parenting orders. However, he was at pains to resist any suggestion that the matter went further than that, or in particular that in matters of management or allocation RSLs had any public functions to perform of any kind whatsoever. Moreover, there was hardly any consideration of what was meant by the extremely broad expression "management" on the one hand, or on the other hand of what was involved in the much narrower field of terminating a tenancy (save in the context of the *subsequent* discussion of legitimate expectations). On the whole, submissions on all sides were addressed at a very broad level of abstraction. On one side it was being suggested that not only the trust, but all RSLs, in all their activities, were acting as public authorities, whereas on the other side it was being suggested that (absent such peripheral matters as ASBOs and the like) RSLs were essentially commercial, albeit subsidised and regulated, entities. These were submissions at the extremes.

115 I said above that this is perplexing litigation. I have sought to illustrate what I mean by that. It is, in this court, litigation in which the respondent claimant has no interest, having lost below and not appealed.

A The argument has proceeded in the main on the basis of an extremely broad canvas, without specific focus on the act of termination in this case or on the critical statutory provision, which is section 6(5), despite the concern there expressed that the focus be on the "particular act". Instead, opposing strategic positions have been taken up. In as much as "management" has been in question, there has been no real attempt to examine what is meant by that, or what is involved in it. No doubt it can cover a vast array of activity, B from the purchase or development of housing to the repair of a leaking bathroom pipe in respect of a single tenancy. In as much as "allocation" and "termination" have been in question, there has been no real attempt to explain why termination of a tenancy by regard to its contractual terms is to be regarded as just the other side of the coin, or part and parcel of, a function of allocation, which is essentially pre-contractual. It has simply been C regarded as such.

Strasbourg and domestic jurisprudence

116 In this state of affairs, I ask myself first, what guidance is given by either Strasbourg or domestic jurisprudence.

117 I begin with Strasbourg jurisprudence. This is, in my judgment, a D significant starting point, because, as Elias LJ has pointed out, at para 35(1) above, the purpose of section 6 is to identify "those bodies for whose acts the state is answerable before the European Court of Human Rights" (per Lord Nicholls of Birkenhead in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, para 6). As Lord Hobhouse of Woodborough observed in the same case, at para 87: "The relevant concept is the opposition of the 'victim' and a 'governmental E body'." Moreover, we are required to take Strasbourg jurisprudence into account in determining any question which has arisen in connection with a Convention right: the 1998 Act, section 2(1): see the *Aston Cantlow* case, per Lord Hope of Craighead, at para 51 and Lord Rodger of Earlsferry, at para 163; and, in *YL v Birmingham City Council (Secretary of State for Constitutional Affairs intervening)* [2008] AC 95, Lord Neuberger of Abbotsbury, at para 157.

F **118** What in this context is to my mind instructive is that there is no case, at any rate none has been cited, in Strasbourg jurisprudence in which the non-governmental provider of social housing has been the cause or object of a complaint of victimhood within the meaning of the Convention. The only Strasbourg case cited in the judgments of the Divisional Court is *Novoseletskiy v Ukraine* (2006) 43 EHRR 53, where, at para 44 of the G judgment below, "a body responsible for the management and distribution of part of the state-owned housing stock was held by the Strasbourg court to be a governmental organisation for whose acts and omissions the state was liable". However, that was because the organisation in question was part of that essential "core" or "governmental" fabric of the state which is at the heart of Convention liability for these purposes. The citation by Richards LJ of that case was simply of an element within the submissions of H Mr Drabble below. When I inquired of Mr Arden generally as to what the teachings of Strasbourg jurisprudence might be about non-governmental providers of social housing, he told me that there were no relevant cases. He explained that by and large there was a distinction between countries of Eastern Europe, which had used municipalities to provide social housing,

and the countries of Western Europe, where subsidised private social housing prevailed. The United Kingdom had recently moved from the Eastern to the Western European model. There were a number of Strasbourg cases concerning the provision of municipal housing, but that was all. Mr Drabble did not dispute this explanation.

119 I turn to domestic jurisprudence for assistance. I am grateful for the analysis performed by Elias LJ in respect of the two leading cases *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 and *YL v Birmingham City Council (Secretary of State for Constitutional Affairs intervening)* [2008] AC 95. We are to perform a multi-factorial assessment. However, how has this worked in practice? First, I remind myself of what Lord Nicholls said in the *Aston Cantlow* case, at para 16:

> "I turn next to consider whether a parochial church council is a hybrid public authority. For this purpose it is not necessary to analyse each of the functions of a parochial church council and see if any of them is a public function. What matters is whether the particular act done by the plaintiff council of which complaint is made is a private act as contrasted with the discharge of a public function."

That is of course a reference to the "particular act" in section 6(5) of the 1998 Act.

120 In this context it is to my mind instructive, in a comparatively new field of inquiry, to try to see how the emerging principles have resulted in decisions. I approach the matter chronologically, while recognising that the law has been developing during the short period under review.

121 In *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55, Moses J had to consider the closure by a registered social landlord ("RSL") of its purpose-built registered care home which it had assured the applicants would be their home for life. Subsequently, however, financial losses led the RSL to decide to close it. Alternative arrangements were offered. The applicants sought judicial review on the ground that the decision to close was a breach of their legitimate expectations. Although Moses J was not operating under the 1998 Act and its section 6, he applied a closely analogous test for susceptibility to judicial review, namely whether the RSL was performing a public duty under a statutory source for its powers or whether the source of the power it was exercising was only in contract, at paras 56–67. He concluded, albeit reluctantly, that it was the latter. It was true that the applicants had been placed with the RSL by Wandsworth London Borough Council pursuant to a statute (sections 21 and 26 of the National Assistance Act, 1948); nevertheless, at p 80: "Once the placement arrangements had been made the relationship between Wandsworth and Servite [the RSL] was commercial." The source of the RSL's powers was purely contractual and it owed no public law obligation to the applicants. Wandsworth's public law obligations were limited to an obligation to reassess the applicant's needs. The applications failed, although Moses J raised the question, at p 85, whether "the solution lies in imposing public law standards on private bodies whose powers stem from contract or in imposing greater control over public authorities at the time when they first make contractual arrangements".

A **122** In *YL's* case [2008] AC 95 Lord Mance referred to the judgment in *R v Servite Houses, Ex p Goldsmith* [2001] LGR 55 as illuminating and persuasive and clearly considered it to be correct. He observed, at para 120:

> "the essentially contractual source and nature of Southern Cross's activities differentiates them from any 'function of a public nature', even though it is (as often in the private sector) a matter of public concern,
B interest and benefit that reputable, efficient and properly regulated providers of such services should exist."

Lord Scott of Foscote and Lord Neuberger agreed with Lord Mance.

123 In *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 the claimant was an RSL which was seeking possession from its tenant, the defendant. The tenant had originally been
C granted a tenancy by her local housing authority on an interim basis, while the question whether she was intentionally homeless was investigated. During her tenancy the property in which she lived (together with a substantial proportion of the authority's housing stock) was transferred by the local authority to the RSL, of whom she became a tenant under a periodic assured shorthold tenancy. In due course the local authority
D decided that she had become intentionally homeless. The RSL then sought possession of her home under section 21(4) of the Housing Act 1988, which provided for mandatory possession by a landlord who gave the requisite notice for seeking possession.

124 The question was whether the RSL was amenable to a complaint under article 8 of the Convention as a hybrid public authority pursuant to section 6 of the 1998 Act. This court, in its judgment given by Lord Woolf
E CJ, regarded inter alia the following features of the case as being relevant to that question, at paras 65–66:

> "65. . . . (iii) The act of providing accommodation to rent is not, without more, a public function for the purposes of section 6 . . . irrespective of the section of society for whom the accommodation is provided. (iv) The fact that a body is a charity or is conducted not for
F profit means that it is likely to be motivated in performing its activities by what it perceives to be in the public interest. However, this does not point to the body being a public authority. In addition, even if such a body performs functions, that would be considered to be of a public nature if performed by a public body, nevertheless such acts may remain of a private nature for the purpose of sections 6(3)(b) and 6(5). (v) What can
G make an act, which would otherwise be private, public is a feature or a combination of features which impose a public character or stamp on the act. Statutory authority for what is done can at least help to mark the act as being public; so can the extent of the control over the function exercised by another body which is a public authority. The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public. However, the fact
H that the acts are supervised by a public regulatory body does not necessarily indicate that they are of a public nature. This is analogous to the position in judicial review, where a regulatory body may be deemed public but the activities of the body which is regulated may be categorised private. (vi) The closeness of the relationship which exists between

Tower Hamlets and Poplar [the local authority and the RSL respectively]. Poplar was created by Tower Hamlets to take a transfer of local authority housing stock; five of its board members are also members of Tower Hamlets; Poplar is subject to the guidance of Tower Hamlets as to the manner in which it acts towards the defendant. (vii) The defendant, at the time of transfer, was a sitting tenant of Poplar and it was intended that she would be treated no better and no worse than if she remained a tenant of Tower Hamlets. While she remained a tenant, Poplar therefore stood in relation to her in very much the position previously occupied by Tower Hamlets.

"66. While these are the most important factors in coming to our conclusion, it is desirable to step back and look at the position as a whole. As is the position on application for judicial review, there is no clear demarcation line which can be drawn between public and private bodies and functions. In a borderline case, such as this, the decision is very much one of fact and degree. *Taking into account all the circumstances, we have come to the conclusion that while activities of housing associations need not involve the performance of public functions, in this case, in providing accommodation for the defendant and then seeking possession, the role of Poplar is so closely assimilated to that of Tower Hamlets that it was performing public and not private functions*. Poplar therefore is a functional public authority, at least to that extent. We emphasise that this does not mean that all Poplar's functions are public. We do not even decide that the position would be the same if the defendant was a secure tenant. The activities of housing associations can be ambiguous. For example, their activities in raising private or public finance could be very different from those under consideration here. The raising of finance by Poplar could well be a private function." (Emphasis added.)

125 I would observe that in that reasoning this court, correctly in my judgment as subsequent House of Lords authority in the *Aston Cantlow* case [2004] 1 AC 546 and *YL's* case [2008] AC 95 has shown, concentrated not so much on the question whether *any* functions of an RSL might be of a public nature, but on whether the particular act of seeking possession with which that case was concerned was of a public or private nature. It is clear that this court felt that it was highly relevant on the particular facts that provision (which had started with Tower Hamlets pending an investigation of intentional homelessness) and termination (which only occurred in the light of Tower Hamlets' decision that the defendant was intentionally homeless) were all part of the same function: see the passage emphasised in para 66 above. The fact that the RSL was a not-for-profit charity did not point to it being a public authority. The raising of private or public finance could well be a private function.

126 In *YL's* case [2008] AC 95, Baroness Hale of Richmond (who was of the minority) observed, at para 61, that "it is the nature of the function being performed, rather than the nature of the body performing it, which matters under section 6(3)(b)" and commented in this connection that *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 had "relied too heavily upon the historical links between the local authority and the registered social landlord, rather than upon the nature of the function itself which was the provision of social housing".

Lord Mance (who was of the majority) was to similar effect, at para 105. While that criticism was made, there is no other direct guide in the speeches in *YL's* case as to the correctness of the decision in the *Poplar* case. Seeing that the subject matter of the criticism had been a significant factor in pushing this court in the *Poplar* case to its decision in what it regarded as a "borderline" case, it is possible to view the outcome there as of now uncertain authority. However, despite the criticism in *YL's* case, I have taken the liberty to quote extensively from the *Poplar* case because, together with the *Servite* case, it is the only prior authority cited to us concerning RSLs, and, in my judgment, its logic (a fortiori when the effect of the criticism is taken into account and the factor concerned is discounted) is that it was not the function of the provision of social housing which determined the result (which would have been a quite general point) but only the special circumstances of the case. I would regard the *Poplar* case, on the facts of the present case and in the light of the criticism of it in *YL's* case, as being helpful to the trust. In particular it recognises (see para 65 (iii) of Lord Woolf CJ's judgment) that providing accommodation to rent is not without more a public function, irrespective of the section of society for whom the accommodation is provided.

127 Not long after the *Poplar* case was decided, it was considered and distinguished in *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936. That was a forerunner of the issue in *YL's* case. The foundation, a large charity, operated a residential care home, which it had decided to close down, and so wished to relocate its residents. The claimants were residents for whom a local authority paid, being persons to whom the authority owed a duty to provide care and accommodation under the National Assistance Act 1948. Their argument that the foundation owed them obligations under article 8 of the Convention on the basis that it was a hybrid public authority under section 6(3)(b) of the 1998 Act failed. Lord Woolf CJ again gave the judgment of this court, which also comprised Laws and Dyson LJJ. Lord Woolf CJ said, at para 35:

> "In our judgment the role that LCF was performing manifestly did not involve the performance of public functions. The fact that LCF is a large and flourishing organisation does not change the nature of its activities from private to public. (i) It is not in issue that it is possible for LCF to perform some public functions and some private functions . . . While the degree of public funding of the activities of an otherwise private body is certainly relevant as to the nature of the functions performed, by itself it is not determinative of whether the functions are public or private . . ."

128 Next in the series of cases is *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, the first of the two cases in the House of Lords which, although they do not concern RSLs, are the leading authorities on the principles for the application of section 6. It and *YL's* case [2008] AC 95 have been analysed by Elias LJ, and I will not reduplicate that. However, it is instructive to stand back and try to see the essence of each of the cases in their decision-making process. In the *Aston Cantlow* case the parochial church council's appeal succeeded because the particular act concerned, the enforcement of the liability for the repair of the chancel, was an act of a private nature. As Lord Nicholls said, at para 16:

A "I turn next to consider whether a parochial church council is a hybrid public authority. For this purpose it is not necessary to analyse each of the functions of a parochial church council. What matters is whether the particular act done by the plaintiff council of which complaint is made is a private act as contrasted with the discharge of a public function."

Lord Nicholls, looking at the matter realistically, concluded that "there is nothing particularly 'public' about this" (ibid). Similarly Lord Hope said, at B para 35, that in the case of non "core" public authorities: "Section 6(5) applies to them, so in their case a distinction must be drawn between their public functions and the acts which they perform which are of a private nature." His decision, at para 64, was that

C "The nature of the act is to be found in the nature of the obligation which the PCC [parochial church council] is seeking to enforce. It is seeking to enforce a civil debt. The function which it is performing has nothing to do with the responsibilities which are owed to the public by the state."

Lord Hobhouse thought that it was not shown that parochial church councils perform *any* function of a public or governmental nature, at para 88. In any event, the section 6(5) question was to be answered in the D defendants' favour, at para 89:

"Is the nature of the relevant act private? The act is the enforcement of a civil liability. The liability is one which arises under private law and which is enforceable by the PCC as a civil debt by virtue of the 1932 Act."

E **129** Finally, in *YL's* case [2008] AC 95 the House of Lords had to consider whether a private company which had contracted with a local authority and the local NHS primary care trust to provide residential accommodation and care in its care home to an elderly woman, was subject to the 1998 Act when it sought to terminate the contract (because of an irreconcilable breakdown in relations with Mrs YL's family). The House of Lords held by a narrow margin that it was not. The argument seems to have F proceeded under section 6(3)(b) rather than under section 6(5). This was possibly because a declaration was sought by way of preliminary issue to the effect that in providing accommodation and care for the claimant the company was exercising public functions within section 6(3)(b): see [2008] AC 95, paras 1 and 76. It does not appear to have been contended that the act of termination was a particular act with a separate, private, status within G section 6(5) irrespective of the section 6(3)(b) status of the company as a whole.

130 The position is more complex because of the division of opinion between their Lordships. It is convenient to consider the position of the minority first. Thus Lord Bingham of Cornhill defined the relevant function under investigation as follows, at para 14:

H "The nature of the function with which this case is concerned is not in doubt. It is not the mere provision of residential accommodation but the provision of residential accommodation plus care and attention for those who, by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them."

A Lord Bingham continued, at para 16:

> "Counsel for the Birmingham City Council laid great emphasis on the fact that its duty under [sections 21 and 26 of the National Assistance Act 1948] is to arrange and not to provide. This is correct, but not in my view significant. The intention of Parliament is that residential care should be provided, but the means of doing so is treated as, in itself, unimportant.
B By one means or another the function of providing residential care is one which must be performed. For this reason also the detailed contractual arrangements between Birmingham, Southern Cross and Mrs Y L and her daughter are a matter of little or no moment."

Similarly, Lord Bingham said, at para 20:

> C "When the 1998 Act was passed, it was very well known that a number of functions formerly carried out by public authorities were now carried out by private bodies. Section 6(3)(b) of the 1998 Act was clearly drafted with this well known fact in mind. The performance by private body A by arrangement with public body B, and perhaps at the expense of B, of what would be a public function if carried out by B is, in my opinion, precisely the case which section 6(3)(b) was intended to embrace."

D

131 For Lord Bingham therefore, the matter was simply and clearly stated. The local authority (a "core" governmental authority) had a direct statutory duty to see to it that residential care (with special emphasis on care) was provided to Mrs YL. If that duty was delegated, at the local authority's expense, to a private company, it was still a public duty. Therefore the company, which was performing that duty on payment for the
E local authority, was a hybrid public authority under section 6(3)(b). No question arose under section 6(5). The termination of Mrs YL's care was necessarily the antithesis of that public duty.

132 Lord Bingham said he also wholly agreed with Baroness Hale, at para 2. She considered that she had amplified Lord Bingham's reasons: see para 75. She explained the statutory framework in more detail and summed
F it up in these terms [2008] AC 95, paras 52–53:

> "52. At the same time, local authorities were placed under a duty to carry out an assessment of the need for community care services of any person who might be in need of them (section 47(1)(a) of the [Community Care Act 1990]) and then to decide whether those needs called for the provision by them of any such services: section 47(1)(b). 'Community
G care services' include arranging or providing accommodation under section 21(1) of the 1948 Act: section 46(3). If the person may also need health care under the National Health Service Act 1977, the local authority must invite the relevant health body to assist in the assessment. A large slice of the social security budget was transferred to local authorities to enable them to meet these new responsibilities.
>
> H "53. The appellant's case was a good example of how the system was supposed to work . . . The local authority arranged the placement with the care home provider and undertook to meet the charges under the tripartite contractual arrangements described above. The local authority has a continuing duty of assessment and remains responsible for the resident's welfare. The local NHS primary care trust assessed her health

care needs, and found them to be in the high band, entitling her to a weekly contribution towards the nursing component in her care . . ." A

Thus Baroness Hale's analysis is the same as Lord Bingham's, save that she also explains the ramifications of those statutory underpinnings which emphasise the importance of care.

133 Baroness Hale went on to draw analogies with Strasbourg jurisprudence concerned with the delegation by state bodies of their public duties to private bodies, at paras 56–57. As for section 6, she said, at paras 65–69 and 71: B

"65. . . . While there cannot be a single litmus test of what is a function of a public nature, the underlying rationale must be that it is a task for which the public, in the shape of the state, have assumed responsibility, at public expense if need be, and in the public interest. C

"66. One important factor is whether the state has assumed responsibility for seeing that this task is performed . . .

"67. Another important factor is the public interest in having that task undertaken. In a state which cares about the welfare of the most vulnerable members of the community, there is a strong public interest in having people who cannot look after themselves, whether because of old age, infirmity, mental or physical disability or youth, looked after properly. They must be provided with the specialist care, including the health care, that they need . . . D

"68. Another important factor is public funding. Not everything for which the state pays is a public function . . . But providing a service to individual members of the public at public expense is different. These are people for whom the public have assumed responsibility . . . E

"69. Another factor is whether the function involves or may involve the use of statutory coercive powers . . .

"71. Finally, then, there is the close connection between this service and the core values underlying the Convention rights and the undoubted risk that rights will be violated unless adequate steps are taken to protect them." F

She briefly referred to section 6(5) at para 73.

134 I have cited from the speeches of the minority at some length to demonstrate what, in my judgment, is clear from them: that, even though here and there some of the factors discussed by Baroness Hale may have limited application to the case presently before us, nevertheless there is nothing or little to suggest that their decision could be carried over into the facts of our case. The statutory underpinnings, the Strasbourg jurisprudence, and even the aspect of public funding, are all fundamentally or at least significantly different. G

135 I turn then to the speeches of the majority. It seems to me that the essential difference between them and the minority is that, whereas the latter began with the statutory duties of the local authorities and considered that what followed was a delegation of duties to private bodies in circumstances where, because of the essentially non delegable nature of those duties, the state, albeit through the private body, had to remain responsible, the majority held that there was no real delegation of public functions, but only a contracting out of the provision of services, and that in this respect there H

A was a great gulf between the obligations of the state and those of the private contractor. Lord Scott put the point in the following way, at paras 29–31:

> "29. There are, in my opinion, very clear and fundamental differences. The local authority's activities are carried out pursuant to statutory duties and responsibilities imposed by public law. The costs of doing so are met by public funds, subject to the possibility of a means tested recovery from
B the resident. In the case of a privately owned care home the manager's duties to its residents are, whether contractual or tortious, duties governed by private law. In relation to those residents who are publicly funded, the local and health authorities become liable to pay charges agreed under private law contracts and for the recovery of which the care home has private law remedies . . .
C "30. As it seems to me, the argument based on the alleged similarity of the nature of the function carried on by a local authority in running its own care home and that of a private person running a privately owned care home proves too much. If every contracting out by a local authority of a function that the local authority could, in the exercise of a statutory power or the discharge of a statutory duty, have carried out itself, turns the contractor into a hybrid public authority for section 6(3)(b) purposes,
D where does this end . . .
"31. These examples illustrate, I think, that it cannot be enough simply to compare the nature of the activities being carried out at privately owned care homes with those carried out at local authority owned care homes. It is necessary to look also at the reason why the person in question, whether an individual or corporate, is carrying out those
E activities. A local authority is doing so pursuant to public law obligations. A private person, including local authority employees, is doing so pursuant to private law contractual obligations . . ."

136 Lord Scott then turned his attention to the impact of regulation (see Lord Mance's speech, at para 79, for the extent of it) and found in it part of the private rights under contract, rather than a reason for an alternative
F regime of public law. He said, at para 32:

> "This regulatory framework is in place. A feature, or consequence, of it is that an obligation by Southern Cross to observe the Convention rights of residents is an express term of the agreement between the council and Southern Cross and is incorporated into the agreement between Southern Cross and YL. Any breach by Southern Cross of YL's Convention rights
G would give YL a cause of action for breach of contract under ordinary domestic law. No one has suggested that the contractual arrangements between the council and Southern Cross and between Southern Cross and YL are not typical. There is, in my opinion, no need to depart from the ordinary meaning of 'functions of a public nature' in order to provide extra protection to YL and those like her . . ."

H Those remarks have resonance for the contractual situation in the present case, to which I will return.

137 Finally, Lord Scott did reach, by reference to the *Aston Cantlow* case [2004] 1 AC 546, the question under section 6(5) of the 1998 Act, without mentioning it in terms. He said, at para 34:

"As to the act of Southern Cross that gave rise to this litigation, namely, the service of a notice terminating the agreement under which YL was contractually entitled to remain in the care home, the notice was served in purported reliance on a contractual provision in a private law agreement. It affected no one but the parties to the agreement . . ."

138 Lord Mance began his analysis with the Strasbourg jurisprudence, at paras 92 et seq. He said that it lacked any case directly in point, but demonstrated two relevant principles. One was that the state may in some circumstances be responsible for failure to regulate or control the activities of private persons; the other was that the state may in some circumstances remain responsible for the conduct of private law institutions to which it had delegated state powers. The first principle did not apply, because the company had no regulatory role. As for the second principle (which had clearly influenced the minority), this recognised at para 99 that

"there may be certain essentially state or governmental functions, particularly involving the exercise of duties or powers, for the manner of exercise of which the state will remain liable, notwithstanding that it has delegated them to a private law body."

However, that principle requires either that the body is established and capitalised by the state for state purposes and armed with state powers, or that the functions of the state are non-delegable. However, neither principle appeared to apply to private care homes or the provision of care and accommodation. Even where a body is provided with special powers, that did not mean that they amounted to functions of a public nature, as distinct from being conferred for private, religious or purely commercial purposes.

139 Lord Mance then turned his attention to the statutory background to the company's role in that case, at paras 107 et seq. Even if a public authority had a duty to *provide* care and accommodation, it did not follow that its provision under contract by a private body was equally the performance of a public function, for on analysis some of the latter's functions and activities may be private in nature (para 110). In that respect, Lord Mance critically said, at para 115, that he did not regard "the actual provision, as opposed to the arrangement, of care and accommodation for those unable to arrange it for themselves as an inherently governmental function". He added, at para 116:

"In providing care and accommodation, Southern Cross acts as a private, profit-earning company. It is subject to close statutory regulation in the public interest. But so are many private occupations and businesses, with operations which may impact on members of the public in matters as diverse for example as life, health, privacy or financial well being. Regulation by the state is no real pointer towards the person regulated being a state or governmental body or a person with a function of a public nature, if anything perhaps even the contrary. The private and commercial motivation behind Southern Cross's operations does in contrast point against treating Southern Cross as a person with a function of a public nature."

Moreover, while it is not possible to distinguish between paying and subsidised residents in a local authority care home, because the local

A authority is a core authority, it is incongruous to distinguish between self-paying and publicly funded residents in a private home (para 119). He therefore concluded that the company in providing care and accommodation to YL in its home was not exercising functions of a public nature within section 6(3)(b). He did not consider section 6(5).

B **140** Lord Mance's analysis may be said to be essentially as follows. The provision under contract of care and accommodation by a private care home, run for profit, is essentially the carrying out of private and not public functions. The statutory background in the obligation of local authorities to arrange and provide such care and accommodation did not turn the *provision* of such services as distinct from their *arranging* into public functions. Regulatory supervision of private care homes did not lead in a different direction, if anything it confirmed his view. Neither did the public C funding of YL's placement. It was incongruous to distinguish between privately and publicly funded residents. Strasbourg jurisprudence was consistent with his view. The contracting out of services otherwise provided under statute by a public authority was not such a delegation of non-delegable duties as to require a different solution.

D **141** Lord Neuberger [2008] AC 95 considered the problem in three stages: first, on the particular facts of the case, secondly by reference to a policy argument concerning the contracting out of services which a core public authority is under a statutory duty to provide, and thirdly by reference to still wider issues of principle (para 132). As to the first stage, he too emphasised that close and detailed supervision did not tell in favour of the company being a hybrid public authority: "There is no identity between the public interest in a particular service being provided properly and the E service itself being a public service" (para 134). Neither did the fact that services of the kind provided by the company were also provided by charities, i e operating in the public interest for the public benefit. Not only did that not affect those who provide such services on a commercial basis, but even in the case of charities it did not mean that provision of the services was a function of a public nature. Otherwise all charities (and all private F organisations providing services which could be provided by charities) would be caught by section 6 (para 135). Nor did the fact that such services were provided to the vulnerable: the need for particular protection went rather to the responsibility of government supervision (para 136). Such factors were not irrelevant, but not persuasive. Lord Neuberger next considered three factors which were essential to Mrs YL's case. (1) As for statutory duties, they applied to the core authority, but only the duty to G arrange was inherently of a public nature. (2) The public funding could not be a sufficient condition, otherwise everything and everyone paid for by a core authority would be drawn into the concept of a public function. (3) Similarly, the fact that the service could be provided by a core authority was not sufficient.

H **142** As for contracting out, this was not a case of the contracting out of a duty, since statute did not require the provision of care by the authority itself. In terms of public funding, it was easier to say that a general subsidy to the business as a whole could turn the business as a whole into a function of a public nature, than in the case of the funding of specific individuals. And in any event, Mrs Y L continued to have her public law remedies against the local authority in respect of their continuing statutory duty to

provide care and accommodation. In truth contracting out took the matter no further, otherwise the provision of meals or the repairing of buildings or the manufacture of military material would be caught. More generally, policy considerations concerning contracting out weighed in the opposite direction, at para 152:

> "It is thought to be desirable, in some circumstances, to encourage core public authorities to contract-out services, and it may well be inimical to that policy if section 6(1) automatically applied to the contractor as it would to the authority. Indeed, unattractive though it may be to some people, one of the purposes of contracting-out at least certain services previously performed by local authorities may be to avoid some of the legal constraints and disadvantages which apply to local authorities but not to private operators . . . [The] fact that there are competing arguments makes it hard to justify the courts resolving the instant issue by reference to policy."

143 Finally, Lord Neuberger came to his "wider perspective" (para 154). He considered that only some wider policy considerations, if available, could bolster the various factors that he had so far considered, even taken together, into a conclusion in favour of Mrs Y L on the section 6(3)(b) issue. It was at this point that Lord Neuberger turned to Strasbourg jurisprudence and to previous authority in the form of the *Aston Cantlow* case [2004] 1 AC 546 for guidance. There was nothing in the former to support Mrs YL's claim, while dicta in the *Aston Cantlow* case emphasised the distinction between functions of an inherently governmental nature (such as running a prison, discharging a statutory regulatory regime or maintaining defence: see para 166) and those that were not, such as maintenance or cleaning contracts (para 162).

144 It was in this context that Lord Neuberger, at para 165, contrasted the public funding of an impecunious individual in *YL's* case with the situation where:

> "the funding effectively subsidises, in whole or in part, the cost of the service as a whole . . . Thus, it appears to me to be far easier to argue that section 6(3)(b) is engaged in relation to the provision of free housing by an entity all of whose activities are wholly funded by a local authority, than it is in relation to the provision of housing by an independently funded entity to impecunious tenants whose rent is paid by the local authority."

145 In a final checklist, Lord Neuberger concluded, at para 160, that the following considerations, in no particular order, taken together led to his decision that the provision of care and accommodation by the company was not a function of a public nature within section 6(3)(b), despite being paid for by a local authority pursuant to its statutory duty: (a) the company's activities would not be subject to judicial review; (b) Mrs Y L would not be treated by the Strasbourg court as having Convention rights against the company; (c) the company's functions with regard to the provision of care and accommodation would not be regarded as inherently governmental; (d) the company had no special statutory powers with regard to the provision of care and accommodation; (e) the care home was not funded by the local authority; (f) the rights and liabilities between the company and

A Mrs Y L arose under a private law contract. In essence, Lord Neuberger's analysis was very similar to that of Lord Mance.

146 Most recently, in *R (Ahmad) v Newham London Borough Council* [2009] PTSR 632, Baroness Hale has emphasised that the provision of housing is not a government function. She said, at para 12:

> "Part VI of the Housing Act 1996 gives no one a right to a house. This
B is not surprising as local housing authorities have no general duty to provide housing accommodation. They have a duty periodically to review housing needs in their area (Housing Act 1985, section 8). They have power to provide housing accommodation by building or acquiring it: 1985 Act, section 9. They also have power to nominate prospective tenants to registered social landlords or to others. They are required to have an allocation policy which applies to selecting tenants for their own
C housing or nominating people for housing held by others: Housing Act 1996, section 159(2). But this does not mean that they have to have available any particular quantity of housing accommodation, still less that they must have enough of it to meet the demand, even from people in the 'reasonable preference' groups identified in section 167(2). In some areas there may be an over-supply of council and social housing.
D In others there may be a severe under-supply. Newham is one of those others."

Baroness Hale emphasises the distinction between allocation and provision.

Discussion and conclusion

147 Applying these analyses and considerations to the facts of the
E present case, I do not consider that the trust's decision to terminate Mrs Weaver's tenancy by seeking possession from the court on mandatory ground 8 justified by her non-payment of rent is properly to be categorised as the exercise of a function of a public nature rather than a private act arising out of contract. In my judgment, although there may be strands based on a multi-factorial approach to argue a conclusion to the contrary effect, the
F essential reasoning of our jurisprudence firmly supports the trust's appeal.

148 First, Strasbourg jurisprudence does not suggest that the trust is amenable to Convention liability or that the United Kingdom's liability can be invoked in respect of such an act.

149 Secondly, I cannot find in the decisions of domestic jurisprudence support for Mrs Weaver's case. The *Servite* case [2001] LGR 55, which was approved by the majority of their Lordships in *YL's* case [2008] AC 95, runs
G contrary to the decision appealed against. The *Poplar* case [2002] QB 48, despite the criticism of it in *YL's* case and allowing full effect for that criticism, gives her case no principled support. The *Aston Cantlow* case [2004] 1 AC 546 emphasises both the importance of section 6(5) in the analysis and the significance of the trust's claim being in support of a private contractual right. As for *YL's* case, the statutory underpinnings there, for
H the reasons preferred by the minority, were much stronger than in the present case, for statute required the provision of care to a vulnerable person in need of welfare services. Lord Bingham himself emphasised the significance for him of the facts that statute required the *provision* of services and that the services concerned went beyond the accommodation and extended to *care* for the particularly vulnerable. In the present case,

however, it is quite clear and common ground that statute does not require the provision of housing accommodation (see paras 61 and 146 above), and there is no question of Mrs Weaver being a particularly vulnerable person to whom care and medical services must also be provided. I am doubtful that even the minority view in *YL's* case would support the Divisional Court's declarations.

150 Thirdly, it seems to me that the argument in this case, reflected in the judgments of the Divisional Court, has been inappropriately influenced by the structure of the dispute in *YL's* case. Because of the nature of the declaration there sought, and also perhaps because it was common ground that, if the provision of care and accommodation was required by statute and/or inherently of a public nature then it was irrelevant that the particular act in question was a decision to terminate the contract, the argument appears to have been essentially directed to section 6(3)(b) of the 1998 Act. Alternatively, the width of the argument under section 6(3)(b) subsumed any question under section 6(5). However, as emerged in submissions before us, it is clear that in our case a major issue ought to be whether, even on the assumption that allocation is a function of a public nature, termination under the terms of the tenancy is of the same nature or alternatively is of the nature of a private act.

151 Fourthly, under the influence of the structure of the argument in our case, submissions have proceeded from the concept that "management and allocation" is an all-embracing public function which includes termination. Accordingly, the court has been encouraged to accept that if management (or allocation) is a public function, then the rest follows. I do not accept that that is a satisfactory way to analyse the housing function. It is to be noted that the declaration is not framed in terms of the "provision" of housing, nor in terms of social housing. "Management" is a vast and undifferentiated area which, as it seems to me, inevitably includes functions and acts which are most unlikely to be of a public nature: such as the commercial acquisition or even development of property, or the financing of it (even on the basis that public subsidy plays an important role, as to which see below), or the maintenance and repair of it, or the daily grind of administering a very substantial portfolio of property of all kinds. In my judgment, the acceptance that management of social housing is essentially a single integrated function of a public nature is most unlikely to be correct. Moreover, the trust operates and manages substantial amounts of property outside the sphere of social housing, or where local authority allocation plays no role: see the figure of 36% implicit in the figure quoted at para 24 above. However, there has been hardly any examination of this issue of what "management" comprises in practice, and the Divisional Court has proceeded on the basis that management is essentially a function of either a public or a private nature and chosen between these extremes in favour of the former. It has seemed to me that both sides of this dispute have had an interest in advancing an argument which would dispose, once and for all, of the issue whether an RSL is for all purposes a hybrid public authority or not. I very much doubt, however, that such an issue can be debated in this way.

152 Fifthly, my concern becomes increasingly acute when the proposition is that because management is a public function, then allocation is, or perhaps vice versa, and because allocation is, therefore termination is. *YL's* case [2008] AC 95 is clear authority for the proposition that even where

A a public authority has a statutory duty both to arrange and to provide care and accommodation for the most vulnerable of our society, the fact that the arrangement may be of an inherently governmental or public nature does not mean that their provision is. It seems to me that, as compared with the case of care and accommodation in a care home, a fortiori that is true of the case of housing, even social housing. Moreover, inasmuch as it is
B suggested that because allocation is a function of a public nature, therefore termination is, I would respectfully disagree. Allocation arises under arrangements made between an RSL and a local authority, where the local authority makes use of such arrangements to fulfil their statutory duty to have an allocation policy. However, once an allocation has been made and a prospective tenant has been accepted by an RSL as its tenant, the tenant then enters into a contractual tenancy with the RSL, and their relationship
C thenceforward is governed, just like any tenant's relationship with his or her landlord, by private law. That remains the case despite the relevance of regulation. Moreover, the statutes which govern the recovery of possession apply to an RSL's social housing tenancies and other landlords' tenancies alike. All the authorities I have considered stress the importance of private contractual rights. The decision in the *Poplar* case [2002] QB 48 was driven by very special factors.

D **153** While it is inevitable that core public authorities who enter into contractual tenancies are subject to the Convention, it seems to me to require special circumstances to impose Convention solutions on top of the working out of private law contracts of private bodies, even if such bodies are also in some respects hybrid public authorities. Admittedly the question can always arise whether a function of a public nature intrudes into the area of the
E contract and decisions which have to be taken under it. Where, however, as here, the contract concerned is one so well known to private/commercial life as a tenancy agreement, where such contracts are being entered into in almost identical or standard form with social housing tenants and non social housing tenants alike, it seems to me to be counter-intuitive to suppose that the working out of that contract as between a private (non-governmental) landlord and a tenant can depend on Convention rights. An exception might
F be where public functions fill the whole or a substantial space of that contract. I see no reason, however, for saying that that is the situation here. On the contrary, a contract like a tenancy contract, for all that it is hedged around by statutory provisions, is made for the specific purpose of determining the rights between the parties.

154 Sixthly, there is nothing special about the regulation which applies
G to social housing which to my mind changes that picture. The majority in *YL's* case [2008] AC 95 thought that if anything regulation is needed for the very reason that, regulation apart, the relevant world is governed by private contract. It is certainly clear that very large parts of commercial life are regulated; and the place and space of regulation in such life is growing all the time. It is true that the modern regulatory regime of social housing controls
H or influences the rents charged (see para 17 above describing the 2008 Act) and that the essence of social housing as there formulated is that it is available at lower than market rents. That, however, is built into the tenancy agreement, which fixes the rent. Similarly, regulation may provide guidance for termination, such as the guidance which is in focus in these proceedings: "Before using ground 8, associations should first pursue all

other reasonable alternatives to recover the debt." However, it seems to me not to matter whether that is treated as part of the contract or not. If, as would appear to be the case, although the issue was only reached in the Divisional Court *after* a decision had been reached on section 6(3)(b), that guidance is part of the contract (see paras 105, 107 above and the term "we will comply with the regulatory framework and guidance issued by the Housing Corporation"), then it is part of the bargain and Mrs Weaver has her contractual remedy. If, on the other hand, Mrs Weaver prefers, seeking a public law remedy outside contract, to say that that term lacks contractual force for all that it is located in the contract, then it would seem to me nevertheless that it would be incongruous on that account to bring into the world of private contractual rights and obligations an obligation which is referred to in the contract and could have been made part of it. As Richards LJ observed (see para 106 above):

> "If it lacks the qualities to give it contractual force notwithstanding that it is located in a contract, I am not satisfied that it can properly be treated as having the qualities that justify its enforcement in public law as a legitimate expectation . . ."

It is noticeable that in *YL's* case [2008] AC 95 the regulatory regime does appear to have been made part of the contract (see Lord Scott, at para 32 of *YL's* case, cited at para 136 above).

155 Seventhly, there is nothing about the nature of the trust, or the typical RSL, to promote the concept that in the everyday administration of its tenancy agreements it is performing functions of a public nature. Although it is a charity, it has independent corporate status and is conducted by an independent board of directors and owned by its private shareholders. As a charity, it operates for the public benefit rather than for commercial profit, but its operations are essentially in the private and business world, rather than in the world of government, for all that. Richards LJ in the court below and Elias LJ in this court consider that the trust's charitable status places it outside the sphere of commercial providers. In my judgment, however, the world of charity is essentially private, and, although a charity does not operate for profit in the ordinary way, nevertheless when its function is to provide a service such as housing in return for the payment of rent and to do so on a substantial scale (the trust owns 33,000 dwellings), it has to operate according to (for want of a better word) business disciplines or else it is very likely to fail. It seems to me that what Lord Neuberger said about charities in *YL's* case, at para 135, puts them into the private world rather than into the world of those performing functions of a public nature. To similar effect is Lord Mance in *YL's* case [2008] AC 95, para 110, where he quotes Lord Woolf CJ in *R (Heather) v Leonard Cheshire Foundation* [2002] 2 All ER 936, para 15:

> "If the authority itself provides accommodation, it is performing a public function . . . However, if a body which is a charity, like LCF, provides accommodation to those to whom the local authority owes a duty under section 21 in accordance with an arrangement under section 26, it does not follow that the charity is performing a public function."

There is no suggestion in *YL's* or *Heather's* cases that a charity is other than in the private world.

A **156** Eighthly, the majority of the trust's capital finance comes from private lenders and the proceeds of housing sales, while a very substantial but decreasing minority comes from public grants. The grants are available to buy social housing. If the properties purchased with the grants are resold, the grants have to be returned, unless rolled over and used on the purchase of further social housing. The trust's revenues come from its rents. The typical ratio of private finance to public grant across the RSL sector as a whole is
B 2:1. Richards LJ and Elias LJ and Lord Collins in this court see the substantial degree of public subsidy in the form of the public grants as a significant factor in determining that everything that an RSL does by way of social housing it does in exercise of a public function. I accept that public subsidy is a factor in the overall assessment; and that Lord Neuberger says in *YL's* case that a general subsidy is in this respect more telling than the
C defrayment by the public purse of the cost of individuals (whereas Baroness Hale took the opposite view).

157 However, in my judgment such matters are relative and there is a danger in confusing form and substance. Public subsidy in its broadest sense comes in many different forms. Sometimes the state defrays the costs of individual consumers in need. Sometimes, by making grants to companies, it
D defrays the costs of particular products or services. Sometimes, by means of tax deductions, it defrays the cost to taxpayers generally of the acquisition of products (capital grants) or services (mortgage finance). Sometimes, as we have seen only recently, very large sums of general public subsidy are needed to prevent private financial institutions from collapse. It would be surprising to learn that these private institutions are hybrid public authorities. Where tax deductible capital grants are concerned, the public policy is to encourage
E efficiency and modernisation by reducing the cost of re-equipment. It is hard to say that one form of subsidy is essentially different from another. The state also uses taxation policy to raise revenues (as well as to expend subsidy) in the public interest: thus duty is raised from the manufacturers of alcohol and tobacco. In social housing the role that public grants essentially play is to mediate between the commercial cost of housing, for which a lower than
F market price is to be paid in the form of rent by tenants, and the revenues obtainable from that rent. The overall effect is to lower the cost of borrowing across the board. There is no direct allocation, however, between the grant on any particular property and the rent payable. Mrs Weaver's home is in a building which the trust acquired on the private market with private finance. On the other hand, the effect is also to subsidise the rents of social housing tenants. Whereas I accept that public finance is an element in
G the equation, I would be sceptical about allowing it, or any particular form of it, to play a dominant role in the assessment.

158 Ninthly, there is the difficult question of public policy addressed by Lord Neuberger in *YL's* case [2008] AC 95, para 152 (see para 142 above). His prescription is that the competing views about policy render this factor neutral. As such, they do not strengthen the case for hybrid status. I would
H add this further consideration. Lord Neuberger spoke of the policy of contracting out as being to avoid the legal constraints and disadvantages of operating as a core governmental authority. I would diffidently suggest that there is another, possibly even more significant, ambition of the policy of moving into the private sector what at some earlier period may have been carried on in the public sector. That is a recognition that, where large

business operations have to be carried out, even when such operations are not governed purely by markets but have elements of social policy about them, they are better carried out by private expertise in the management of such operations, whose experience and efficiency nevertheless redound to the public interest.

159 Tenthly, and finally, the public welfare concern which all feel for those in need of social housing—and I mean to include government, the courts, the RSLs themselves and the public at large in that "all"—is addressed or capable of being addressed in many different ways: in statutory provision, in regulation, in public subsidy, in the exercise of charitable status, in the contractual arrangements between local authorities and RSLs, in the form of tenancy agreements, in the expertise of RSLs, and in the ongoing duty of local authorities to assess and to allocate accommodation for those in need. It is, however, unnecessary to give to decisions, under contract, of an essentially private nature an artificial status as acts of a public nature or in performance of public functions, in order to ensure proper protection.

160 In sum, when I consider the various factors which the authorities teach us to consider, I can find insufficient to support the conclusion that in the exercise of its contractual rights under its tenancy agreement the trust is acting in the public rather than in the private sphere, or in performance of a function of a public nature. While it is conceded by the trust that in certain, limited but irrelevant respects the trust is a hybrid public authority for the purpose of section 6(3)(b) of the 1998 Act, I am sceptical how far the management of social housing by an RSL can be brought within the meaning of that subsection. Even if allocation is to be brought within that subsection, that is not the same as provision of accommodation. In my judgment, however, for the purpose of section 6(5) the trust's decision to exercise its contractual rights by invoking a claim for possession under ground 8 cannot be attacked in public law or by reference to the Convention.

161 For my part, therefore, I would allow this appeal. In the event, however, for the reasons given by my Lords, the appeal will be dismissed.

Appeal dismissed.
Permission to appeal refused.

5 November 2009. The Supreme Court (Lord Hope of Craighead DPSC, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood JJSC) dismissed an application by the defendant landlord for permission to appeal.

J R S

Employment Appeal Tribunal

Grainger plc and others *v* Nicholson

UKEAT/219/09

2009 Oct 7;
Nov 3

Burton J

Discrimination — Religion or belief — Philosophical belief — Employee holding belief as to catastrophic effect of climate change — Whether "philosophical belief" — Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660), reg 2(1) (as substituted by Equality Act 2006 (c 3), s 77(1))

A "philosophical belief" within the meaning of regulation 2(1)(b) of the Employment Equality (Religion or Belief) Regulations 2003[1] is a belief, genuinely held and not merely an opinion or viewpoint, as to a weighty and substantial aspect of human life and behaviour that has a certain level of cogency, seriousness, cohesion and importance, is worthy of respect in a democratic society and is not incompatible with human dignity or in conflict with the human rights of others (post, para 24).

A belief is not precluded from the protection of the Regulations merely because it is not shared by others, or does not govern the entirety of the believer's life, or does not constitute or allude to a fully-fledged system of thought, or is based on a political philosophy or on science (post, paras 27, 28, 30).

Campbell and Cosans v United Kingdom (1982) 4 EHRR 293 and *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, HL(E) considered.

Where, therefore, on an employee's claim of discrimination under regulation 3 of the 2003 Regulations, an employment judge ruled that his asserted belief, namely that mankind was heading towards catastrophic climate change and everyone was under a moral duty to lead their lives in a manner which mitigated or avoided that catastrophe for the benefit of future generations, was capable of being a "philosophical belief" within the meaning of regulation 2(1)(b), and the employers appealed—

Held, dismissing the appeal, that the employee's asserted belief was capable of being a "philosophical belief" for the purposes of the Regulations, and, accordingly, the case would be remitted for a full hearing with evidence and cross-examination directed, in particular, to the genuineness of the belief and also to whether what was done by the employers was done on grounds of that belief (post, para 32).

The following cases are referred to in the judgment:

Arrowsmith v United Kingdom (1978) 3 EHRR 218
Campbell and Cosans v United Kingdom (1982) 4 EHRR 293
Church of the New Faith v Comr of Pay-Roll Tax (Victoria) (1983) 154 CLR 120
Eweida v British Airways plc [2009] ICR 303, EAT
H v United Kingdom (1993) 16 EHRR CD 44
Kremzow v Austria (Case C-299/95) [1997] ECR I-2629, ECJ
McClintock v Department of Constitutional Affairs [2008] IRLR 29, EAT
R (Dimmock) v Secretary of State for Education and Skills [2007] EWHC 2288 (Admin); [2008] 1 All ER 367
R v Morgentaler [1988] 1 SCR 30

[1] Employment Equality (Religion or Belief) Regulations 2003, reg 2(1), as substituted: see post, para 9.
Reg 3: see post, para 8.

A *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15; [2005] 2 AC 246; [2005] 2 WLR 590; [2005] 2 All ER 1, HL(E)

No additional cases were cited in argument.

INTERLOCUTORY APPEAL from an employment judge sitting at London Central

B By reasons sent to the parties on 1 April 2009, an employment judge decided that the belief on which the claimant, Mr T Nicholson, based a claim of unlawful discrimination against his employers, Grainger plc, and others, was capable of being a "belief" for the purposes of the Employment Equality (Religion or Belief) Regulations 2003.

On 30 April 2009 the employers appealed on the grounds that (1) the C claimant's belief was not a religious or philosophical belief within the meaning of the 2003 Regulations; (2) it was insufficient that an opinion had "cogency, seriousness cohesion and importance" or was "an opinion based on some real or perceived logic or on information or lack of information available"; and (3) the employment judge's conclusion was perverse.

The facts are stated in the judgment.

D *John Bowers QC* (instructed by *Grange Wintringham, Grimsby*) for the employers.

Dinah Rose QC and *Ivan Hare* (instructed by *Bindmans LLP*) for the claimant.

The court took time for consideration.

E 3 November 2009. The following judgment was handed down.

BURTON J

1 This is an appeal by the respondent employers, Grainger plc, against the decision of Regional Employment Judge Sneath on 18 March 2009, by reasons sent to the parties on 1 April 2009, after a pre-hearing review, that F the claimant was entitled to pursue a claim under the Employment Equality (Religion or Belief) Regulations 2003. The issue was whether the belief assertedly held by the claimant, Mr Nicholson, was capable of being a belief for the purposes of the 2003 Regulations. At the tribunal, the claimant was in person and the employers were represented by junior counsel. Before me, the fullest possible consideration of the point has been G given by leading counsel now instructed on either side, Mr John Bowers QC for the employers and Ms Dinah Rose QC, with Mr Ivan Hare, for the claimant.

2 The facts do not matter, this being a preliminary issue, but it should simply be said that the claimant was employed by the employers until 31 July 2008. The employers claim that the claimant's employment was terminated on grounds of redundancy: the claimant claims that his dismissal H was unfair and that he was discriminated against contrary to the 2003 Regulations, because of his asserted philosophical belief about climate change and the environment.

3 The employment judge recorded, in para 5 of his judgment, the content of a witness statement by the claimant, which reads:

"2. I have a strongly held philosophical belief about climate change and the environment. I believe we must urgently cut carbon emissions to avoid catastrophic climate change.

"3. It is not merely an opinion but a philosophical belief which affects how I live my life including my choice of home, how I travel, what I buy, what I eat and drink, what I do with my waste and my hopes and my fears. For example, I no longer travel by airplane, I have eco-renovated my home, I try to buy local produce, I have reduced my consumption of meat, I compost my food waste, I encourage others to reduce their carbon emissions and I fear very much for the future of the human race, given the failure to reduce carbon emissions on a global scale."

4 The employment judge reached no conclusion about this statement, and recorded at para 6:

"The claimant has not been cross-examined on that evidence, but it is doubtful whether such cross-examination would be permitted, since it is not the function of the tribunal to examine the beliefs of claimants appearing before it. Instead it is the function of the tribunal to analyse those beliefs to see whether they engage relevant legislation."

5 That seemed to me, and counsel did not dissent when I raised the matter, not to be correct. It seems to me an implicit cross-reference to the words of Lord Nicholls of Birkenhead in *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, para 22, when Lord Nicholls said:

"When the genuineness of a claimant's professed belief is an issue in the proceedings, the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief is made in good faith . . . But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual."

6 Where, as here, the assertion is of a philosophical belief, it is plain that the limiting words of Lord Nicholls do not, or at any rate, may not, apply. To establish a religious belief, the claimant may only need to show that he is an adherent to a particular religion. To establish a philosophical belief, not least to establish, if such be necessary, all the underlying facts set out, or assumed, in the short extract from his evidence set out above, it is plain that cross-examination is likely to be needed. Indeed, para 13 of the employment judge's judgment emphasises this point, when he says:

"I distinguished the claimant's case from that of Mr McClintock"—in *McClintock v Department of Constitutional Affairs* [2008] IRLR 29—"because the claimant has settled views about climate change, and acts upon those views in the way in which he leads his life. In my judgment, his belief goes beyond mere opinion, such as might be held on some

A aspects of climate change, such as whether it is environmentally desirable to travel by air."

If such be necessary to be established, it was plainly not open to the employment judge to do so without cross-examination or inquiry.

7 In those circumstances, it is agreed between the parties that, in so far as the employment judge may have purported to hold, as he seems to do in B the last sentence of para 10 of his judgment, that "the claimant's beliefs are or amount to a philosophical belief within the 2003 Regulations", he was not entitled to go that far and that the limit of his decision, and of mine if I uphold it, is that (almost as set out in para 1(a) of the judgment) "the *asserted* belief held by the claimant upon which he bases his claim of discrimination is *capable* of being a belief for the purposes of" the 2003 Regulations.

C 8 Regulation 3(1) of the 2003 Regulations reads (in material part):

> "For the purposes of these Regulations, a person ('A') discriminates against another person ('B') if—(a) on the grounds of the religion or belief of B . . . A treats B less favourably than he treats or would treat other persons."

D 9 The interpretation section is what has been in issue in this appeal. Regulation 2(1) reads:

> "In these Regulations—(a) 'religion' means any religion, (b) 'belief' means any religious or philosophical belief, (c) a reference to religion includes a reference to lack of religion, and (d) a reference to belief includes a reference to lack of belief."

E 10 This definition resulted, so far as the crucial sub-paragraph in issue in these proceedings, sub-paragraph (b), is concerned, from an amendment inserted from 30 April 2007 by section 77(1) of the Equality Act 2006. Prior to the amendment, the word "similar" appeared before the words "philosophical belief". The circumstances which led to the amendment to delete that word were not in the event contentious. In *Religious Freedom,* F *Religious Discrimination and the Workplace* (2008) by Lucy Vickers, p 21, Ms Vickers suggests, by reference to footnote (21):

> "to be defined as 'similar' to religion was viewed as offensive to some humanists and atheists, and the definition was amended by the Equality Act 2006 to remove the term 'similar'."

G In support of this, Mr Bowers adduced, without objection, the relevant passage from Hansard relating to the then Equality Bill ((HL Debates), 13 July 2005, col 109) where Baroness Scotland, the Attorney General, is recorded as saying, in relation to the deletion by amendment of the word "similar":

> "It was felt that the word 'similar' added nothing and was, therefore, redundant. This is because the term 'philosophical belief' will take its H meaning form the context in which it appears; that is, as part of the legislation relating to discrimination on the grounds of religion or belief. Given that context, philosophical beliefs must therefore always be of a similar nature to religious beliefs. It will be for the courts to decide what constitutes a belief for the purposes of [the Regulations] but case law

suggests that any philosophical belief must attain a certain level of cogency, seriousness, cohesion and importance, must be worthy of respect in a democratic society and must not be incompatible with human dignity. Therefore an example of a belief that might meet this description is humanism, and examples of something that might not . . . would be support of a political party or a belief in the supreme nature of the Jedi Knights"—a reference to a Camelot-style order in the cult film Star Wars —"I hope that this provides some assurance on the change of definition of 'religion or belief' that we have adopted, and I hope that the noble Baroness will therefore feel content to withdraw the amendment" [which indeed ensues].

11 This passage helpfully encapsulates the three main issues between the parties on this appeal:

(i) How far, if at all, the belief said to qualify for protection under the Regulations is required to be similar to a religious belief?

(ii) What limits (if any) should be placed upon the words "philosophical belief"? Mr Bowers submits that there are or should be at least three limits: (a) it must be a "settled" belief, part of a system of beliefs; and/or (b) it must be a philosophical belief and not a political belief, one based upon political opinions, such as, for example, fascism; and/or (c) it must not be a scientific belief based upon conclusions drawn from science and resulting from research or the gathering of information.

(iii) Whether the authorities in relation to the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 9 and article 2 of the First Protocol in particular, are of relevance, or indeed persuasive or conclusive in this field. This question arises in this context because the reference by the Attorney General to "case law" in the citation from Hansard above derives from the words of the judgment of the European Court of Human Rights in *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, a case in which the complainants successfully alleged that the system of corporal punishment in Scottish state schools offended their *philosophical convictions* under article 2 of the First Protocol to the Convention.

12 Although the regional employment judge set out the content of the claimant's written statement, as above, he did not articulate the *philosophical belief*, which he concluded (arguably) fell for protection. I asked Ms Rose to articulate it for me, and she did so as follows:

> "The philosophical belief is that mankind is heading towards catastrophic climate change and therefore we are all under a moral duty to lead our lives in a manner which mitigates or avoids this catastrophe for the benefit of future generations, and to persuade others to do the same."

13 She submits that: (i) there is a field (according to the *Internet Encyclopaedia of Philosophy*, an extract from which she produced) called "environmental ethics", whose job is said to be to outline our moral obligations in the face of serious environmental concerns; (ii) if a claimant had a similar belief that mankind is heading towards *economic* catastrophe, with the consequential asserted moral duty, then that too, she would submit, would be capable of amounting to a philosophical belief for the purposes of the 2003 Regulations.

A **14** The central question appears to me to be the applicability and status of the European Court of Human Rights authorities, commencing with *Campbell v United Kingdom*, relied upon by the Attorney General in Parliament. The relevant provisions of the Convention are as follows.

(i) Article 9(1):

> "Everyone has the right to freedom of thought, conscience and
B religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice, and observance."

It can be seen that the belief in question is not necessarily a *philosophical* belief.

C (ii) Article 14 (the general prohibition of discrimination):

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

D This protects (but only by reference to some other article to which this must be ancillary) against discrimination on grounds of political or other opinion.

(iii) Article 2 of the First Protocol protects the right to education, and provides:

> "in the exercise of any functions which it assumes in relation to
E education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

15 Mr Bowers submits that there is no requirement for the 2003 Regulations to be construed in accordance with the Convention jurisprudence, and that the approach of the English courts in the
F interpretation of the Regulations passed by the United Kingdom Parliament pursuant to its obligations under Council Directive 2000/78/EC of 27 November 2000 (the EC Framework Directive) (OJ 2000 L303, p 16) to be construed independently, save only by reference to any jurisprudence of the European Court of Justice, of which there is none: he has referred to the book by Ms Vickers and also to another of her works *Religion and Belief*
G *Discrimination in Employment—the EU Law* (2006), but, although there is some reference to how some of the other Community members have legislated, including Austria, Germany and The Netherlands, there is nothing from which I feel able to draw any common or persuasive thread. Ms Rose however relies upon the Framework Directive:

(i) She points out that the member states' obligation, by reference to article 1, is as to the purpose of the Directive being the combating of
H discrimination "on the grounds of religion or belief". There is thus no limitation to any kind of belief, and thus, putting it at its lowest, no warrant for the United Kingdom legislature to limit the kind of belief to be protected.

(ii) She refers (as did the employment judge) to the fact that the Convention is prayed in aid as a source in both recitals 1 and 4.

Mr Bowers notes that the original draft of recital 1 was amended to include reference to the "constituted traditions common to the member states", but that does not seem to me to do anything more than emphasise that the Convention enshrines principles already familiar to, e g, the United Kingdom (see also *Kremzow v Austria* (Case C-299/95) [1997] ECR I-2629, para 14), and certainly not to undermine the causal connection.

16 Further, there are two authorities in the Employment Appeal Tribunal from which some assistance can be drawn, both judgments given by Elias J (President). The first is *McClintock v Department of Constitutional Affairs* [2008] IRLR 29. In that case, this tribunal upheld a decision by an employment tribunal concluding that a Justice of the Peace member of the family panel was not entitled to protection in circumstances where he declined to officiate in cases where he might have to decide whether same sex partners should adopt children. Although this was a challenge to the applicability of the 2003 Regulations, by reference to whether the claimant had a relevant belief, the case plainly turned on the finding of fact. The tribunal concluded that Mr McClintock's objection was not based on a philosophical belief. The appeal tribunal's conclusions are clearly set out at para 45 of the judgment:

> "As the tribunal in our view correctly observed, to constitute a belief there must be a religious or philosophical viewpoint in which one actually believes. It is not enough 'to have an opinion based on some real or perceived logic or based on information or lack of information available'. Mr McClintock had not as a matter of principle rejected the possibility that single sex parents could ever be in a child's best interests; he felt that the evidence to support this view was unconvincing, but did not discount the possibility that further research might reconcile the conflict which he perceived to exist."

He did not therefore have, for example, a fixed homophobic belief.

17 The appeal tribunal rejected the three arguments put forward by counsel for Mr McClintock, by reference to their conclusion, at para 44, that "The tribunal found as a fact that Mr McClintock chose not to put his objections on the basis of any religious or philosophical belief". At the outset of setting out those arguments, Elias J recorded in para 41:

> "The test for determining whether views can properly be considered to fall into the category of a philosophical belief is whether they have sufficient cogency, seriousness, cohesion and importance and are worthy of respect in a democratic society: see *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293. That was a decision under article 9 of the [Convention], but [counsel for the claimant] submits that it should equally inform the construction of the Regulations."

18 Mr Bowers submits that, when Elias J came, in para 44, to reject counsel's three arguments, he was also rejecting that proposition. I do not agree. It is certainly the case that Elias J did not specifically adopt the proposition, but he did not reject it, and certainly gave no reason for doing so.

19 The second authority is *Eweida v British Airways plc* [2009] ICR 303, a case based wholly on religious belief (the British Airways stewardess wearing the cross). Elias J, giving the judgment of the appeal

A tribunal, plainly cross-referred to the Convention jurisprudence which, by now, included not only *Campbell v United Kingdom* but *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, to which I have referred in para 5 above. He plainly considered that the tribunal was entitled, and indeed obliged, to draw on that jurisprudence in construing the 2003 Regulations (which runs further counter to Mr Bowers's
B construction of the judgment given by Elias J in *McClintock v Department of Constitutional Affairs* [2008] IRLR 29). At para 26 he referred to the speech of Lord Nicholls in *Williamson's* case and concluded: "the protection afforded to those holding a religious or philosophical belief is a broad one. The belief can be intentionally personal and subjective." He noted that *Williamson* concerned article 9 of the Convention, which protected the right to freedom of religion, rather than domestic law, but continued, at para 27:

C

> "However, by section 3 of the Human Rights Act 1998, it is incumbent on domestic courts to construe domestic laws compatibly with Convention rights, and therefore the same (or at least no less favourable) approach must be adopted to the concept of religion and belief in the 2003 Regulations."

D **20** Like Elias J, I have found such jurisprudence extremely helpful in this relatively uncharted territory. Allowance must be made for the fact that the article 9 *belief* need not be a philosophical belief, though an article 2 of the First Protocol *conviction* must be *philosophical*. Prior to *Campbell's* case 4 EHRR 293, the only matters said to be of any potential relevance are two decisions of the European Commission on Human Rights. The first related to a complaint by Ms Pat Arrowsmith, *Arrowsmith v United*
E *Kingdom* (1978) 3 EHRR 218, in which the Commission was of the opinion, at para 69, that pacifism is a philosophy. In a subsequent decision of the Commission, *H v United Kingdom* (1993) 16 EHRR CD 44, the Commission noted that the United Kingdom Government did not contest that veganism was capable of concerning belief within the meaning of article 9 of the Convention. Though neither of those decisions, and certainly
F not the latter, which was based upon a concession, could be in any way binding, it is significant that, clearly by reference to them, Lord Walker of Gestingthorpe was able to state in his speech in *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, para 55:

> "pacifism, vegetarianism and total abstinence from alcohol are uncontroversial examples of beliefs which would fall within article 9 (of
G course pacifism or any comparable belief may be based on religious convictions, but equally it may be based on ethical convictions which are not religious but humanist . . .)"

And *Arrowsmith v United Kingdom* is expressly approved by Lord Nicholls in para 24.

21 But it is to the general principles as laid down in *Campbell v United*
H *Kingdom* 4 EHRR 293 and in *Williamson's* case to which I am directed by Ms Rose. I have briefly described the facts of *Campbell* in para 11 above. The central conclusions of the court appear at para 36:

> "The Government also contested the conclusion of the majority of the commission that the applicants' views on the use of corporal punishment

amounted to 'philosophical convictions', arguing, inter alia, that the expression did not extend to opinions on internal school administration, such as discipline, and that, if the majority were correct, there was no reason why objections to other methods of discipline, or simply to discipline in general, should not also amount to 'philosophical convictions'.

"In its ordinary meaning the word 'convictions', taken on its own, is not synonymous with the words 'opinions' and 'ideas', such as are utilised in article 10 of the Convention, which guarantees freedom of expression; it is more akin to the term 'beliefs' (in the French text: 'convictions') appearing in article 9—which guarantees freedom of thought, conscience and religion—and denotes views that attain a certain level of cogency, seriousness, cohesion and importance.

"As regards the adjective 'philosophical', it is not capable of exhaustive definition, and little assistance as to its precise significance is to be gleaned from the travaux préparatoires. The commission pointed out that the word 'philosophy' bears numerous meanings: it is used to allude to a fully-fledged system of thought or, rather loosely, to views on more or less trivial matters. The court agrees with the commission that neither of these two extremes can be adopted for the purposes of interpreting article 2: the former would too narrowly restrict the scope of a right that is guaranteed to all parents and the latter might result in the inclusion of matters of insufficient weight or substance.

"Having regard to the Convention as a whole, including article 17, the expression 'philosophical convictions' in the present context denotes, in the court's opinion, such convictions as are worthy of respect in a 'democratic society' and are not incompatible with human dignity; in addition, they must not conflict with the fundamental right of the child to education, the whole of article 2 being dominated by its first sentence.

"The applicants' views relate to a weighty and substantial aspect of human life and behaviour, namely the integrity of the person, the propriety or otherwise of the infliction of corporal punishment and the exclusion of the distress which the risk of such punishment entails. They are views which satisfy each of the various criteria listed above; it is this that distinguishes them from opinions that might be held on other methods of discipline or on discipline in general."

22 As for *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, this too was a case relating to corporal punishment, although the parents in question there did not succeed, for reasons with which I do not need to trouble. Both article 9 and article 2 of the First Protocol were in play. Although there are relevant passages in the speeches of both Lord Walker, at paras 55 and 59–61, and Baroness Hale of Richmond, at paras 75–76, the significant passage is in Lord Nicholls's speech. After dealing, in para 22 (from which I have cited in para 5 above), with the approach to the question of the genuineness of the belief, he continued:

"23. Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of 'manifestation' arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in article 9 of

A the European Convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of
B seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory,
C symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the
D Convention . . .

"24. This leaves on one side the difficult question of the criteria to be applied in deciding whether a belief is to be characterised as religious. This question will seldom, if ever, arise under the European Convention. It does not arise in the present case. In the present case it does not matter whether the claimants' beliefs regarding the corporal punishment of children are categorised as religious. Article 9 embraces freedom of
E thought, conscience and religion. The atheist, the agnostic, and the sceptic are as much entitled to freedom to hold and manifest their beliefs as the theist. These beliefs are placed on an equal footing for the purpose of this guaranteed freedom. Thus, if its manifestation is to attract protection under article 9 a non-religious belief, as much as a religious belief, must satisfy the modest threshold requirements implicit
F in this article. In particular, for its manifestation to be protected by article 9 a non-religious belief must relate to an aspect of human life or behaviour of comparable importance to that normally found with religious beliefs. Article 9 is apt, therefore, to include a belief such as pacifism: *Arrowsmith v United Kingdom* (1978) 3 EHRR 218. The position is much the same with regard to the respect guaranteed to a parent's 'religious and philosophical convictions' under article 2 of the
G First Protocol: see *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293 . . ."

23 Ms Rose submits that this is consistent with the words of Wilson J in the Supreme Court of Canada in *R v Morgentaler* [1988] 1 SCR 30, 179, namely "in a free and democratic society 'freedom of conscience and
H religion' should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality".

24 I do not doubt at all that there must be some limit placed upon the definition of "philosophical belief" for the purpose of the 2003 Regulations, but before I turn to consider Mr Bowers's suggested such limitations, I shall endeavour to set out the limitations, or criteria, which are to be implied or

introduced by reference to the jurisprudence set out above. (i) The belief must be genuinely held. (ii) It must be a belief and not, as in *McClintock v Department of Constitutional Affairs* [2008] IRLR 29, an opinion or viewpoint based on the present state of information available. (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour. (iv) It must attain a certain level of cogency, seriousness, cohesion and importance. (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others (para 36 of *Campbell v United Kingdom* 4 EHRR 293 and para 23 of *Williamson's* case [2005] 2 AC 246).

25 Mr Bowers submits that, in order satisfactorily to place a limitation on the philosophical belief that is to be protected, and in order to be *similar* to a religious belief, it must form part of a system of beliefs, and not be one-off. He refers to dicta of the High Court of Australia in *Church of the New Faith v Comr of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120, 134, referring to philosophies which "seek to explain, in terms of a broader reality, the existence of the universe, the meaning of human life and human destiny". He refers also to Ms Vickers's exposition of how another member state, The Netherlands, approaches the question of belief in its equivalent Regulations:

> "In the Netherlands the term levensovertuiging (philosophy of life) is used . . . in order to place limitations on the type of belief that can be covered. The term 'philosophy of life' requires a coherent set of ideas about fundamental aspects of human existence, and includes broad philosophies such as humanism, but does not extend to more general views about society."

26 His submission is that what is required is a philosophical belief based on a philosophy of life, not a scientific or political belief or opinion, or a lifestyle choice. Both sides refer to dictionary definitions of philosophy, as did the regional employment judge, but I do not find them particularly helpful to resolve the question, since, as one would expect, each dictionary referred to has a number of definitions of philosophy. It is, as I have said, common ground that there must be some limitation, and hence Malcolm Evans, cited by Ms Vickers, from a work "Religious Liberty and Non-Discrimination" is plainly right to say that "no system could countenance the right of anyone to believe anything and to be able to act accordingly". I am satisfied that, notwithstanding the amendment to remove "similar", it is necessary, in order for the belief to be protected, for it to have a similar status or cogency to a religious belief. However, as is apparent from the decision in *Eweida v British Airways plc* [2009] ICR 303, which is a decision of the Employment Appeal Tribunal on these Regulations, and not part of the Convention jurisprudence, even a religious belief is not required to be one shared by others (see para 29):

> "Accordingly, it is not necessary for a belief to be shared by others in order for it to be a religious belief, nor need a specific belief be a mandatory requirement of an established religion for it to qualify as a religious belief. A person could, for example, be part of the mainstream Christian religion, but hold additional beliefs which are not widely shared by other Christians, or indeed shared at all by anyone."

A **27** I conclude that it is not a bar to a *philosophical belief* being protected by the 2003 Regulations if it is a one-off belief and not shared by others, a fortiori where it is likely that others do share the belief. Pacifism and vegetarianism can both be described as one-off beliefs in the sense in which I understand it to be being used by Mr Bowers, namely a belief that does not govern the entirety of a person's life. Hence, provided that there are the limitations referred to above, which I accept as being appropriately applied B to the Regulations, I would subscribe, even were the jurisprudence of the Convention not otherwise, as I conclude it to be, persuasive, if not binding upon me, to the proposition that, as concluded by the court in *Campbell v United Kingdom* 4 EHRR 293, para 36, the philosophical belief in question does not need to constitute or "allude to a fully-fledged system of thought", *provided that* it otherwise satisfies the limitations set out in para 24 above. C As it was put in argument, such philosophical belief does not need to amount to an "-ism".

28 I turn to Mr Bowers's next suggested limitation, relating to political belief. As appears from the passage in Hansard, the Attorney General suggested that "support of a political party" might not meet the description of a philosophical belief. That must surely be so, but that does not mean that a belief in a political philosophy or doctrine would not qualify. The D Attorney General's other example of a suggested non-candidate was a belief in the supreme nature of the Jedi Knights, and this would fail on the basis of non-compliance with at least four of the limitations suggested above. However, belief in the political philosophies of Socialism, Marxism, Communism or free-market Capitalism might qualify. There is nothing to my mind in the make-up of a philosophical belief—particularly against the E background of article 14 of the Convention referred to above—which would disqualify a belief based on a political philosophy. The belief asserted by the claimant in this case, by reference to his alleged philosophical belief in anthropogenic climate change, if established, is likely to be characterised as a political belief: see paras 3 and 4 in my judgment in relation to Vice-President Gore's film in *R (Dimmock) v Secretary of State for Education and Skills* [2008] 1 All ER 367. But I do not see that as a ground for excluding it, F if it be otherwise qualified as a genuinely held philosophical belief. It seemed to me that the real concern that Mr Bowers had, and one which the court would naturally share, would be the fear that reliance could be placed upon an alleged philosophical belief based on a political philosophy which could be characterised as objectionable: a racist or homophobic political philosophy for example. In my judgment, the way to deal with that would G be to conclude that it offended against the requirement set out in para 36 of *Campbell and Cosans v United Kingdom* 4 EHRR 283, that the belief relied on must be "worthy of respect in a democratic society and not incompatible with human dignity" or, in accordance with para 23 of *Williamson* [2005] 2 AC 246, a belief "consistent with basic standards of human dignity or integrity". Paragraph 36 in *Campbell* expressly refers, as the source of this requirement/caveat, to article 17 of the Convention, which deals with H "Prohibition of abuse of rights".

29 As to Mr Bowers's suggested limitation by reference to a belief based upon or by reference to science, this appears to me to be drawn by him from two sources. The first is his reference to what must be the first appearance in a bundle of legal authorities of the *History of Western Philosophy* by

Bertrand Russell. Russell commences his introduction by a discussion of the word "philosophy", which has, as he says, been used in many ways, some wider and some narrower. He continues: "Philosophy, as I shall understand the word, is something intermediate between theology and science." He thus creates his own parameters, which indeed extend to a compartmentalisation of history, whereby theology dominated in primitive times, philosophy began in Greece in the sixth century BC, was again submerged by theology as Christianity rose and Rome fell, and remained dominant throughout the Middle Ages thanks to the pre-eminence of the Catholic Church, and was then followed by

> "the third period, from the seventeenth century to the present day . . . dominated, more than either of its predecessors, by science; traditional religious beliefs remain important, but are felt to need justification and are modified wherever science needs to make this imperative."

But these categorisations, even by someone as eminent as Bertrand Russell, are not conclusive. The second source for his argument appears to be the decision of the Employment Appeal Tribunal in *McClintock v Department of Constitutional Affairs* [2008] IRLR 29, by reference to what Elias J said in para 45 of his judgment, which I have set out in para 16 above. But that seems to me, as I have said above, to mean that Mr McClintock was *not* acting on the basis of a philosophy, as opposed to his acting on the basis of a philosophy derived from science.

30 In my judgment, if a person can establish that he holds a philosophical belief which is based on science, as opposed, for example, to religion, then there is no reason to disqualify it from protection by the Regulations. The employment judge drew attention to the existence of empiricist philosophers, no doubt such as Hume and Locke. The best example, as it seems to me, which was canvassed during the course of the hearing, is by reference to the clash of two such philosophies, exemplified in the play *Inherit the Wind*, i e one not simply between those who supported Creationism and those who did not, but between those who positively supported, and wished to teach, only Creationism and those who positively supported, and wished to teach, only Darwinism. Darwinism must plainly be capable of being a philosophical belief, albeit that it may be based entirely on scientific conclusions (not all of which may be uncontroversial).

31 The last of Mr Bowers's careful and persuasive submissions needs to be addressed, and that is his case that the provisions of regulation 2(1)(d) of the Regulations must be borne in mind, i e, that "a reference to belief includes a reference to lack of belief". He submits that, if the claimant's belief in climate change and its consequence is to be allowed to amount to a philosophical belief, then the absence of such a belief, the belief, for example, that man is *not* causing climate change, and that development of the world's resources is an imperative, then that too would have to amount to a philosophical belief, manifested, for example, by driving a gas-guzzling car and taking frequent flights. But that, in my judgment, is a non sequitur. It may be possible for someone to establish such a philosophical belief, but it is certainly not necessary in order for Ms Rose's argument to succeed. The existence of a positive philosophical belief does not depend upon the existence of a negative philosophical belief to the contrary. What is intended to be protected by regulation 2(1)(d) is discrimination against a person on

A the grounds of his lack of belief. Thus, if the claimant has his philosophical belief in climate change, and *he* were to discriminate against someone else in the work force who does *not* have that belief, then the *latter* would be capable of arguing that he was being treated less favourably because of his *absence* of the belief held by the claimant.

32 For these reasons I dismiss Mr Bowers's appeal, and uphold the decision of the employment tribunal, provided that it is, and is only, in the
B terms of para 1(a) of the employment judge's judgment as amended by me in para 7 above. Further, I make clear that, at any full hearing, there will indeed need to be evidence and cross-examination relating to the matters set out in para 11 of the tribunal judgment (in that the claimant has to "adduce evidence from which the tribunal could conclude that what was done was done on the grounds of his belief"). But particularly, and logically anterior,
C there will, in the light of the unusual nature of the asserted belief and of its alleged manifestation, need to be evidence and cross-examination directed to the genuineness of the belief (Lord Nicholls in *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, para 23) and also, in so far as relevant, by reference to the limitations and criteria set out in para 24 above.

D *Appeal dismissed.*

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Court of Appeal

*Mayor of London (on behalf of the Greater London Authority) *v* Hall and others

[2010] EWCA Civ 817

2010 July 9; 16 Lord Neuberger of Abbotsbury MR, Arden, Stanley Burnton LJJ

Injunction — Trespass — Order for possession — Demonstrators setting up camp on square opposite Parliament in breach of byelaws — Title to square vested in Crown but local authority responsible for control and management functions — Mayor on behalf of local authority applying for possession order and injunction requiring demonstrators to leave square — Whether mayor having right to claim possession — Whether injunction impermissible enforcement of criminal law — Whether injunction breaching defendants' Convention rights — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 10, 11 — Greater London Authority Act 1999 (c 29), ss 384, 385

By section 384(1) of the Greater London Authority Act 1999[1] title to the square opposite the Houses of Parliament was vested in the Crown but by section 384(3) the care, control, management and regulation of the square was the function of the Greater London Authority, to be exercised by the Mayor of London on behalf of the authority under section 384(8). Acting pursuant to section 384(8) the mayor applied for an order for possession of the square against defendants who were encamped there in order to demonstrate in respect of a number of causes and an injunction against certain defendants requiring them to dismantle the structures which they had erected on the square and to leave the square. The majority of the defendants had only been encamped on the square for a few weeks but the second defendant, a long-standing protester who had pitched a tent on a small part of the square, had been there for some nine years without causing damage to the square or discouraging lawful visitors, joined from time to time by the third defendant. The defendants contended (i) that the mayor had no right to possession of the square since title to the land was vested in the Crown; (ii) that since by camping on the square they were in contravention of byelaws made pursuant to section 385(1) of the 1999 Act, which by section section 385(3) was a criminal offence, the grant of an injunction would amount to an impermissible enforcement of the criminal law; and (iii) that the orders sought would breach their rights to freedom of expression and freedom of assembly, guaranteed by articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, scheduled to the Human Rights Act 1998[2]. The judge made a possession order over the whole of the square against 17 of 19 named defendants and persons unknown and imposed injunctions on 14 of the defendants and persons unknown.

[1] Greater London Authority Act 1999, s 384: see post, para 3.
S 385: see post, para 4.

[2] Human Rights Act 1998, Sch 1, Pt I, art 10: "1. Everyone has the right to freedom of expression . . . 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."

Art 11: "1. Everyone has the right to freedom of peaceful assembly . . . 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 . . ."

A On applications for permission to appeal by seven named defendants—

Held, granting permission to appeal to and allowing the appeals of the second and third defendants but refusing permission to all other defendants, that it was implicit in sections 384 and 385 of the Greater London Authority Act 1999 that the mayor had the right to seek possession of the square in his own name since, although bare title of the square was vested in the Crown, every aspect of ownership and possession was vested in the mayor as part of his own statutory duty and statutory B right, not as an agent of the Crown; that since the mayor was entitled, in his capacity of the person in possession of the square, to maintain an injunction to remove those in unlawful occupation and since there was evidence to support the view that the criminal penalties provided for in section 385(3) of the 1999 Act to enforce the byelaws would not have operated as a deterrent to the defendants, the judge had been entitled to grant injunctive relief; that the defendants' desire to express their views in the square in the form of a relatively long-term occupation with tents and placards C was within the scope of articles 10 and 11 of the Convention; that, although the defendants were trespassers and in breach of the byelaws, they were entitled to have the proportionality of both the making of the possession order and the granting of the injunction assessed by the court, rather than the mayor, in a balancing exercise considering the facts and focusing very sharply and critically on the reasons put forward for curtailing the expression of their beliefs in public; that, balancing the defendants' rights to freedom of expression and assembly with the need to prevent crime, protect health and protect the rights and freedoms of others to access the D square and demonstrate with authorisation, the relief granted in respect of all but the second and third defendants had been a wholly proportionate response; but that, since different considerations applied to the second defendant and those protesting with him, and since he was entitled to have his case decided on the basis of new medical evidence which he wished to put before the court, the question of whether it was proportionate to make an order for possession and to grant an injunction against him would be remitted for reconsideration by the High Court (post, paras 28–30, E 32–33, 37, 40, 43, 53–56, 65, 68–69, 72, 76, 77).

Manchester Airport plc v Dutton [2000] QB 133, CA and *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, SC(E) considered.

Decision of Griffith Williams J [2010] EWHC 1613 (QB) reversed in part.

The following cases are referred to in the judgment of Lord Neuberger of F Abbotsbury MR:

Asher v Whitlock (1865) LR 1 QB 1

Belfast City Council v Miss Behavin' Ltd [2007] UKHL19; [2007] 1 WLR 1420; [2007] 3 All ER 1007, HL(NI)

Birmingham City Council v Shafi [2008] EWCA Civ 1186; [2009] 1 WLR 1961; [2009] PTSR 503; [2009] 3 All ER 127, CA

City of London Corpn v Bovis Construction Ltd [1992] 3 All ER 697, CA

G *Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2008] UKHL 57; [2009] AC 367; [2008] 3 WLR 636; [2009] 1 All ER 653, HL(E)

Georgeski v Owners Corpn Sp49833 [2004] NSWSC 1096

Harper v Charlesworth (1825) 4 B & C 574

Hill v Tupper (1863) 2 H & C 121

Kay v Lambeth London Borough Council [2006] UKHL 10; [2006] 2 AC 465; [2006] H 2 WLR 570; [2006] 4 All ER 128, HL(E)

Manchester Airport plc v Dutton [2000] QB 133; [1999] 3 WLR 524; [1999] 2 All ER 675, CA

Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening) [2009] EWCA Civ 852; [2010] 1 WLR 713; [2010] PTSR 423; [2010] 3 All ER 201, CA

R (Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55; [2007] 2 AC 105; [2007] 2 WLR 46; [2007] 2 All ER 529, HL(E)
R (SB) v Governors of Denbigh High School [2006] UKHL 15; [2007] 1 AC 100; [2006] 2 WLR 719; [2006] 2 All ER 487, HL(E)
Roe v Harvey (1769) 4 Burr 2484
Secretary of State for the Environment, Food and Rural Affairs v Meier [2009] UKSC 11; [2009] 1 WLR 2780; [2010] PTSR 321; [2010] 1 All ER 855, SC(E)
Stoke-on-Trent City Council v B & Q (Retail) Ltd [1984] AC 754; [1984] 2 WLR 929; [1984] 2 All ER 332, HL(E)
Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23; The Times, 25 February 2009, CA
University of Essex v Djemal [1980] 1 WLR 1301; [1980] 2 All ER 742, CA
West Bank Estates Ltd v Arthur [1967] 1 AC 665; [1966] 3 WLR 750, PC
Western Australia v Ward (2002) 213 CLR 1

The following additional cases were cited in argument:

Appleby v United Kingdom (2003) 37 EHRR 783
Director of Public Prosecutions v Jones (Margaret) [1999] 2 AC 240; [1999] 2 WLR 625; [1999] 2 All ER 257, HL(E)
Handyside v United Kingdom (1976) 1 EHRR 737
Khorasandjian v Bush [1993] QB 727; [1993] 3 WLR 476; [1993] 3 All ER 669, CA
Özgür Gündem v Turkey (2000) 31 EHRR 1082
Powell v McFarlane (1977) 38 P & CR 452
Pye (J A) (Oxford) Ltd v Graham [2002] UKHL 30; [2003] 1 AC 419; [2002] 3 WLR 221; [2002] 3 All ER 865, HL(E)
Vogt v Germany (1995) 21 EHRR 205
Westminster City Council v Haw [2002] EWHC 2073 (QB)

The following additional cases, although not cited, were referred to in the skeleton arguments:

Alamo Housing Co-operative Ltd v Meredith [2003] EWCA Civ 495; [2004] LGR 81, CA
Anonymous (1704) 6 Mod 14
Blum v Director of Public Prosecutions (Secretary of State for the Home Department intervening) [2006] EWHC 3209 (Admin), DC
Buckinghamshire County Council v Moran [1990] Ch 623; [1989] 3 WLR 152; [1989] 2 All ER 225, CA
Chief Constable of Leicestershire v M [1989] 1 WLR 20; [1988] 3 All ER 1015
Christian Democratic People's Party v Moldova (Application No 28793/02) (unreported) given 14 May 2006, ECtHR
Ćosić v Croatia (Application No 28261/06) (unreported) given 15 January 2009, ECtHR
Countryside Residential (North Thames) v Tugwell (2000) 81 P & CR 10, CA
Crisp v Barber (1788) 2 Durn & E 749
Danford v McAnulty (1883) 8 App Cas 456, HL(E)
de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69; [1998] 3 WLR 675, PC
Emmerson v Maddison [1906] AC 569, PC
Fuentes Bobo v Spain (2000) 31 EHRR 1115
Harrow London Borough Council v Qazi [2003] UKHL 43; [2004] 1 AC 983; [2003] 3 WLR 792; [2003] 4 All ER 461, HL(E)
Huang v Secretary of State for the Home Department [2007] UKHL 11; [2007] 2 AC 167; [2007] 2 WLR 581; [2007] 4 All ER 15, HL(E)
Hunter v Canary Wharf Ltd [1997] AC 655; [1997] 2 WLR 684; [1997] 2 All ER 426, HL(E)
Limb v Union Jack Removals Ltd [1998] 1 WLR 1354; [1998] 2 All ER 513, CA

McCann v United Kingdom [2008] LGR 474; 47 EHRR 913
Mullen v Salford City Council [2010] EWCA Civ 336; [2011] 1 All ER 119, CA
Nurettin Aldemir v Turkey (Application Nos 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02) (unreported) given 18 December 2007, ECtHR
Oates v Shepherd (1747) 2 Strange 1272
Paulić v Croatia (Application No 3572/06) (unreported) given 22 October 2009, ECtHR
Philipps v Philipps (1878) 4 QBD 127, CA
Platform "Ärzte für das Leben" v Austria (1988) 13 EHRR 204
R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] UKHL 15; [2008] 1 AC 1312; [2008] 2 WLR 781; [2008] 3 All ER 193, HL(E)
R (Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)
Redmond-Bate v Director of Public Prosecutions [2000] HRLR 249, DC
South Bucks District Council v Porter [2003] UKHL 26; [2003] 2 AC 558; [2003] 2 WLR 1547; [2003] 3 All ER 1, HL(E)
Stankov v Bulgaria (Application Nos 29221/95 and 29225/95) (unreported) given 2 October 2001, ECtHR
VgT Verein gegen Tierfabriken v Switzerland (2001) 34 EHRR 159
Wibberley (Alan) Building Ltd v Insley [1999] 1 WLR 894; [1999] 2 All ER 897, HL(E)
Williams v Fawcett [1986] QB 604; [1985] 1 WLR 501; [1985] 1 All ER 787, CA
Young v Bristol Aeroplane Co Ltd [1944] KB 718; [1944] 2 All ER 293, CA
Ziliberberg v Moldova (Application No 61821/00) (unreported) given 4 May 2004, ECtHR

APPLICATIONS for permission to appeal from Griffith Williams J

By a claim form dated and served on 26 May 2010, and amended pursuant to the order of Maddison J dated 3 June 2010, the claimant, the Mayor of London (on behalf of the Greater London Authority) claimed an order for possession of Parliament Square Gardens as against the defendants, Rebecca Hall, Brian Haw, Barbara Tucker, Charity Sweet, Lew Almond, Chan Aniker, Anna Chithrakla, Chris Coverdale, Joshua Dunn, Dirk Duputall, Friend (also known as Robert Hobbs), Stuart Holmes, Rodge Kinney, Professor Chris Knight, Peace Little, Simon Moore, Anita Olivacce, Peter Phoenix, Raga Woods and persons unknown, and an injunction as against the first and fourth to twentieth defendants, requiring them forthwith to: (1) dismantle and remove from the grassed area all tents and similar structures on Parliament Square Gardens except with permission granted by the mayor or on his behalf under byelaw 5(9) of the Trafalgar Square and Parliament Square Gardens Byelaws 2000; (2) cease to organise or take part in the assembly known as Democracy Village and thereafter not to take part in any assembly without permission under byelaw 5 of the 2000 Byelaws or section 133 of the Serious Organised Crime and Police Act 2005; and (3) leave the square in accordance with the lawful directions of the mayor or on his behalf under byelaw 5(7); and as against the second and third defendants, an injunction requiring them forthwith to: (1) dismantle and remove all tents and similar structures except with permission from the mayor or on his behalf under byelaw 5(7); (2) cease to organise or take part in any assembly on the grassed area without permission under byelaw 5(10) and/or section 133 of the 2005 Act; and (3) leave the grassed area in accordance with the lawful directions issued on behalf of the mayor.

On 29 June 2010 Griffith Williams J granted the relief sought, making an order for possession over the whole of Parliament Square Gardens against all defendants except the fourth and nineteenth and granting injunctions against all the defendants, except the first and nineteenth.

By an appellant's notice dated 2 July 2010 the first defendant, Rebecca Hall, sought permission to appeal against the possession order made against her on the following grounds, inter alia. (1) The claimant mayor was not entitled to possession of Parliament Square Gardens and accordingly the possession order, made under CPR Pt 55, had been made in error of law. (2) For the law to attribute possession of land to a person who could establish no paper title to possession the claimant had to show both factual possession and the requisite intention to possess, and since the judge had made no finding that the mayor was in physical occupation of Parliament Square Gardens, it had been wrong for the judge to find that the mayor had a right to seek possession. (3) If, which was not accepted, the judge had found that the mayor was in factual possession of the land, in so finding he had erred in law. The Greater London Authority Act 1999 vested the legal estate in the land in the Queen and plainly did not expressly give possession, or even a right of occupation of the square, to the mayor, the duties and functions of "control, management and regulation" of Parliament Square Gardens in section 384 of the 1999 Act being distinct and different from the right to possession of the land and conferring no exclusive right to possession. Nothing in the statutory scheme created a right for the mayor *at will* to exclude *the world* from entering and/or remaining on Parliament Square Gardens which was the hallmark of the right to possession necessary to found a successful possession claim by a claimant with no title. (4) The judge had therefore misconstrued the 1999 Act in three material respects: (i) in deciding that sections 30(2)(c) and 34 were not ancillary to the duty and functions in section 384 but provided greater powers than section 384 itself; (ii) in deciding that the power to regulate the "use" of Parliament Square Gardens in section 386 by byelaws created a power to exclude the world from the square; (iii) in having made no reference to the fact that the byelaws themselves, at byelaw 5(7), did not provide a power to exclude but only a power to give a direction to leave, which direction had to be reasonable. (5) The judge had erred in treating the ability to close or fence off the square to carry out its duties and functions as a general power to exclude the whole world at will. (6) Management functions were not inconsistent with the possibility of having exclusive possession but such responsibilities did not confer a right to possession in the present case. Management functions could be incidental to possession but the converse was not true. (7) The judge had erred in rejecting the first defendant's submission that the statutory scheme under the 1999 Act was in effect no different from control or management functions conferred by a property owner on a managing agent. The judge had failed to recognise the full implications of that extension or development of the common law approach to exclusive possession, based not on a legal estate or physical occupation of the land but on a statutory duty or a function of day-to-day control and management of the land. (8) The judge had impermissibly extended the common law relating to the entitlement to possession in respect of land not owned by the claimant and over which the public had an unfettered right of entry. That approach, following Laws LJ in *Manchester Airport plc v Dutton* [2000] QB 133, was inconsistent with the

observations of Lord Neuberger of Abbotsbury MR in *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, para 59, as to the limits of the courts' powers to develop the common law. (9) If the first defendant was correct and the judge had erred in law in concluding that the statute had created a right of exclusive possession over Parliament Square Gardens and the mayor sought to rely on *Dutton's* case, it could be distinguished on the facts of the present case, and had in any event been decided per incuriam in the light of *Hill v Tupper* (1863) 2 H & C 121 and *Hunter v Canary Wharf Ltd* [1997] AC 655, which had not been cited to the court in *Dutton's* case, and/or *Dutton's* case had been wrongly decided.

By an appellant's notice dated 1 July 2010 the second defendant, Brian Haw, sought permission to appeal against the possession order and the injunction against him on the following grounds, inter alia. (1) The judge, while correctly recognising that the second defendant's rights under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms were engaged by the issue of whether he required to occupy a small area of Parliament Square Gardens in order to carry out his authorised protest in Parliament Square, had erred in law in concluding that there was a pressing social need not to permit an indefinite camp by the second defendant in order to protect the rights and freedoms of others to access all of Parliament Square Gardens and to demonstrate with authorisation. (2) The judge ought to have concluded that, in view of the nine-year length of the second defendant's demonstration involving substantial periods during which use of a small part of Parliament Square Gardens had been tolerated by the claimant, and the absence of any evidence that any member of the public had been inconvenienced or prevented from holding a permitted demonstration by the second defendant's presence there, that there was no pressing social need to require him to cease using Parliament Square Gardens to sleep in a tent. (3) The judge ought to have held that the exclusion of the second defendant from Parliament Square Gardens either by the grant of a possession order or of an injunction, and by the prohibition on the second defendant pitching a tent without permission by way of injunction, were impermissible restrictions on the second defendant's article 10 and 11 rights.

The third defendant, Barbara Tucker, the eighth defendant, Chris Coverdale, the eleventh defendant, Friend (also known as Ian Robert Hobbs), the twelfth defendant, Stuart Holmes, and the fifteenth defendant, Peace Little, also sought permission to appeal.

The facts are stated in the judgment of Lord Neuberger of Abbotsbury MR.

Jan Luba QC, Mark Wonnacott, Stephanie Harrison and *John Beckley* (instructed by *Bindmans LLP*) for the first defendant, Ms Hall.

Martin Westgate QC and *Paul Harris* (instructed by *Birnberg Peirce & Partners*) for the second defendant, Mr Haw.

The third, eighth, eleventh, twelfth and fifteenth defendants appeared in person.

Ashley Underwood QC and *David Forsdick* (instructed by *Eversheds LLP*) for the mayor.

The court took time for consideration.

16 July 2010. The following judgments were handed down.

LORD NEUBERGER OF ABBOTSBURY MR

1 There are before us applications for permission to appeal, which have been ordered to be heard on the basis that, if permission is given, the hearing of the appeal should follow immediately. We have heard the matter on a "rolled up" basis; in other words, the application and the projected appeal have been, in effect, argued together.

2 There are two orders which are sought to be appealed, and they were made by Griffith Williams J, following a hearing spread over eight days between 14 and 24 June 2010, with judgment given on 29 June [2010] EWHC 1613 (QB). Both orders were made in favour of the claimant, the Mayor of London, suing "on behalf of the Greater London Authority". The first was an order for possession of Parliament Square Gardens, London SW1 ("PSG"), against 17 out of 19 named defendants and "persons unknown". The second order was an injunction requiring 14 out of the 19 defendants and "persons unknown" (a) to dismantle any structures on, (b) (save in the case of three of the defendants, Mr Haw, Mrs Tucker and Ms Sweet) to cease to organise assemblies on, and (c) to leave, PSG.

The legislative background

3 The principal statutory provision governing the ownership and control of PSG is section 384 of the Greater London Authority Act 1999, which is in the following terms:

> "(1) The land comprised in the site of the central garden of Parliament Square (which, at the passing of this Act, is vested in the Secretary of State for Culture, Media and Sport) is by this subsection transferred to and vested in Her Majesty as part of the hereditary possessions and revenues of Her Majesty.
>
> "(2) Nothing in subsection (1) above affects— (a) any sewers, cables, mains, pipes or other apparatus under that site, or (b) any interest which was, immediately before the passing of this Act, vested in London Regional Transport or any of its subsidiaries.
>
> "(3) The care, control, management and regulation of the central garden of Parliament Square shall be functions of the authority.
>
> "(4) It shall be the duty of the authority well and sufficiently to light, cleanse, water, pave, repair and keep in good order and condition the central garden of Parliament Square.
>
> "(5) The functions conferred or imposed on the authority by this section are in addition to any other functions of the authority.
>
> "(6) In consequence of the preceding provisions of this section, any functions of the Secretary of State under or by virtue of section 22 of the Crown Lands Act 1851 (duties and powers of management in relation to the royal parks, gardens and possessions there mentioned), so far as relating to the whole or any part of the central garden of Parliament Square, shall determine.
>
> "(7) Subsections (3) and (4) above shall have effect notwithstanding any law, statute, custom or usage to the contrary.
>
> "(8) Any functions conferred or imposed on the authority by virtue of this section shall be functions of the authority which are exercisable by the mayor acting on behalf of the authority.

A "(9) In this section 'the central garden of Parliament Square' means the site in Parliament Square on which the Minister of Works was authorised by the Parliament Square (Improvement) Act 1949 to lay out the garden referred to in that Act as 'the new central garden'."

4 It is also relevant to refer to the next section of the same Act ("section 385") which provides, so far as is relevant:

B "(1) The authority may make such byelaws to be observed by persons using Trafalgar Square or Parliament Square Garden as the authority considers necessary for securing the proper management of those squares and the preservation of order and the prevention of abuses there.

"(2) Byelaws under this section may designate specified provisions of the byelaws as trading byelaws.

C "(3) A person who contravenes or fails to comply with any byelaw under this section shall be guilty of an offence and liable on summary conviction— (a) if the byelaw is a trading byelaw, to a fine not exceeding level 3 on the standard scale, or (b) in any other case, to a fine not exceeding level 1 on the standard scale."

5 It is also convenient to set out some of the Trafalgar Square and
D Parliament Square Gardens Byelaws 2000 ("the byelaws"), made pursuant to section 385(1):

"3. No person shall within the Squares . . . (6) fail to comply with a reasonable direction given by an authorised person to leave the Squares . . ."

"5. Unless acting in accordance with permission given in writing by . . .
E the mayor . . . no person shall within the Squares: (1) attach any article to any tree, plinth, plant box, seat, railing, fence or other structure; (2) interfere with any notice or sign; (3) exhibit any notice, advertisement or any other written or pictorial matter . . . (7) camp, or erect or cause to be erected any structure, tent or enclosure . . . (9) make or give a public speech or address . . . (10) organise or take part in any assembly, display,
F performance, representation, parade, procession, review or theatrical event . . . (13) go on any shrubbery or flower bed . . ."

The factual background to the projected appeal

6 The basic facts giving rise to these proceedings are well summarised in the opening five paragraphs of the judge's judgment:

G "1. . . . PSG . . . comprises the central area of Parliament Square around which runs the public highway, including in places pavement. To the east is the Palace of Westminster, to the south Westminster Abbey, to the west the Supreme Court and to the north, Whitehall and various government buildings. It is a highly important open space and garden at the heart of London and our parliamentary democracy; it is an area of significant historic and symbolic value worldwide.

H "2. PSG is part of the Westminster Abbey and Parliament Square conservation area and a UNESCO designated world heritage site . . . It is classified as Grade II on English Heritage's Register of parks and gardens with special historic interest. It provides world renowned views of both the palace of Westminster and Westminster Abbey.

"3. On 1 May 2010, four separate groups said to represent the four horsemen of the apocalypse and which had formed up at different locations across London arrived and set up a camp which they named their 'Democracy Village'. Their then stated intention was to remain until 6 May 2010, the date of the general election but they have continued to occupy PSG and (on the evidence of a number of the defendants . . .) have every intention to do so for the foreseeable future.

"4. Brian Haw (the second defendant) has been camping lawfully since 2001 on a pavement on the eastern side of PSG—a part of the highway controlled by Westminster City Council. He was joined some years later by Barbara Tucker (the third defendant). They have been conducting their own protest for love, peace, justice for all. They and those associated with them are in no way a part of the Democracy Village.

"5. The defendants who are a part of the Democracy Village are demonstrating variously in respect of a number of causes—these include the war in Afghanistan, the war in Iraq, genocide, war crimes and worldwide environmental issues."

7 As this attenuated summary suggests, the full factual background, particularly in the view of the defendants, is wide-ranging and involves very fundamental issues indeed. This was clear from the judge's summary of the evidence he read and heard, and it was brought home to us by the eloquent oral submissions we received from some of the defendants, revealing their strong feelings of moral and ethical outrage at various issues of undoubted public importance, identified in para 5 of the judgment below. Bearing in mind the fundamental nature of these issues, and the location where the defendants are gathered, the centrality of the two freedoms, which are undoubtedly engaged in these proceedings, freedom of expression and freedom of assembly, could not be placed under a sharper focus.

8 Mr Haw, the second defendant, (represented at first instance by Mr Harris, who was led in this court by Mr Westgate QC) has been a virtually permanent fixture on the pavement area on the east of PSG, facing the Houses of Parliament, since 2001. While some might regard his presence with his placards as an eyesore in the face of Parliament, others see him as something of a national treasure, embodying the right of free speech in the very eye of the democratic storm. There have been various attempts to remove him from the pavement area, but none have so far succeeded, and the present proceedings do not seek to remove him from there, at least directly. At some point, he erected a tent on the grassed area of PSG ("the grassed area") immediately adjoining his pitch on the pavement; there is some dispute as to when that started, he says in 2001, the evidence on behalf of the mayor is much later. The third defendant, Ms Tucker, who represented herself, has joined Mr Haw from time to time, as has the fourth defendant, Ms Sweet.

9 The other defendants have been on PSG for all, or much, of the time since Democracy Village started up at the beginning of May 2010. Of those defendants, Ms Hall, the first defendant, and a member of Democracy Village, was represented by Mr Luba QC, Mr Wonnacott, Ms Harrison and Mr Beckley. The other named defendants are members of Democracy Village, and, in so far as they took part in the proceedings below, they acted in person. All of them were added as named defendants on their application, as the proceedings originally identified only three named defendants, as well as "persons unknown".

A **10** After hearing argument and evidence, the judge made the order for possession and granted the injunction against the great majority of the named defendants, although he excluded two defendants from each order. In particular, the judge decided that no injunction should be granted against Ms Hall, although she was included in the order for possession.

11 The application for permission to appeal was made by a number of the defendants, and Smith LJ ordered that the application be heard in open B court, with appeal to follow if permission was granted. I have already referred to the fact that Mr Haw was represented before us; Mrs Tucker represented herself. Of the Democracy Village occupiers, I have already mentioned that Ms Hall was represented; other members of Democracy Village, Mr Coverdale, Friend, Mr Holmes, Mr Knight, and Peace Little (to all of whom the injunction and the order for possession extended) made C oral submissions on their own behalf.

The issues on this appeal

12 A number of issues have been raised. First, whether the trial below was fair—whether it complied with article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the D Convention"). Secondly, whether the claim for possession was properly constituted. Thirdly, whether the order for possession and the injunction complied with articles 10 and 11 of the Convention in terms of proportionality. Fourthly, whether an injunction was a permissible remedy in the light of section 385 and the byelaws. Fifthly, there are issues concerning costs.

13 Mr Haw (together with Mrs Tucker) raises three arguments specific E to his case, one relating to the speed of the proceedings, the second to the form of the possession application and order against him, and the third relating to proportionality.

14 I shall take these various issues in turn, save that those relating to Mr Haw will be discussed before the question of costs.

F *Did the defendants have a fair trial?*

15 The gap between the issue of these proceedings, 26 May 2010, and the commencement of the hearing before Griffith Williams J, 14 June 2010, was undoubtedly very short. However, so far as the domestic procedural aspect is concerned, CPR Pt 55 understandably envisages an abbreviated procedure in relation to "a possession claim against trespassers", and that procedure is mandatory in a case such as the present. Injunctive relief, if G justified, should, as a matter of principle, be available speedily.

16 Having said that, this was an unusual case, and it is right to consider whether the defendants were afforded a fair trial which complies with the domestic law and with article 6 (although it would be a rare case where the two requirements would not march together). There is no reason to think that there are any areas of law or fact which could be raised other than H those identified in para 12 above: if there had been, no doubt Mr Luba or Mr Westgate would have drawn them to our attention. The second and fourth issues principally involve legal argument and have been fully canvassed by counsel. The only area where it is, at least on the face of it, conceivable that more time would have been needed to gather evidence or argument would be on proportionality. However, having heard the

arguments and read the evidence and the judgment, I am quite satisfied that no prejudice whatever was caused to any of the defendants (other than Mr Haw) in relation to the presentation of their respective cases on this issue, whether in the form of evidence or arguments, by the short time between the issue of proceedings and the hearing of the claims.

17 The principal concerns expressed by the defendants who pursued this argument related to the importance attached to the issues which those defendants who participated in the Democracy Village stood for (and, in Mrs Tucker's case, the issues which Mr Haw stood for). Those issues are of prime public importance, and in the first rank of topics which article 10 is concerned to respect, in that they are political in nature. The importance of having an unrestricted right to express publicly and strongly a controversial view on a political, or any other, topic cannot be doubted: it is of the essence of a free democratic society and should be vigilantly protected by the legislature, the executive and the judiciary. Accordingly, it was unnecessary for the defendants in this case to expand on their views, with which many may agree strongly and many may disagree strongly, relating to the environment, alleged genocide, the wars in Iraq and Afghanistan, and more specific issues such as the use of depleted uranium.

18 It is true that Mr Holmes (and possibly other defendants) has applied for legal aid, and there has not been the time to have their applications processed. However, in my view, no prejudice has been caused to him as a result of his having to represent himself. The issues have been fully canvassed with the assistance of six barristers, and their instructing solicitors, acting for Mr Haw and Ms Hall, and the factual issues have been fully aired in the form of the evidence put before the judge. Indeed, without in any way intending to criticise anyone (as it is inevitable where so many defendants separately advance their respective cases), the issues were aired more fully below than they would have been if the unrepresented defendants had been represented.

19 It is also right to mention that this was not a case where the parties were forced to present their respective cases on the first occasion that the case came before a judge for hearing. The case came before Maddison J on 3 June, when he gave certain directions, and it came before him again on 7 June, when he gave further directions. The defendants therefore had significantly more time to prepare their respective cases than the minimum which they could have been given under the Civil Procedure Rules and quite rightly in the circumstances. This was not a case where they can have been taken by surprise at the hearing proceeding on 14 June. Further, because Griffith Williams J heard evidence from any party who reasonably wished to give evidence, there was time for further consideration to be given to arguments and evidence during the ten days over which the hearing was spread.

20 Accordingly, even ignoring the point that the Court of Appeal is, as a matter of principle, reluctant to interfere with a judge's case management decision (a point of very considerable importance, I should add), it seems to me that Griffith Williams J was not merely entitled, but was positively correct, in deciding to proceed with the hearing and to refuse an adjournment. If the mayor was entitled to any of the relief which he was seeking, it would be wrong to delay the proceedings for any time greater than was needed to ensure that the defendants had a fair trial.

A *Does the mayor have the right to claim possession?*

21 The powers and duties relating to PSG and conferred on the Greater London Authority (which I shall treat as conferred on the mayor, both in the light of section 384(8) and for the sake of convenience) are in sections 384(3) and (4), 385(1) and (2), and the byelaws. In my view, those provisions, as can be seen from the control which the mayor actually exercised (gardening,
B refuse collection, patrolling, enforcement of byelaws), inevitably lead to the conclusion that the mayor was, at any rate until 1 May, in possession of PSG. As the majority of the Australian High Court put it, a person has possession of certain land if he can "control access to the [land] by others, and, in general, decide how the land will be used": *Western Australia v Ward* (2002) 213 CLR 1, para 52. Of course, the grassed area of PSG is not fenced off, as it is intended to be available for general public access, but the precise nature
C of the acts and rights required to amount to possession varies with the nature of the land and all the circumstances: see e g *West Bank Estates Ltd v Arthur* [1967] 1 AC 665, 678B–C.

22 The argument advanced by Mr Luba and Mr Wonnacott on this first issue is simply stated, and is based on clear, if somewhat historical, principles, although, at least on its face, the argument seems absurd. Simply
D stated the argument is this: a claim for possession of land, if made by a person who has been put out of possession, can only be successfully maintained if that person can establish title of some sort to a legal estate in the land. In particular, it is insufficient for such a person to maintain such a claim, if he is merely relying on an interest or right, falling short of a legal estate, which gives him a claim or right to use and control of the land. The reason I describe the argument as apparently absurd is that it amounts
E to saying that the mere fact that a person can establish that he has a right to use and control, which effectively amounts to possession, of land does not entitle him to maintain a claim for possession of that land even against someone on that land who is undoubtedly a trespasser.

23 The basis of this argument, in very summary terms, is that (i) a claim for possession of land is the modern equivalent of a claim for ejectment
F (see the discussion in *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780, paras 6–7, 26–33, and 59–61); (ii) a claim for ejectment (as opposed to a claim for an injunction in trespass) could only be maintained by someone who could establish a legal estate in the land (see e g per Lord Mansfield CJ, and Aston and Willes JJ in *Roe v Harvey* (1769) 4 Burr 2484, 2487, 2488 and 2489 respectively, and per Bayley J in *Harper v Charlesworth* (1825) 4 B & C 574, 589); and (iii) it
G would represent an unprincipled departure, fraught with inconsistencies and unforeseeable problems and conundrums, to depart from this rule (as the Supreme Court of New South Wales decided in *Georgeski v Owners Corpn Sp49833* [2004] NSWSC 1096).

24 This argument is inconsistent with the majority decision of this court in *Manchester Airport plc v Dutton* [2000] QB 133, where the plaintiff's
H case was weaker than the mayor's case here, as the mayor has actually enjoyed possession, and his right is statutory in origin. However, it is said by Mr Luba that the reasoning of the majority in *Dutton's* case is inconsistent with authority not cited to the court in that case (such as *Hill v Tupper* (1863) 2 H & C 121), and that it is inconsistent with the more principle-based approach of the House of Lords in *Meier's* case [2009] 1 WLR 2780,

although *Dutton's* case was referred to without adverse criticism by Lord Rodger of Earlsferry JSC, at para 6. A

25 Mr Underwood QC, who appeared with Mr Forsdick for the mayor, argued that, as the mayor had been in possession before the defendants wrongly dispossessed him, authority showed that, even under the arcane rules relating to ejectment proceedings, he could properly seek possession. That is true, but it is because a claimant's previous possession is evidence of his title (or, strictly speaking, of his prior seisin), but it is rebuttable evidence, and if rebutted by other evidence, the right to claim possession dissolves: see *Asher v Whitlock* (1865) LR 1 QB 1. In this case, therefore, the defendants argue, the presumption of the mayor's right to claim possession arising from his previous possession dissolves once one looks at section 384(1), which makes it clear that the mayor has no title, as the freehold is vested in the Crown. B C

26 As at present advised, at least if one ignores the full effect of sections 384 and 385, I think that there is real force in the defendants' argument, the erudition of whose contents was matched by the clarity and crispness of its presentation. Certainly, if the law governing the right to claim possession is governed by the same principles as those that governed the right to maintain a claim in ejectment, the argument seems very powerful. D

27 However, there is obvious force in the point that the modern law relating to possession claims should not be shackled by the arcane and archaic rules relating to ejectment, and, in particular, that it should develop and adapt to accommodate a claim by anyone entitled to use and control, effectively amounting to possession, of the land in question—along the lines of the views expressed by Laws LJ in *Dutton's* case [2000] QB 133 and by Baroness Hale of Richmond JSC in *Meier's* case [2009] 1 WLR 2780. Further, it is only my opinion in *Meier's* case, paras 60–69, which can be said plainly to support the argument that a possession order may be subject to the same principles as those that applied to ejectment, and even my opinion was concerned with a very different aspect of a possession order from that raised here, as the claimant's title was not in issue. Lord Rodger JSC at paras 6 and 7 can be said to provide only a little, and then only very indirect, support for the argument, and any such support is rather undermined by his uncritical citation of *Dutton's* case. The effect of the brief speeches of Lord Walker of Gestingthorpe and Lord Collins of Mapesbury JJSC is neutral on the argument, save that they can be said to have adopted a relatively orthodox approach to the concept of possession. Baroness Hale JSC's observations at paras 26–36 are rather against the argument. E F G

28 However, even assuming that Mr Luba and Mr Wonnacott are right as a matter of general principle, the answer in this case lies in the relevant statutory provisions. As Stanley Burnton LJ pointed out, and as Mr Luba realistically accepted, it would be open to Parliament to confer by statute the power to claim possession of land on a person who has no title to that land. Although it is true that there is nothing in the 1999 Act which, in express terms, gives the mayor the right to seek possession of PSG in his own name, I have reached the conclusion that it is implicit in sections 384 and 385 that he has that right. H

29 In the two sections, the legislature has distributed different aspects of ownership and control between the Crown and the mayor. Title is

undoubtedly vested in the Crown by section 384(1), but every aspect of ownership and possession is vested in the mayor, as part of his own statutory duty and statutory right, and not as an agent of the Crown: he has complete control and regulation of PSG. The only satisfactory reason which was advanced at the hearing for vesting title to PSG in the Crown, rather than the mayor, is symbolic: Parliament Square (like Trafalgar Square, which enjoys the same regime) is a place of premier national significance and importance.

30 While the Crown has no function other than that of bare ownership, the mayor decides what activities can occur on PSG, how it is to be laid out and maintained, what statues and other structures are to be erected there, who can come onto PSG, in what circumstances, what they can and cannot do when they are there, and when they have to leave. It is common ground that, if, as I consider is clear, the mayor is the person entitled to lawful possession of PSG, he could obtain an injunction, such as that which he has obtained, as a claimant seeking an injunction in trespass only has to show that he is entitled to (or even only that he enjoyed) possession—see per Chadwick LJ, dissenting in *Dutton's* case [2000] QB 133, paras 146–147. In fact, the only thing which the mayor cannot do in relation to PSG, on the defendants' case, is to seek possession.

31 Mr Luba argued that Parliament must have appreciated, or, more accurately, must be taken to have appreciated, the law, and that, by vesting the freehold of PSG in the Crown, it must have envisaged that only the Crown (presumably by relator action through the Attorney General) could bring proceedings for possession if PSG was invaded by squatters. He suggested that this was reinforced by the absence of a provision such as is found in section 1(2) of the Crown Estate Act 1961, which specifically bestows on the Crown Estates Commissioners the ability to perform "all such acts as belong to the Crown's rights of ownership".

32 It seems obvious that, in order for the scheme envisaged by sections 384 and 385 to work properly, the mayor should have the ability to seek possession in his own name of PSG. It cannot have been envisaged that he would have to ask the Attorney General to bring proceedings, with the delay, uncertainty and cost which such a course would involve. Indeed, the Attorney General would have a discretion whether to bring a relator action, and, for reasons which seemed good to him, he might refuse to seek an order for possession. It would be scarcely consistent with the powers and duties conferred on the mayor by sections 384 and 385 if he could be denied the ability to obtain possession of PSG. The national importance of PSG underlines the need for minimum delay and maximum certainty and simplicity where summary action is required.

33 Reading the two sections together, they show that while bare title to PSG is vested in the Crown, the mayor is given the power to do everything in relation to the land. The mayor can, in my view, rely on the two sections to show not merely that he has a statutory right to possession of PSG, and indeed a statutory duty to enforce that right, but, crucially for present purposes, to demonstrate that while they confer title to PSG on the Crown, it is a title which it is his right to enforce, and, bearing in mind his duties under sections 384 and 385, his obligation to enforce, in his own name. In other words, far from those two sections undermining his title to sue, they support it.

34 As to the 1961 Act, the Crown Estates Commissioners are the agents of the Crown, so it is understandable why there is specific reference to their powers in section 1(2). However, it goes a little further than that: as Arden LJ said, given the provisions of section 1(2) of that Act and the reference to the 1851 Act in section 384(6), it seems very unlikely that Parliament envisaged that the Crown would have to bring proceedings for possession of PSG in its own name.

35 It is right to refer to the fact that the possession proceedings in *Meier's* case [2009] 1 WLR 2780 were brought by the freehold title owner, the Secretary of State, rather than the Forestry Commission, in whom the management of the land was vested. The powers given to the mayor under sections 384 and 385 are considerably wider than those conferred on the forestry commissioners by the Forestry Act 1967. This would explain why the claimant was not the forestry commissioners, but the Secretary of State, to whom Crown woodlands had devolved through the Minister of Works. There was a similar line of devolution of PSG through the Minister of Works to the Secretary of State for Culture, Media and Sport, but the 1999 Act extinguished all those powers. Those powers included all the rights of the Crown in respect of PSG: hence the need for section 384(1) to revest title in the Crown. It is significant that this was done by extinguishing and not recreating in the Crown Estate Commissioners the wide powers to manage that they have in relation to Crown lands: those powers enable the Crown Estate Commissioners to exercise all the rights of ownership in Crown lands: see section 1(2) of the 1961 Act, referred to above.

Articles 10 and 11 of the Convention and proportionality

36 As I have already said, there can be no doubt that the defendants should have the right to express the views which they wish to express; similarly, there is no doubt that they should enjoy the right to assemble together. Such rights are, of course, specifically protected by, respectively, articles 10 and 11 of the Convention. However, as articles 10.2 and 11.2 of the Convention emphasise, these rights, vitally important though they are, must be subject to some constraints, and those constraints include "restrictions" provided they are, inter alia,

> "prescribed by law and . . . necessary in a democratic society in the interests of . . . public safety, for the prevention of disorder or crime . . . for the protection of the [under article 10, 'reputation or'] rights ['and', under article 11, 'freedoms'] of others."

37 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.

A **38** Having said that, the greater the extent of the right claimed under article 10.1 or article 11.1, the greater the potential for the exercise of the claimed right interfering with the rights of others, and, consequently, the greater the risk of the claim having to be curtailed or rejected by virtue of article 10.2 or article 11.2.

39 The byelaws themselves cannot be said to fall foul of articles 10 and 11: they envisage demonstrations, speeches, camping, placards and the like being permitted subject to the mayor's consent. In this case, the mayor considered and refused an application (or, strictly, a letter which he treated as an application) for the establishment and continuance of the Democracy Village on PSG, and he refused it for reasons given in a fairly detailed letter dated 20 May 2010. That letter included the observation that:

> "The effect of the Democracy Village is to prevent the public from exercising their rights over a very significant part of PSG for a prolonged and indefinite period [and] one impact of the Democracy Village has been to exclude others from exercising their right to protest there. The extent and duration of the impact of the Democracy Village on the lawful, reasonable and ordinary activities on PSG is the primary reason for refusing consent."

The letter also said that "The mayor is seriously concerned about the substantial damage which is being caused by the Democracy Village to PSG", and that "the cost of reparation to return the Square to its former condition is substantial". The letter went on to state that:

> "Permissions for other peaceful protests and rallies on Parliament Square Garden are normally limited to a maximum of three hours, in order to allow for proper management, to ensure that the day-to-day business of the city is not impeded, and to allow the maximum number of groups or individuals to use the space to exercise their democratic right to peaceful protest. As this period will be extended in appropriate cases, the mayor is not prepared to permit camping by significant numbers for a prolonged period."

40 The Democracy Village defendants are plainly trespassers on PSG: rightly, that is no longer in contention, although it was debated before the judge. The defendants' presence on PSG is also in breach of the byelaws, as the mayor's consent to their occupation has been refused. Although those are factors to be weighed against them, particularly after what is now more than two months of effectively exclusive occupation, the Democracy Village defendants are still entitled to have the proportionality of both the making of the possession order and the granting of the injunction sought by the mayor assessed by the court as articles 10 and 11 are engaged, not least because it is the mayor, the person seeking the relief who could authorise them remaining lawfully on PSG.

41 This is not a case like *Kay v Lambeth London Borough Council* [2006] 2 AC 465 or *Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2009] AC 367, where (at least in the view of the majority of the House of Lords in each case) article 8 could not be invoked by an occupier of a residential property in support of his case against his landlord's claim for possession. That was because the domestic law had already taken into account, and balanced,

the public interest in a public authority landlord obtaining possession and the tenant's right to respect for his home. No such legislative balancing exercise has been carried out here. In any event, it can be argued that recent Strasbourg jurisprudence could be invoked to suggest that the reasoning of the majority in those two cases should no longer hold good (an issue which has just been argued before the Supreme Court on appeal from *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2010] 1 WLR 713*).

42 Quite apart from this, when freedom of assembly, and, even more, when freedom of expression, are in play, then, save possibly in very unusual and clear circumstances, article 11, and article 10, should be capable of being invoked to enable the merits of the particular case to be considered. Thus, in *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, paras 36 and 37 Lord Bingham of Cornhill made it clear that state authorities have a positive duty to take steps to ensure that lawful public demonstrations can take place, and that any prior restraint on freedom of speech requires "the most careful scrutiny".

43 Given, therefore, that articles 10 and 11 are in play, it seems to me that the decision on the balancing, or proportionality, issue is ultimately one for the court, not the mayor: see *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 and *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420. Further, when carrying out that balancing exercise, the court must consider the facts, and, particularly when it comes to article 10 (and article 11), focus very sharply and critically on the reasons put forward for curtailing anyone's desire to express their beliefs—above all their political beliefs—in public.

44 In that connection, it is clear both from the evidence before the judge and from some of the argument before us that the factual basis for some of the reasoning in the mayor's letter of 20 May, refusing Democracy Village the right to occupy PSG, was challenged. In particular, it was said by some of the defendants that the presence of the Democracy Village on PSG had plainly not prevented at least three significant demonstrations in Parliament Square and its vicinity since 1 May, and that, far from putting off people from visiting PSG, whether or not for the purpose of demonstrating, the Democracy Village actually encouraged people to come to Parliament Square to express or discuss the views which the defendants supported.

45 The judge received written and oral evidence from Simon Grinter, the head of the Greater London Authority's Facilities and Squares Management (who was closely cross-examined by or on behalf of a number of the defendants), which included a written note from Syed Shah (a PSG warden). He also read witness statements from nine of the defendants, and from various public figures in support of the defendants' case, and heard oral evidence from about 15 of the defendants and a number of supporting witnesses. The effect of that evidence is pretty fully summarised at [2010] EWHC 1613 (QB) at [23]–[74].

46 The judge concluded, at para 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

* *Reporter's note.* The Supreme Court's decision of 3 November 2010 is now reported [2010] 3 WLR 1441.

A 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:

B "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, in so far as those conclusions amounted to findings of fact, they were, to put it at its lowest, findings which were open to the judge C 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

"while 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 D 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 E 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 F of others, they are obviously significant factors.

49 The importance of Parliament Square as a location for demonstrations and the importance of the right to demonstrate each cut both ways in this case. It is important that the Democracy Village members are able to express their views through their encampment on PSG, just opposite the Houses of Parliament. However, as Arden LJ rightly said, it is equally important to all the other people who wish to demonstrate on G PSG that the Democracy Village is removed, in the light of the judge's finding, in line with the mayor's view, and (it should be added) the preponderance of the evidence, that the presence of the Democracy Village impedes the ability of others to demonstrate there. Additionally, there are the rights of those who simply want to walk or wander in PSG, not perhaps Convention rights, but none the less important rights connected with freedom and self-expression. The fact that Democracy Village have been H effectively in exclusive occupation of PSG for over two months is also relevant, especially as there is no sign of the camp being struck, as the defendants have, it may be said, had some 70 days to make their point.

50 As to the suggestion that removing all the Democracy Village defendants was an overreaction, Mr Underwood pointed out that this was

very much an "all or nothing" situation: either all the Democracy Village defendants go, or none of them do. He said, with force, that it was not fair, principled or practical to distinguish between the defendants (save, perhaps, Mr Haw, Mrs Tucker and Ms Sweet, the fourth defendant) when considering whom to evict. There is no good reason to let some of them stay while requiring others to leave: it would involve arbitrary selection; it would encourage other, new, supporters of Democracy Village to join the camp; it would be unlikely to achieve the ends which the mayor is seeking, and entitled, to achieve. He also made the point that the mayor needed to recover possession in order to control the use of PSG and bring to an end the "first come first served anarchy" which currently prevailed.

51 The defendants relied on the reasoning of Laws LJ in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23; The Times, 25 February 2009, where this court held an attempt by the Government to prevent a protest camp being held at Aldermaston to be unlawful. However, as the judge pointed out, the facts of that case were very different from those in this case. The protest camp was on a piece of land adjoining the highway by Aldermaston, and the protest was held one weekend every month, and had taken place for over 20 years; further, there was no evidence of any significant obstruction of the highway or to any other public, or indeed private, right; in addition, no attempt had been made by the Secretary of State to enforce his right, whether to possession or anything else, for all that time. Further, in that case, the need to balance the rights of the defendants to demonstrate against the rights of others to demonstrate did not arise, as of course it does here.

The injunction should not have been granted in aid of the criminal law

52 The defendants argue that the judge should not have granted the injunction, because, as a matter of principle, it was wrong to invoke the civil law to enforce byelaws which have their own criminal sanction—see section 385(3). As a matter of principle, there is clear authority for the proposition that, particularly where "Parliament has legislated in detail", the courts should at least "in general leave the matter to be dealt with as Parliament intended . . . save perhaps in exceptional circumstances": *Birmingham City Council v Shafi* [2009] 1 WLR 1961, para 44, following the principles laid down by Lord Templeman in *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] AC 754, 776, and Bingham LJ in *City of London Corpn v Bovis Construction Ltd* [1992] 3 All ER 697, 714. Further, it is clear that Parliament has legislated relevantly on two fairly recent occasions—namely in the 1999 Act, which, in sections 384 and 385, relates to activities on PSG, and also in the Serious Organised Crime and Police Act 2005, which, in sections 132 and 134, contains rather controversial provisions creating criminal offences out of unauthorised demonstrations and similar activities within a specified distance of the Palace of Westminster.

53 There are, in my view, two answers to this argument. The first is that the mayor is entitled, in his capacity of the person in possession of PSG, to maintain an injunction to remove those in unlawful occupation. Even on the assumption that, as contended by Mr Luba and Mr Wonnacott, the mayor is not entitled to maintain a claim for possession, it is accepted that, if he is entitled to use and control, effectively amounting to possession, he is entitled, in that capacity, to enjoin those in occupation of PSG from

A remaining there. If, as I have concluded, he is entitled to maintain a claim for possession, then, if the facts justify it, he is entitled to an injunction in support of the enforcement of that claim (a view which receives support from the thrust of the reasoning in *Meier's* case [2009] 1 WLR 2780).

54 In this case, the need to ensure that the defendants remove their tents and placards and do not return was, to my mind, plainly established to the judge's satisfaction. He concluded that the great majority of the defendants B would not be deterred by the threat of criminal proceedings in the magistrates' court from continuing to breach the byelaws. It must follow from this that, if not entitled to sue for possession, the mayor, as the person entitled to possession, was justified in seeking injunctive relief, and that, if he was entitled to sue for possession, he was entitled to seek injunctive relief in support.

C **55** Furthermore, the judge's finding that the criminal procedures provided for in section 385(3) would not operate as a deterrent to the defendants justified his decision to grant an injunction in aid of the enforcement of the byelaws. On this point, the judge said [2010] EWHC 1613 (QB) at [143]:

> "Whereas the standard of proof required in civil proceedings is the D balance of probabilities, I am, in fact, sure that these applications (subject to the exercise of the court's discretion) must succeed. I am satisfied, for the reasons which follow that this is an exceptional case: the identities of most of those taking part in the Democracy Village are unknown—but for their insistence in being joined as defendants to these proceedings, the identities of defendants 5 to 19 would not have been ascertained; it would impose an undue burden on the claimant to institute proceedings against E all the occupiers, with the complicating factor that some of those taking part move in and out of occupation; effecting service would not be straightforward; proceedings in the magistrates' courts would have to be by way of summons, a sometimes prolonged procedure; the refusals, hitherto, of those taking part in the Democracy Village to obey lawful instructions gives no grounds for optimism that there will be future F compliance; indeed a number of the defendants made it clear they have no intention of obeying a court order for possession; . . ."

56 Given these conclusions, which were ones which were plainly open to him on the evidence (to put it at its lowest), I consider that the judge was entitled to grant the injunction that he did, even ignoring the fact that it was sought by the person entitled to possession of the land concerned. In the G *B & Q (Retail)* case [1984] AC 754, 776J, having said that the court should, in principle, be "reluctant" to grant an injunction in aid of the criminal law which provided for penalties for Sunday trading, Lord Templeman said that "the council were entitled to take the view that the appellants would not be deterred by a maximum fine which was substantially less than the profits which could be made from illegal Sunday trading". So here: the judge found H that, albeit for reasons more admirable than money-making, the defendants would not have been deterred from continuing to breach the byelaws by a level 1 fine in the magistrates' court.

57 Quite apart from this, I do not think that the byelaws were framed with a view to applying to a long-term, or even indefinite, and exclusive, or near-exclusive, occupation of PSG. Although the words of byelaws 5(a)(7),

(9) and (10), taken together, cover the sort of operation involved in the Democracy Village, I consider that that sort of exclusive long-term arrangement was not within the contemplation of those who drafted the byelaws. Although I would not suggest that this is a separate reason for upholding the judge's decision to grant an injunction, it is a point which underpins the two reasons which I do consider justify that decision.

Mr Haw's arguments

58 Separate arguments are raised on procedural aspects, on the possession application and order, and on proportionality, by Mr Westgate on behalf of Mr Haw, and, at least arguably, by Mrs Tucker who has joined in his demonstration, and by Ms Sweet, who has also done so, albeit to a lesser extent. As explained above, his long-standing presence on the pavement on the east side of Parliament Square is not challenged in these proceedings. What is challenged is his encroachment onto a small adjoining part of PSG, where he has pitched a tent.

59 Mr Haw makes the general point that he is entirely separate from the other, Democracy Village, defendants. He has pitched his tent on what is only a very small part of the grassed area, and has done so since about 2001 (albeit that he has also pitched it on the pavement where he demonstrates) and there is no suggestion that his presence, unlike that of the Democracy Village defendants, has discouraged other visitors or demonstrators to PSG or has damaged the flowers on PSG.

60 The first of Mr Haw's arguments that it is convenient to consider is that the application and order for possession against Mr Haw both extend to the whole of PSG, and not just the small part which he occupies. At first sight that submission derives some support from the decision in *Meier's* case [2009] 1 WLR 2780, which underlines the point that possession can only be sought of the land occupied by the defendant. However, where only part of what can fairly be described as one piece of land is occupied by a defendant, it is clear that the owner of the land can claim possession of the whole piece. The point is most clearly made by Lord Rodger JSC at para 10, where he refers to the right to possession of a piece of land as being "indivisible" (and see also paras 67 and 97). Further, where, as here, the whole piece of land is occupied by trespassers, and it is difficult precisely to identify who occupies what part, it is particularly unrealistic to expect the claimant to identify which part each defendant occupies, and practicality is a relevant factor, as the decision in *University of Essex v Djemal* [1980] 1 WLR 1301 establishes.

61 The other arguments raised on behalf of Mr Haw both rely on the contention that his health requires him, or at least makes it better for him, to sleep on the relatively softer grass rather than the pavement, because of an acute medical condition from which he suffers. At first sight, that is answered by Mr Underwood's point that he can get a mattress, but it is said in response that the pavement slopes in a way that prevents sleeping on the pavement being feasible in the light of his medical condition.

62 Mr Haw contends that the application for possession and for the injunction came on speedily because of factors which applied to the other, Democracy Village, defendants, and which had no application to him, as summarised in para 59 above, and that this caused him prejudice, because he was unable to obtain medical reports to support his case that he needed to be able to sleep on the grass. He says that this is very important because, if he

A has to remove the tent and restrain his presence and activities to the pavement, it would be an unfair and disproportionate interference with his presence and activities on the pavement.

63 This contention is not only based on his medical condition, but it is also based on his alleged need to sleep on the grass for reasons of safety, as he is less likely to be hit by traffic or attacked by thugs than if he sleeps on the pavement. I have some doubts about this: if pitched on the grass, his tent B would be very close to the western edge of the eastern pavement, and therefore would be not much further from the traffic and would be equally accessible to thugs. And there is no evidence of his having been harmed in any traffic accident.

64 Mr Haw's argument on proportionality goes wider, in that he says that, while the judge appeared to accept [2010] EWHC 1613 (QB) at [119] C that he was in a different position from the Democracy Village defendants when embarking on the discussion of proportionality, he did not distinguish between him and the other defendants when actually considering that issue. For the reasons identified in para 59 above, he says that his claim to remain on the very small part of PSG occupied by his tent at least deserved separate consideration from the claim against the other, Democracy Village, defendants—particularly when it came to the issue of proportionality. D

65 I accept that Mr Haw is in a different position from that of the Democracy Village defendants. He and his demonstration are quite separate from them and theirs, he has been demonstrating for far longer, and his demonstration "pitch" is not under attack in these proceedings. Further, his demonstration has not put off visitors or other demonstrators (one rather suspects that the reverse may be the case), and there is no question of his E having damaged the flora on PSG. The evidence as to when he first pitched his tent on the grass, and how often it was pitched there is in dispute, but it does seem as if he has been encamped on PSG for a significantly longer time than the Democracy Village.

66 Mr Underwood's argument that it is wrong for the mayor to try and distinguish between the various occupiers of PSG has, as I have mentioned, great force in relation to all the Democracy Village defendants. While F I accept that it can also be applied to Mr Haw, it appears to me that it has much less force in his case, essentially for the reasons identified in the preceding paragraph. Those reasons may well justify treating Mr Haw differently from the other defendants, as a matter of principle.

67 The judge did not make any findings of fact as to the effect of making an order for possession or granting an injunction against Mr Haw on his G ability to maintain his demonstration or on his rights under article 10 or article 11. Nor did he expressly consider Mr Haw separately from the other defendants when considering the proportionality under articles 10 and 11 of making the orders against him sought by the mayor, although he did consider Mr Haw separately on the issue of the likelihood of his being deterred by magistrates' court proceedings (see [2010] EWHC 1613 (QB) at [148]). Further, although the judge received the medical report on Mr Haw H before he gave judgment, it was only received on the last day of the hearing and Mr Haw had very limited opportunity to consider its contents and to make submissions about it.

68 With considerable hesitation, I have reached the conclusion that the question of whether it was proportionate to make an order for possession

and to grant an injunction against Mr Haw should be remitted for reconsideration by the High Court. Although the case against him was weaker than that against the Democracy Village defendants, for the reasons already mentioned, it was still a strong case in the sense that he had no defence to the claims for possession or an injunction other than the argument based on articles 10 and 11. In addition, in an important respect, his argument based on those articles is weaker than that of the other defendants: the orders are not intended to interfere with his desire to continue with his demonstration in Parliament Square. However, he argues that they would make it more difficult, even medically very difficult, for him to do so, because he will have to pitch his tent on the pavement.

69 I entertain very significant doubts whether Mr Haw will be able to persuade a judge that he should be able to maintain a tent on the grassed area of PSG, even if he establishes that, for the medical or other reasons, his being prevented from doing so would render it significantly harder for him to maintain his demonstration on the pavement facing the Houses of Parliament. His right to express his views is not being challenged, and it is by no means clear that, if he had to sleep elsewhere, he would be precluded from maintaining his pitch where it is. Even if his ability to maintain his pitch is, albeit indirectly, under challenge, it might well be stretching his article 10 rights too far to say that he should be entitled, particularly after having done so for so long, to maintain his demonstration in the precise location of his choice, by trespassing on adjoining public property. However, I think that he is entitled to have his case decided on the basis of the medical and other evidence he wishes to put before the court, and to have a reasoned judgment on the issue.

Issues relating to costs

70 The main argument on costs was that of Ms Hall, who was ordered to pay the costs of the possession proceedings, but not of the injunction proceedings, as the judge accepted that she would not disobey the possession order, and would be deterred by magistrates' court proceedings. She said it was illogical that she should have to pay the costs of the possession proceedings and not receive the costs of the injunction proceedings. When Stanley Burnton LJ put to him the point that it would be simpler to make no order for costs as between her and the mayor in relation to the whole proceedings, Mr Underwood realistically and fairly said that he had no submission to make.

71 So far as the other defendants are concerned, it was submitted that it was unfair that each of them should potentially be liable for the costs of an eight-day action, with two directions hearings. I have some sympathy with that view, but the judge did find that the Democracy Village defendants were, as it were, in it together. He said [2010] EWHC 1613 (QB) at [138]:

> "on the evidence and the balance of probabilities I am satisfied in the case of each defendant that he or she knew of such breaches by others who were part of Democracy Village and for the purposes of the criminal law aided and abetted the commission of such breaches."

In the light of that finding, I consider that it is hard for the Democracy Village defendants to object to an order which effectively renders each of them jointly and severally liable for the costs of these proceedings. None the

A less, I would limit the extent of those costs to 80% of the total costs, as part of the costs related to Mr Haw, Mrs Tucker, and Ms Sweet, whose case was separate, and anyway is being remitted.

Conclusions

72 On the various substantive issues which have been raised, I would
B grant Mr Haw (and Mrs Tucker and Ms Sweet) permission to appeal on the issue whether it is proportionate to make an order for possession or to grant an injunction against him, grant his appeal, and would remit that issue to the High Court. Otherwise, I would refuse permission to appeal on all other substantive issues, save that the order for possession against the other defendants will have to be amended to exclude the area occupied by Mr Haw's tent.

C **73** I would grant Ms Hall permission to appeal on costs, allow her appeal, and substitute for the partial order for costs against her, a direction that there be no order for costs as between her and the mayor. I would also grant permission to the Democracy Village defendants to appeal on costs. As I have indicated, I would allow their appeal to the extent of limiting their liability to 80%, rather than 100%, of the mayor's costs on a standard basis.

D **74** No doubt counsel can prepare an appropriate form of order. The order should include directions to ensure that the rehearing of the claims against Mr Haw is disposed of very speedily.

75 Finally, I would like to express my appreciation to all those, whether lawyers or defendants, who addressed the court orally or in writing: this was a case involving a large number of parties and two significant legal issues, as well as other points, and it was disposed of efficiently and fairly in a day.
E Our task was also greatly assisted by the quality of the oral and written submissions and the judgment below.

ARDEN LJ

76 I agree.

STANLEY BURNTON LJ

F **77** I also agree.

Appeals of second and third defendants allowed on issue of proportionality only. Issue remitted to High Court for rehearing.

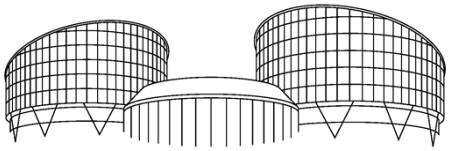
Permission to appeal refused to all
G *other applicants.*

Appeal of first defendant on costs allowed.

Order for costs against Democracy Village defendants varied.

SUSAN DENNY, Barrister

H



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF TARANENKO v. RUSSIA

(Application no. 19554/05)

JUDGMENT

STRASBOURG

15 May 2014

FINAL

13/10/2014

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Taranenko v. Russia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Isabelle Berro-Lefèvre, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Paulo Pinto de Albuquerque,
Ksenija Turković,
Dmitry Dedov, *judges,*

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 8 April 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 19554/05) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Ms Yevgeniya Vladimirovna Taranenko ("the applicant"), on 12 April 2005.

2. The applicant was represented by Ms E. Liptser, a lawyer practising in Moscow. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, that she had been detained in inhuman conditions, that her detention had been excessively long and that her prosecution and conviction for participation in a protest action against the President's policies had violated her rights to freedom of expression and freedom of assembly.

4. On 16 March 2009 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1981 and lives in Moscow.

A. Events leading to the applicant's arrest and prosecution

1. Media reports

6. The media reported that on 14 December 2004 a group of about forty members of the National Bolsheviks Party (also referred to herein as "the Party") occupied the reception area of the President's Administration building in Moscow and locked themselves in an office on the ground floor.

7. They asked for a meeting with the President, the deputy head of the President's Administration Mr Surkov, and the President's economic advisor Mr Illarionov. They waved placards with "Putin, resign!" («Путин, уйди!») written on them through the window and distributed leaflets with a printed address to the President that listed ten ways in which he had failed to uphold the Russian Constitution, and a call for his resignation.

8. The intruders stayed in the office for an hour and a half until the police broke through the door. During the arrest**,** they did not offer any resistance to the authorities.

2. The applicant's version of events

9. According to the applicant, she was not a member of the National Bolsheviks Party. She was writing a master's thesis in sociology on forms of activity of radical political movements in modern Russia. On 14 December 2004 one of the members of the National Bolsheviks Party told her about the direct action in the President's Administration building planned for that day. She came to witness the protest action in order to collect information for her thesis. She did not take part in the occupation of the office, but merely watched the action, took notes and pictures.

3. The prosecution's case

10. The indictment of the applicant states that at 12.30 p.m. on 14 December 2004 forty Party members effected an unauthorised entry into the reception area of the building used by the President of the Russian Federation's Administration. Some of them pushed back the guards at the entrance and occupied room no. 14 on the ground floor. They locked themselves in, blocked the door with a heavy safe and let other members of their group enter through the window.

11. Until the police arrived, the Party members, including the applicant, waved placards through the office window, threw out leaflets and chanted slogans calling for the President's resignation. They stayed in the office for approximately one hour, destroyed office furniture and equipment and damaged the walls and the ceiling.

B. The criminal proceedings against the applicant

1. Decisions concerning the extension of a custodial measure

12. On 14 December 2004 the applicant was arrested.

13. On 16 December 2004 the Khamovnicheskiy District Court of Moscow ordered the applicant's detention on the grounds that she was suspected of an especially serious criminal offence, might abscond, reoffend, interfere with the witnesses or obstruct the investigation in some other way.

14. On 22 December 2004 the applicant was charged with the attempted violent overthrow of the State (Article 278 of the Criminal Code) and intentional destruction and degradation of others' property in public places (Articles 167 § 2 and 214).

15. On the same date the applicant asked to be released, referring to her clean criminal record, permanent residence in Moscow and permanent employment as a school teacher.

16. On 24 December 2004 the investigator refused her request, referring to the gravity of the charges, the absence of a registered residence in Moscow and the risk that she might abscond.

17. On 7 February 2005 the Zamoskvoretskiy District Court of Moscow extended the applicant's detention until 14 April 2005, finding that the grounds on which the preventive measure had previously been imposed still persisted and there was no reason to vary the preventive measure.

18. On 15 February 2005 the charges against the applicant were amended to that of a charge of participation in mass disorder, an offence under Article 212 § 2 of the Criminal Code.

19. On 8 April 2005 the Zamoskvoretskiy District Court extended the applicant's detention until 14 July 2005, referring to the gravity of the charge and the risk that she might abscond or interfere with the investigation.

20. On 7 June 2005 the investigation was completed and thirty-nine people, including the applicant, were committed for trial.

21. On 30 June 2005 the Tverskoy District Court of Moscow held a preliminary hearing. It rejected the defendants' requests to be released. It stated that it had taken into account the defendants' characters, their young age, frail health, family situation and stable way of life. However, it found, referring to the gravity of the charges, that "the case file gives sufficient reasons to believe that, once released, the defendants would flee or interfere with the trial". It therefore ordered that all defendants should remain in custody. On 17 August 2005 the Moscow City Court rejected appeals lodged by several of the applicant's co-defendants.

22. On 27 July 2005 the applicant and her co-defendants lodged applications for release. On 27 July 2005 the Tverskoy District Court rejected the applications, finding that their detention was lawful and

justified. In particular, it noted that their detention had been extended by the court order of 30 June 2005 and, under the Code of Criminal Procedure, that order was valid for six months. On 5 October 2005 the Moscow City Court upheld the decision on appeal.

23. On 3 August 2005 the applicant and her co-defendants filed new applications for release. On 10 August 2005 the Tverskoy District Court rejected the applications. It held:

> "The court takes into account the defence's argument that an individual approach to each defendant's situation is essential when deciding on a preventive measure.
>
> Examining the grounds on which ... the court ordered and extended detention in respect of all the defendants without exception ... the court notes that these grounds still persist today. Therefore, having regard to the state of health, family situation, age, profession and character of all the defendants, and to the personal guarantees offered by certain private individuals and included in the case file, the court concludes that, if released, each of the applicants might abscond or obstruct justice in some other way...
>
> In the court's view, in these circumstances, having regard to the gravity of the charges, there are no grounds for varying or revoking the preventive measure in respect of any defendant..."

24. On 2 November 2005 the Moscow City Court upheld the decision on appeal.

2. The conviction

25. During the trial the applicant and her co-defendants stated that they had taken part in a peaceful protest against President Putin's policies. According to the plan of the protest action agreed in advance, they were to go to the President's Administration building to meet officials and hand over a petition that listed the President's ten failures to comply with the Constitution and contained a call for his resignation. They were then to talk to journalists. On 14 December 2004 they had entered the reception area of the President's Administration building as planned and had gone into a vacant office on the ground floor. The guards had followed them and had hit those who had lagged behind, had pushed them into the office and had shut the door behind them. The guards had threatened to use force against the protesters. Taking fright, the protesters had locked the office door and blocked it with a metal safe. They had chanted slogans and distributed leaflets through the windows, thereby expressing their opinions about important political issues. They denied destroying any furniture or offering resistance to the police. They claimed that the furniture had been destroyed by the police officers who had broken down the door and arrested them.

26. The employees and the guards of the President's Administration stated that on 14 December 2004 a group of about forty people had rushed into the President's Administration's reception area. They had pushed one of the guards aside, had scurried through the metal detectors and had jumped over tables and chairs. They had run into one of the offices, had

locked the door and had started to chant political slogans. The police had arrived and ordered that the office be vacated. As the protesters had failed to comply, the police had broken down the door and arrested them. Some of the witnesses stated that the protesters had showed resistance to the police, in particular by preventing them from forcing open the door.

27. The police officers who had participated in the arrest stated that before breaking the door down they had ordered that the premises be vacated. Having received no response, they had forced open the door and had arrested the protesters. They denied breaking any furniture in the office, stating that it had been damaged before their arrival.

28. On 8 December 2005 the Tverskoy District Court found the applicant and her co-defendants guilty of participation in mass disorder. It found it established that the defendants had unlawfully entered the President's Administration building without complying with the requisite entry formalities. In particular, they had bypassed identity and security checks and had pushed aside the guard who had attempted to stop them. They had then proceeded to one of the offices without being registered at the reception desk and without complying with the guards' lawful demands to leave the premises. In view of their unlawful and aggressive behaviour, they could not argue that they had participated in a peaceful political action. The court also held as follows:

> "[The defendants], acting in conspiracy, committed serious breaches of public safety and order by disregarding established norms of conduct and showing manifest disrespect for society... They effected an unauthorised entry into the reception area of the President of the Russian Federation's Administration building and took over office no. 14 on the ground floor... They then blocked the door with a heavy metal safe and conducted an unauthorised meeting, during which they waved the National Bolsheviks Party flag and placards, threw anti-[Putin] leaflets out [of windows] and issued an unlawful ultimatum by calling for the President's resignation, thereby destabilising the normal functioning of the President's Administration and preventing its reception personnel from performing their service duties, namely ... reception of members of the public and examination of applications from citizens of the Russian Federation...
>
> While performing the above disorderly acts [the defendants] ... destroyed and damaged property in the offices of the reception area of the President's Administration building..."

29. In respect of the applicant, the court noted that it was irrelevant whether she had joined the direct action for academic or other purposes. It had been established that she had directly participated in the mass disorder together with the others. Taking into account the fact that the defendants had voluntarily compensated the pecuniary damage in the amount of 74,707.08 Russian roubles (approximately 2,200 euros) caused by their actions and that the applicant had positive character references, the court sentenced her to three years' imprisonment, but suspended the sentence and put her on three years' probation. She was immediately released.

30. In her appeal submissions the applicant complained, in particular, that she had been convicted, in breach of Article 10 of the Convention, for her participation in a peaceful assembly and for public expression of her opinions about important political issues.

31. On 29 March 2006 the Moscow City Court upheld the judgment on appeal.

C. Conditions of detention

32. From 16 December 2004 to 8 December 2005 the applicant was held in detention facility no. IZ-77/6 in Moscow.

33. According to the applicant, her cell, which accommodated forty inmates, was overcrowded. The applicant suffered from psoriasis (a skin disease), chronic pyelonephritis (a kidney infection), chronic bronchitis and allergies. She did not receive medical treatment appropriate for her conditions.

34. According to the Government, from 17 to 20 December 2004 the applicant was held in cell no. 307, which measured 132.1 sq. m and housed thirty-two inmates. From 20 December 2004 to 13 October 2005 and from 21 October to 8 December 2005 the applicant was held in cell no. 303, which measured 123.4 sq. m and housed twenty-seven to thirty inmates. From 13 to 21 October 2005 the applicant was held in cell no. 120, which measured 22.9 sq. m and housed two inmates. The applicant had a separate bunk at all times and was provided with bedding. In support of their position, the Government submitted certificates issued by the remand centre governor on 25 June 2009 and selected pages from the prison population register which recorded, for each day, the number of sleeping bunks and the number of inmates in each of the remand centre's cells.

35. Relying on certificates of the same date from the remand centre governor, the Government further submitted that all cells had been equipped with toilet facilities which were separated from the living area by a partition. There had been forced ventilation in the cells. The windows had been large and had not been blocked by shutters. The cells had had sufficient artificial light, which had been located so as not to disturb the inmates' sleep. There had been no insects or rodents in the detention facility, as all the cells had been disinfected every month. Hot food had been served three times a day. Inmates had been able to take an hour-long daily walk in the exercise yards. They had been allowed to take a shower at least once a week.

36. Relying on the applicant's medical records, the Government submitted that the applicant had been regularly examined by specialist doctors and had been prescribed treatment when necessary.

II. RELEVANT DOMESTIC LAW

37. Participation in mass disorder accompanied by violence, riots, arson, destruction of property, use of firearms or explosives or armed resistance to the authorities is punishable by three to eight years' imprisonment (Article 212 § 2 of the Criminal Code).

38. For a summary of the relevant domestic law provisions governing the conditions and length of pre-trial detention, see the cases of *Dolgova v. Russia*, no. 11886/05, §§ 26-31, 2 March 2006, and *Lind v. Russia*, no. 25664/05, §§ 47-52, 6 December 2007.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

39. The applicant complained that the conditions of her detention from 16 December 2004 to 8 December 2005 in remand centre no. IZ-77/6 in Moscow had been in breach of Article 3 of the Convention, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

40. The Government submitted that the conditions of the applicant's detention had been satisfactory. The number of inmates in her cells had been below their design capacity and she had been provided with an individual bunk and bedding at all times. The cells had had both natural and artificial light and forced ventilation. All health and safety and hygiene standards had been met. Inmates had received food three times a day. The applicant had received medical treatment appropriate for her conditions. In sum, the conditions of her detention had been compatible with Article 3.

41. The applicant maintained her claims.

42. The Court notes that the applicant did not describe the conditions of her detention in much detail. Nor did she challenge the description of the conditions submitted by the Government, who asserted that the personal space afforded to her had exceeded four square metres and that the medical treatment she received had been appropriate for her conditions (see paragraphs 34 to 36 above). In such circumstances, the Court considers, on the basis of the information provided by the parties, that the conditions of the applicant's detention did not reach the threshold of severity to fall within the ambit of Article 3 of the Convention.

43. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

44. The applicant complained under Article 5 § 1 (c) of the Convention that there had been no grounds to detain her and that the domestic courts had not had due regard to the defence's arguments. Under Article 5 § 3, she complained of a violation of her right to trial within a reasonable time and alleged that the detention orders had not been based on sufficient reasons. The relevant parts of Article 5 read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ...
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial ..."

A. Admissibility

45. As regards the applicant's complaint that her detention was unlawful, the Court notes that on 16 December 2004 the Khamovnicheskiy District Court of Moscow ordered the applicant's remand in custody. The applicant's detention was subsequently extended on several occasions by the domestic courts.

46. The domestic courts acted within their powers in making those decisions and there is nothing to suggest that they were invalid or unlawful under domestic law. The question of whether the reasons for the decisions were sufficient and relevant is analysed below in connection with the issue of compliance with Article 5 § 3 (compare *Khudoyorov v. Russia*, no. 6847/02, §§ 152 and 153, ECHR 2005-X (extracts)).

47. The Court finds that the applicant's detention was compatible with the requirements of Article 5 § 1 of the Convention. It follows that this complaint must be rejected as manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

48. As regards the applicant's complaint of a violation of her right to trial within a reasonable time or to release pending trial, the Court finds that it is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of

the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

49. The applicant submitted that the domestic courts had not advanced "relevant and sufficient" reasons to hold her in custody for almost a year. The domestic authorities had extended her detention relying essentially on the gravity of the charge without examining her individual situation or demonstrating the existence of specific facts in support of their conclusion that she might abscond, interfere with the investigation or reoffend. She also referred to the case of *Dolgova v. Russia (cited above)* lodged by her co-defendant, where a violation of Article 5 § 3 had been found in similar circumstances.

50. The Government submitted that the decisions to remand the applicant in custody had been lawful and well-reasoned. She had been charged with a serious criminal offence of mass disorder committed by an organised group and accompanied by riots and destruction of property. Her pre-trial detention had therefore been justified.

51. The Court observes that the applicant was remanded in custody on 14 December 2004. On 8 December 2005 the trial court convicted her of a criminal offence, put her on probation and immediately released her. The period to be taken into consideration lasted almost twelve months.

52. The Court has already, on a large number of occasions, examined applications against Russia raising similar complaints under Article 5 § 3 of the Convention and found a violation of that Article on the grounds that the domestic courts extended an applicant's detention relying essentially on the gravity of the charges and using stereotyped formulae without addressing his or her specific situation or considering alternative preventive measures (see, among many others, *Khudoyorov, cited above*; *Mamedova v. Russia*, no. 7064/05, 1 June 2006; *Pshevecherskiy v. Russia*, no. 28957/02, 24 May 2007; *Shukhardin v. Russia*, no. 65734/01, 28 June 2007; *Belov v. Russia*, no. 22053/02, 3 July 2008; *Aleksandr Makarov v. Russia*, no. 15217/07, 12 March 2009; *Lamazhyk v. Russia*, no. 20571/04, 30 July 2009; *Makarenko v. Russia*, no. 5962/03, 22 December 2009; *Gultyayeva v. Russia*, no. 67413/01, 1 April 2010; *Logvinenko v. Russia*, no. 44511/04, 17 June 2010; *Sutyagin v. Russia*, no. 30024/02, 3 May 2011; *Romanova v. Russia*, no. 23215/02, 11 October 2011; and *Valeriy Samoylov v. Russia*, no. 57541/09, 24 January 2012).

53. The Court further notes that it has previously examined similar complaints lodged by the applicant's co-defendants and found a violation of their rights set out in Article 5 § 3 of the Convention (see *Dolgova v. Russia*, cited above, §§ 38-50; *Lind v. Russia*, cited above, §§ 74-86; *Kolunov v. Russia*, no. 26436/05, §§ 48-58, 9 October 2012; *Zentsov and*

Others v. Russia, no. 35297/05, §§ 56-66, 23 October 2012; *Manulin v. Russia*, no. 26676/06, §§ 55-62, 11 April 2013; and *Vyatkin v. Russia*, no. 18813/06, §§ 50-57, 11 April 2013). In each case the Court noted, in particular, the domestic courts' reliance on the gravity of the charges as the main factor for the assessment of the applicant's potential to abscond, reoffend or obstruct the course of justice, their reluctance to devote proper attention to a discussion of the applicant's personal situation or to have proper regard to the factors pointing in favour of his or her release, the use of collective detention orders without a case-by-case assessment of the grounds for detention in respect of each co-defendant and the failure to thoroughly examine the possibility of applying another, less rigid, measure of restraint, such as bail.

54. Having regard to the materials in its possession, the Court notes that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Indeed, the domestic courts inferred the risks of absconding, reoffending or interfering with the proceedings essentially from the gravity of the charge against the applicant. They did not point to any aspects of the applicant's character or behaviour that would justify their conclusion that she presented such risks. They gave no heed to important and relevant facts supporting the applicant's petitions for release and reducing the above risks, such as her clean criminal record, permanent place of residence and employment. Nor did they consider the possibility of ensuring the applicant's attendance by the use of a more lenient preventive measure. Finally, after the case had been submitted for trial in June 2005 the domestic courts issued collective detention orders, using the same summary formula to refuse the applications for release and extend the pre-trial detention of thirty-nine people, notwithstanding the defence's express request that each detainee's situation be dealt with individually.

55. Having regard to the above, the Court considers that by failing to address specific facts or consider alternative "preventive measures" and by relying essentially on the gravity of the charges, the authorities extended the applicant's detention on grounds which, although "relevant", cannot be regarded as "sufficient". In these circumstances it is not necessary to examine whether the proceedings were conducted with "special diligence".

56. There has accordingly been a violation of Article 5 § 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLES 10 AND 11 OF THE CONVENTION

57. The applicant complained that her arrest, the detention pending trial and the sentence imposed on her at the end of the criminal proceedings had violated her right to freedom of expression under Article 10 of the

Convention and her right to freedom of assembly under Article 11 of the Convention. These Articles read as follows:

Article 10

"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

"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."

A. Admissibility

58. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

59. The Government submitted that the applicant, together with other members of the National Bolsheviks Party, had effected a forcible and unauthorised entry into the premises of the President's Administration and had destroyed State property there. Their protest had not therefore been peaceful. The purpose of their actions had been to attract attention to the unlawful activities of the National Bolsheviks Party, rather than to express opinions or impart information or ideas. Instead of expressing their opinions

in one of the ways permitted by Russian law – such as at a public gathering, meeting, demonstration, march or a picket – they had acted in a manner constituting a criminal offence. The prosecution of the applicant for that criminal offence had not therefore interfered with her freedom of expression.

60. The Government further argued that the applicant had not been persecuted for her political opinions or demands. She had been prosecuted for participation in mass disorder involving destruction of State property. Her arrest, detention and conviction had therefore pursued the legitimate aims of protecting public order, resuming the normal functioning of the President's Administration, and investigating criminal offences and punishing those responsible.

61. The applicant submitted that she had participated in a protest against the President's policies, which in her opinion violated citizens' rights. The participants in the protest action of 14 December 2004 had considered that a petition addressed to the President's Advisor might be more effective than any of the methods of public assembly – such as public gatherings, meetings, demonstrations, marches or pickets – suggested by the Government. She argued in that connection that Article 10 protected not only the substance of the ideas and information expressed, but also the form in which they were conveyed.

62. The applicant further submitted that the protest action had been a peaceful one. The participants had entered the President's Administration building with the aim of handing over a petition. Given that their protest had taken place in a locked office, their actions could not be classified as mass disorder under Russian criminal law. They had not destroyed any property; the property had been in fact damaged by the arresting police officers. The participants in the protest had moreover compensated the damage in full. In those circumstances, her arrest, remand in custody for a year and the sentence imposed on her – three years' imprisonment, suspended for three years – had been disproportionate to any legitimate aim.

2. The Court's assessment

(a) General principles

63. According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society" (see

Handyside v. the United Kingdom, 7 December 1976, § 49, Series A no. 24, and *Jersild v. Denmark*, 23 September 1994, § 37, Series A no. 298).

64. Moreover, Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see *Oberschlick v. Austria (no. 1),* 23 May 1991, § 57, Series A no. 204; *Thoma v. Luxembourg*, no. 38432/97, § 45, ECHR 2001-III; and *Women On Waves and Others v. Portugal*, no. 31276/05, § 30, 3 February 2009).

65. Similarly, 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 (see *Djavit An v. Turkey*, no. 20652/92, § 56, ECHR 2003-III, and *Barraco v. France*, no. 31684/05, § 41, 5 March 2009). A balance must be always struck between the legitimate aims listed in Article 11 § 2 and the right to free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places (see *Ezelin v. France*, 26 April 1991, § 52, Series A no. 202).

66. However, Article 11 of the Convention only protects the right to "peaceful assembly". That notion does not cover a demonstration where the organisers and participants have violent intentions (see *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, § 77, ECHR 2001-IX, and *Galstyan v. Armenia*, no. 26986/03, § 101, 15 November 2007). Nonetheless, even if there is a real risk of a public demonstration resulting in disorder as a result of developments outside the control of those organising it, such a demonstration does not fall outside the scope of Article 11 § 1, but any restriction placed on such an assembly must be in conformity with the terms of paragraph 2 of that Article (see *Schwabe and M.G. v. Germany*, nos. 8080/08 and 8577/08, § 103, ECHR 2011 (extracts)).

67. To sum up, the Court reiterates that any measures interfering with freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles do a disservice to democracy and often even endanger it (see *Fáber v. Hungary*, no. 40721/08, § 37, 24 July 2012).

(b) Application to the present case

(i) Applicable Convention provision

68. The Court notes that the issues of freedom of expression and freedom of peaceful assembly are closely linked in the present case. Indeed, the protection of personal opinions, secured by Article 10 of the Convention, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11 of the Convention (see *Ezelin,* cited above, § 37; *Djavit An,* cited above, § 39; *Women On Waves and Others,* cited above, § 28; *Barraco,* cited above, § 26; and *Palomo Sánchez and Others v. Spain*

[GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 52, ECHR 2011).

69. The parties submitted arguments under Articles 10 and 11 together. The Court, however, considers that the thrust of the applicant's complaint is that she was convicted for protesting, together with other participants in the direct action, against the President's policies. The Court therefore finds it more appropriate to examine the present case under Article 10, which will nevertheless be interpreted in the light of Article 11 (see *Women On Waves and Others*, cited above, § 28).

(ii) Existence of an interference

70. The Court has previously held that protests can constitute expressions of opinion within the meaning of Article 10. Thus, protests against hunting involving physical disruption of the hunt or a protest against the extension of a motorway involving a forcible entry into the construction site and climbing into the trees to be felled and onto machinery in order to impede the construction works were found to constitute expressions of opinion protected by Article 10 (see *Steel and Others v. the United Kingdom*, 23 September 1998, § 92, *Reports of Judgments and Decisions* 1998-VII, and *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 28, ECHR 1999-VIII). The arrest and detention of protesters therefore constituted an interference with the right to freedom of expression (ibid.). The arrest of students who, during an official ceremony at a university, shouted slogans and raised banners and placards protesting against various practices of the university administration which they considered to be anti-democratic also constituted an interference with the right to freedom of expression (see *Açık and Others v. Turkey*, no. 31451/03, § 40, 13 January 2009).

71. The applicant in the present case was arrested at the scene of a protest action against the President's policies. She was part of a group of about forty people who forced their way through identity and security checks into the reception area of the President's Administration building and locked themselves in one of the offices, where they started to wave placards and to distribute leaflets out of the windows. She was charged with participation in mass disorder in connection with her taking part in the protest action and remanded in custody for a year, at the end of which time she was convicted as charged and sentenced to three years' imprisonment, suspended for three years. The Court considers that her arrest, detention and conviction constituted interference with the right to freedom of expression.

(iii) Justification for the interference

72. In order for the interference to be justified under Article 10, it must be "prescribed by law", pursue one or more of the legitimate aims listed in the second paragraph of that provision and be "necessary in a democratic

society" – that is to say, proportionate to the aim pursued (see, for example, *Steel and Others,* cited above, § 89, and *Lucas v. the United Kingdom* (dec.), no. 39013/02, 18 March 2003).

73. It is not contested that the interference was "prescribed by law", notably Article 212 § 2 of the Criminal Code, and "pursued a legitimate aim", that of preventing disorder and protecting the rights of others, for the purposes of Article 10 § 2. The dispute in the case relates to whether the interference was "necessary in a democratic society".

74. The test of necessity in a democratic society requires the Court to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient. In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This margin of appreciation is not, however, unlimited, but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10. The Court's task in exercising its supervisory function is not to take the place of the national authorities, but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their margin of appreciation. In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see, among many others, *Jerusalem v. Austria*, no. 26958/95, § 33, ECHR 2001-II, and *Krasulya v. Russia*, no. 12365/03, § 34, 22 February 2007).

75. In assessing the proportionality of the interference, the nature and severity of the penalties imposed are also factors to be taken into account (see *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV; *Tammer v. Estonia*, no. 41205/98, § 69, ECHR 2001-I; and *Skałka v. Poland*, no. 43425/98, § 38, 27 May 2003).

(α) "Pressing social need"

76. The Court will first examine whether the "interference" complained of corresponded to a "pressing social need".

77. It notes that the applicant and the other participants in the protest action wished to draw the attention of their fellow citizens and public officials to their disapproval of the President's policies and their demand for his resignation. This was a topic of public interest and contributed to the debate about the exercise of presidential powers. The Court reiterates in this connection that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or debates on questions of public interest. It has been the Court's consistent approach to require very strong reasons

for justifying restrictions on political debate, for broad restrictions imposed in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned (see *Feldek v. Slovakia*, no. 29032/95, § 83, ECHR 2001-VIII, and *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV).

78. That being said, the Court reiterates that, notwithstanding the acknowledged importance of freedom of expression, Article 10 does not bestow any freedom of forum for the exercise of that right. In particular, that provision does not require the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property, such as, for instance, government offices and ministries (see *Appleby and Others v. the United Kingdom*, no. 44306/98, § 47, ECHR 2003-VI).

79. In the present case the protest action in which the applicant participated took place in the President's Administration building. It is significant that the Administration's mission was to receive citizens and examine their complaints and its premises were therefore open to the public, subject to identity and security checks. The protesters, however, failed to comply with the established admission procedure: they bypassed the identity and security checks, did not register at the reception desk and did not wait in a queue for an available official to receive their petition. Instead, they stormed into the building, pushed one of the guards aside, jumped over furniture and eventually locked themselves in a vacant office. Such behaviour, intensified by the number of protesters, could have frightened the employees and visitors present and disrupted the normal functioning of the President's Administration. In such circumstances the actions of the police in arresting the protesters, including the applicant, and removing them from the President's Administration's premises may be considered as justified by the demands of the protection of public order (see, for similar reasoning, *Steel and Others,* cited above, §§ 103 and 104, and *Lucas,* cited above).

(β) Proportionality

80. It remains to be ascertained whether the length of the applicant's detention pending trial and the penalty imposed on her at the end of it were proportionate to the legitimate aim pursued (see *Steel and Others,* cited above, §§ 105-107).

– Overview of the Court's case law

81. The Court reiterates in this connection that the Contracting States do not enjoy unlimited discretion to take any measure they consider appropriate in the name of the protection of public order. The Court must exercise the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the applicants and other persons from imparting information or ideas contesting the established order of things (see *Women On Waves and Others,* cited above, § 43).

82. The Court has had several occasions to assess the proportionality of sanctions imposed for unlawful conduct involving some degree of disturbance of public order. Thus, in the case of *Steel and Others v. the United Kingdom* the Court examined two situations. The first situation concerned a protest against a grouse shoot involving a group of about sixty people attempting to obstruct a hunt. The Court considered that in such circumstances forty-four hours' detention pending trial and sentencing to twenty-eight days' imprisonment was proportionate to the legitimate aim of protecting public order. The second situation concerned a protest against the construction of a motorway. The participants repeatedly broke into a construction site, where they climbed into trees to be felled and onto some of the stationary machinery and placed themselves in front of machinery in order to impede the engineering works. The Court considered that seventeen hours' detention pending trial and sentencing to seven days' imprisonment for such disorderly behaviour was compatible with the requirements of Article 10 (see *Steel and Others,* cited above, §§ 105 – 109).

83. In *Drieman and Others v. Norway* the Court examined the proportionality of the sanction imposed on participants in a direct action against whaling carried out by Greenpeace. The direct action consisted of manoeuvring boats in such a manner as to obstruct whaling by, on each occasion, placing the boat between the hunting vessel and the whale, thereby making it impossible to harpoon the whale. Whereas the Court left open the question as to whether that particular conduct could be covered by the guarantees set out in Articles 10 and 11, it found that by imposing a criminal fine on the participants the national authorities had acted within their margin of appreciation (see *Drieman and Others,* cited above).

84. Further, in the case of *Lucas v. the United Kingdom* the Court found that four hours' detention pending trial and sentencing to a fine for blocking a public road to protest against the retention of a nuclear submarine were proportionate to the legitimate aim of protecting public order in view of the dangers posed by the protesters' conduct in sitting in a public road (see *Lucas,* cited above).

85. Similarly, in the case of *Barraco v. France* the Court held that a suspended sentence of three months' detention for blocking a highway by the participants in a go-slow protest organised by a trade union was proportionate to the legitimate aims pursued. The Court noted that the applicant had not been punished for his participation in the demonstration itself, but rather for particular behaviour in the course of the demonstration, namely the repeated and intentional blocking of a public road, thereby causing more obstruction than would normally arise from the exercise of the right of peaceful assembly (see *Barraco,* cited above, §§ 41-49).

86. The Court also takes note of the case of *Osmani and Others v. the former Yugoslav Republic of Macedonia.* In that case the applicant, the mayor of a town, stated in a speech made during a public assembly his

refusal to remove an Albanian flag, in defiance of a decision of the Constitutional Court. That speech triggered a fight between those citizens who wanted to remove the flag and those who wanted to keep it. After that incident, that applicant organised an armed vigil to protect the Albanian flag. The police later found weapons in the town hall and in the applicant's flat. On the same day as they found the cache of weapons, the police were attacked by a group of about 200 people, who were armed with metal sticks and threw stones, rocks, Molotov cocktails and teargas projectiles at them. The Court found that in the very sensitive interethnic situation of that time the applicant's speeches and actions had encouraged interethnic violence and violence against the police. When assessing the proportionality of the sanction, the Court took into account that, although the applicant had been sentenced to seven years' imprisonment, due to an amnesty he spent only one year and three months in prison. Therefore, even if the original sentence could be considered severe, the term actually spent in prison could not be considered disproportionate, regard being had to the facts of the case (see *Osmani and Others v. the former Yugoslav Republic of Macedonia* (dec.), no. 50841/99, 11 October 2001).

87. An analysis of the Court's case-law cited above reveals that the Contracting States' discretion in punishing illegal conduct intertwined with expression or association, although wide, is not unlimited. It goes hand in hand with European supervision by the Court, whose task is to give a final ruling on whether the penalty was compatible with Article 10 or 11. The Court must examine with particular scrutiny the cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence.

88. Another important principle that transpires from the Court's case-law is that participants in a demonstration which results in damage or other disorder but who do not themselves commit any violent or otherwise reprehensible acts cannot be prosecuted solely on the ground of their participation in the demonstration. Thus, in the case of *Ezelin v. France* the applicant was sentenced to a reprimand for participating in a demonstration which resulted in public property being damaged by offensive and insulting graffiti, the perpetrators of which were never identified. When finding a violation of Article 11, the Court held that the freedom to take part in a peaceful assembly was of such importance that a person could not be subjected to a sanction – even one at the lower end of the scale of disciplinary penalties – for participation in a demonstration, so long as that person did not himself commit any reprehensible act on such an occasion (see *Ezelin,* cited above, § 53).

89. That approach was further confirmed in the cases of *Yılmaz and Kılıç v. Turkey* and *Schwabe and M.G. v. Germany*. Thus, in the case of *Yılmaz and Kılıç* the Court found that four years' imprisonment for participating in a demonstration during which slogans calling for violence

had been chanted by the crowd was disproportionate to the legitimate aim of protecting public order and therefore incompatible with Article 10. When assessing the proportionality of the sanction, the Court took into account, among other things, that it had been never established whether the applicants had taken part in chanting the violent slogans (see *Yılmaz and Kılıç v. Turkey*, no. 68514/01, §§ 65-69, 17 July 2008). Finally, the case of *Schwabe and M.G* concerned the applicants' arrest immediately before the commencement of a demonstration against a G8 summit. A similar demonstration the day before had ended with rioting, involving well-organised violent demonstrators who had attacked the police with stones and baseball bats. The Court noted that it had not been shown that the applicants had had violent intentions in seeking to take part in G8-related demonstrations. In such circumstances, their detention for almost six days in order to prevent them from participating in a demonstration that risked becoming violent had failed to strike a fair balance between the aims of securing public safety and the prevention of crime and the applicants' interest in freedom of assembly (see *Schwabe and M.G.,* cited above, §§ 105 and 114-119).

– *Analysis of the present case*

90. Turning now to the present case, the Court notes that the applicant's conviction was at least in part founded on the domestic courts' condemnation of the political message conveyed by the protesters. Indeed, the applicant was accused of "throwing anti-[Putin] leaflets" and "issuing an unlawful ultimatum by calling for the President's resignation" (see paragraph 28 above). At the same time, it is significant that the applicant was not convicted for expression of an opinion alone, but rather for expression mixed with particular conduct.

91. The Court notes that the participants in the protest action came to the President's Administration building to meet officials, hand over a petition criticising the President's policies, distribute leaflets and talk to journalists. They were not armed and did not resort to any violence or force, except for pushing aside the guard who attempted to stop them. The disturbance that followed was not part of their initial plan but a reaction to the guards' attempts to stop them from entering the building. Although that reaction may appear misplaced and exaggerated, it is significant that the protesters did not cause any bodily injuries to the guards, any other employees of the President's Administration or visitors. Indeed, the charges against them did not mention any use or threat of violence against individuals or infliction of any bodily harm to anyone.

92. Further, it is true that the protesters were found guilty of damaging the President's Administration's property. The Court, however, notes that the domestic courts did not establish whether the applicant had personally participated in causing that damage or had committed any other

reprehensible act. It is also significant that before the end of the trial the defendants compensated all the pecuniary damage caused by their protest action.

93. The above circumstances lead the Court to conclude that the present case is different from *Osmani and Others* because the protesters' conduct, although involving a certain degree of disturbance and causing some damage, did not amount to violence. It is therefore closer on the facts to *Steel and Others, Drieman and Others, Lucas* and *Barraco.*

94. The exceptional severity of the sanction, however, distinguishes the present case from the cases of *Steel and Others, Drieman and Others, Lucas* and *Barraco*, where the measures taken against the applicants in comparable circumstances were considered to be justified by the demands of public order. Indeed, in none of those cases was the sentence longer than a few days' imprisonment without remission, except in one case (*Barraco*) where it amounted to a suspended sentence of three months' imprisonment which was not, in the end, served. The Court accordingly considers that the circumstances of the instant case present no justification for being remanded in custody for a year and for the sentence of three years' imprisonment, suspended for three years.

95. The Court therefore concludes that, although a sanction for the applicant's actions might have been warranted by the demands of public order, the lengthy period of detention pending trial and the long suspended prison sentence imposed on her were not proportionate to the legitimate aim pursued. The Court considers that the unusually severe sanction imposed in the present case must have had a chilling effect on the applicant and other persons taking part in protest actions (see, mutatis mutandis, *Cumpănă and Mazăre,* cited above, § 116).

96. In view of the above, and especially bearing in mind the length of the pre-trial detention and the exceptional seriousness of the sanctions involved, the Court finds that the interference in question was not necessary in a democratic society.

97. There has therefore been a violation of Article 10 of the Convention interpreted in the light of Article 11.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

98. Lastly, the Court has examined the other complaints submitted by the applicant, and, having regard to all the material in its possession and in so far as they fall within the Court's competence, it finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

100. The applicant claimed 30,000 euros (EUR) in respect of non-pecuniary damage.

101. The Government submitted that the claim was excessive. In their opinion, the finding of a violation would constitute sufficient just satisfaction.

102. The Court considers that the applicant has suffered non-pecuniary damage as a result of her detention and criminal sentence which were incompatible with the principles of the Convention. The damage cannot be sufficiently compensated by a finding of a violation alone. Making its assessment on an equitable basis, the Court awards the applicant EUR 12,500 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

103. The applicant did not claim costs and expenses. Accordingly, there is no call to make an award under this head.

C. Default interest

104. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning the excessive length of the applicant's pre-trial detention and the interference with her rights to freedom of expression and freedom of assembly admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

3. *Holds* that there has been a violation of Article 10 of the Convention interpreted in the light of Article 11 of the Convention;

4. *Holds*
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 12,500 (twelve thousand five hundred euros) plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 May 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Isabelle Berro-Lefèvre
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint separate opinion of Judges Pinto de Albuquerque, Turković and Dedov is annexed to this judgment.

I.B.L.
S.N.

JOINT CONCURRING OPINION OF JUDGES PINTO DE ALBUQUERQUE, TURKOVIĆ AND DEDOV

1. The *Taranenko* case deals with a new aspect of the limits of freedom of expression and expressive conduct in the public arena. It is the first time that the European Court of Human Rights ("the Court") has had to evaluate the exercise of this freedom inside the premises of a public building, which a group of people including the applicant entered without authorisation. Simultaneously, the Court faces the delicate issues of the legality and proportionality of the criminal punishment of the applicant's conduct, amounting to "participation in mass disorder"[1]. We can subscribe to the Chamber's finding of a violation of Article 10 of the European Convention of Human Rights ("the Convention"), but not entirely to its reasons. Our disagreement is based on a different assessment of both the legality and the proportionality of the interference with the applicant's Convention freedoms[2].

The deficient legal framework governing mass disorder or rioting

2. The applicant was found guilty of the criminal offence of "participation in mass disorder", established by Article 212 § 2 of the Russian Criminal Code. This offence refers to the conduct of someone who voluntarily takes part in an organised or non-organised movement of

1. The concept of mass disorder or rioting is used in this opinion in a technical, criminal-law sense, to include various forms of mass social disorder which may be violent or non-violent, armed or non-armed. Mass social disorder may be caused without violence being used. In a violent riot violence may be used against persons or property. A violent riot may be armed, that is, accompanied by the use of arms. But there may also be violent, non-armed riots, where violence is perpetrated by means other than arms, such as physical force. A non-violent riot may be armed if the participants carry arms but do not use them. Mass riots, be they violent or non-violent, are frequently, but not necessarily, accompanied by disobedience or even resistance to public authorities such as the police.

2. The applicant complained also of a violation of Article 11 of the Convention, but the majority preferred to deal with the case under Article 10, "interpreted in the light of Article 11" (see paragraph 97 and point 3 of the operative part). The majority gave no justification for this approach. Since the purpose of the group of about forty intruders was to assemble inside the President's Administration building, ask for a meeting with the President and two other senior politicians, wave placards, distribute leaflets and ultimately lock themselves in an office inside the building, Article 11 rights were clearly at stake. Furthermore, the applicant and the other intruders were punished because of the unauthorised entry and gathering inside a public building, and not because of the content of the political message conveyed. Therefore, the facts should have been addressed primarily under Article 11. In any case, the pre-trial detention and criminal punishment of the demonstrators also raised, in a broad sense, the issue of the infringement of their freedom of expression and expressive conduct.

disturbance of social order caused by a mass of citizens, which must be accompanied by one or more of acts of violence against one or more persons, by a pogrom against an ethnic or religious group[3], by acts of arson[4], by the destruction of movable property (for example, cars) or immovable property, by the use of firearms or explosives or by armed resistance to the authorities. Thus, the offence is not based on a merely potentially dangerous conduct but on the causation of harm as a result of the offender's conduct, directed either at persons or at property. Yet this is not the sole provision applicable to the conduct of causing mass social disorder in the respondent State. There are three provisions which might be applicable to this conduct: Articles 212 and 213 of the Russian Criminal Code and Article 20.1 of the Russian Code of Administrative Offences. The borderline between these provisions is not at all clear. In the case of non-armed mass social disorder, such as in the present case, it is disputed whether Article 212 of the Russian Criminal Code or Article 20.1 of the Russian Code of Administrative Offences applies. In the case of armed mass social disorder, both Articles 212 and 213 of the Russian Criminal Code may be applied. It is interesting to note that the criminal offence of hooliganism (Article 213 of the Criminal Code) involves the same conduct of breach of public order as the criminal offence of mass disorder (Article 212 of the Criminal Code), but is punishable by a lesser penalty. Hence, the rationality of the penal policy choice to create these two autonomous offences is highly questionable. The overlapping of these legal provisions is aggravated by a prosecutorial practice that frequently imputes to "rioters" the offence of "violent overthrow of State power" (Article 278 of the Russian Criminal Code). In fact, the prosecutorial practice of initially charging participants in political demonstrations with the offence of "violent overthrow of State power", for the purpose of justifying their pre-trial detention for long periods of time, and subsequently amending the charges to a lesser charge of participation in mass disorder, is not censured by the domestic courts, which passively accept this prosecutorial practice[5].

3. Moreover, the minimum penalty under Article 212 § 2 of the Russian Criminal Code is excessive. Although the setting of maximum and minimum prison sentences for criminal offences is a domain where member States enjoy a wide margin of appreciation, they are not entirely free when legislating on these issues. Among others, member States must take into consideration the following two principles: first, a very broad penal

3. Pogrom is a Russian word which originally referred to a violent riot aimed at the massacre or persecution of Jews. It now refers to all forms of collective violence directed at an ethnic or religious group.

4. Arson is a wilful conduct of setting fire to one or more buildings or other property of another person or of burning one's own property for an illegal purpose.

5. *Dolgova v. Russia*, no. 11886/05, § 42, 2 March 2006, and *Lind v. Russia*, no. 25664/05, § 78, 6 December 2007.

framework, with a great disparity between the minimum and the maximum prison terms, raises an issue of certainty of the penal law under Article 7 (*nulla poena sine legge certa*), and second, a very long mandatory minimum prison term calls into question the necessity of the State interference. A comparative law review of the penal codes of member States provides a useful logical instrument for the purposes of this necessity test.

4. In the present case, a review of the European penal codes in force at the relevant time shows that a significant number of codes provide for no minimum prison term or for a minimum prison term lower than three years as punishment for the conduct of participation in mass social disorder, even when accompanied by acts of violence towards persons or property. Article 355 of the Andorran Penal Code makes rioting causing danger to persons subject to a penalty of up to two years' imprisonment. Article 274 of the Austrian Penal Code subjects participation in a breach of social order to a penalty of up to two years' imprisonment, and leadership of a riot to a prison term of up to three years. In Belgium, rioting is punished by "police penalties", which may constitute a fine or a prison term of up to seven days (see, for example, Article 70 of the Police Regulations of the city of Brussels). Under Article 239 of the Estonian Penal Code, persons participating in mass disorder who commit desecration, destruction, arson or other similar acts or who disregard a lawful order or offer resistance to a police officer, special constable or any other person combating such activities on a legal basis, or incitement of such person to non-performance of his or her duties, are liable to a pecuniary penalty or up to five years' imprisonment. Article 238 of the same Code punishes the offence of organising or planning disorder involving a large number of persons or incitement to participation in such disorder, if such disorder results in desecration, destruction, arson or other similar acts, with three to eight years' imprisonment. Section 2 of Chapter 17 of the Finnish Penal Code makes non-violent rioting subject to a fine or imprisonment for at most one year, participation in a violent riot to a fine or imprisonment for at most two years and leadership of a violent riot to a fine or imprisonment for at most four years. Section 14 of the Irish Criminal Justice (Public Order) Act 1994 makes the offence of riot punishable by a fine and/or a period of imprisonment of up to ten years, but sets no minimum prison term. Violent disorder, which is covered by Section 15 of the Act, is subject to the same penalty. Article 283 of the Lithuanian Criminal Code punishes participation in non-armed rioting with a prison term of up to five years and armed rioting with a term of up to six years. Section 324 of the Croatian Penal Code makes rioting subject to a fine or a period of imprisonment ranging from three months to three years. The aggravated offence of rioting committed out of hatred, towards large number of persons, with the use of arms, endangering the life or physical integrity of other persons or resulting in extensive material damage, is punishable by imprisonment of between six

months and five years. Article 431-3 of the French Criminal Code punishes participation in a non-armed riot with a fine and one year's imprisonment and participation in an armed riot with a fine and three years' imprisonment. Article 225 of the Georgian Criminal Code punishes the offence of organising or leading mass disorder involving violence, pogrom, arson, the use of arms or explosive devices, or armed resistance against a Government representative, with imprisonment for a term ranging from three to ten years, while mere participation in the riot is punishable by prison sentences ranging from two to eight years. Article 186 of the Dutch Penal Code punishes participation in a riot with a prison term of up to three months or a second-category fine. Article 125 of the German Penal Code punishes rioting with a fine or a prison term of up to three years, and armed rioting with a prison term of six months to ten years. Article 274 of the Liechtenstein Criminal Code punishes participation in a riot accompanied by murder, bodily harm or damage to property with a prison term of up to three years. Article 385 of the Macedonian Penal Code punishes those who participate in a crowd which by means of joint action performs acts of violence against people or damages or destroys property on a large scale, with a fine or with imprisonment for up to three years; if during the action of the crowd a person is killed or sustains serious bodily injury, or large-scale damage is caused, the participants in the crowd are liable, by virtue of their participation, to imprisonment for between three months and five years. The leader of the crowd is punished with a prison term of one to ten years. Article 399 of the Montenegro Criminal Code punishes rioting with a prison term ranging from three months to three years, and when there is bodily harm or serious humiliation of third parties, with a term ranging from six months to five years. Article 136 of the Norwegian Penal Code makes rioting subject to a prison term of up to three years and when there is violence against persons or property, to a prison term ranging from two months to five years. Article 302 of the Portuguese Penal Code punishes participation in a riot with one year's imprisonment or 120 day-fines, and organisation of a riot with three years' imprisonment or 360 day-fines; however, when the riot is armed the upper limit is doubled. The lower limit is one month's imprisonment or ten day-fines. Article 344 of the Serbian Criminal Code punishes rioting with a prison term of three months to three years, and where there is bodily harm or serious damage to the property of third parties, with a prison term ranging from six months to five years. Article 514 of the Spanish Penal Code punishes the leaders of unlawful demonstrations with a prison term of between one and three years and a fine; participants carrying arms or other dangerous implements are liable to a prison term of between one and two years. Section 1 of Chapter 16 of the Swedish Penal Code punishes participation in a non-violent riot with a fine or a prison term of up to two years, and leadership of a riot with up to four years' imprisonment. Section 2 of the same chapter punishes participation in

a violent riot with a fine or a prison term of up to four years, and leadership with a penalty of up to ten years' imprisonment. These provisions do not set a minimum penalty. In some countries such as Hungary the crime of rioting is associated with the immediate aim of impeding the exercise of constitutional authority by means of violence or threats of violence, or of coercing the Parliament, the President of the Republic, the Supreme Court or the Government to take certain measures, but even in this case the crime is punishable with imprisonment of between two and eight years (Article 140 of the Hungarian Criminal Code). Based on this comparative law review, it can be ascertained that a minimum prison term of three years for the criminal offence of participating in mass social disorder, even when accompanied by damage caused to property, is *per se* problematic from the standpoint of the principle of necessity.

5. It is true that Article 64 of the Russian Criminal Code provides for the option of sentencing the defendant to a penalty below the minimum set by the applicable criminal provision. But Article 64 does not establish a clear set of conditions for the application of this concession. Although it refers to a list of "exceptional" circumstances, this list is not exhaustive and judges may refer to other circumstances. The lower courts exercise considerable discretion in the application of this list of circumstances, since the higher courts have failed to date to give any guidelines as to how the said provision should be construed and have thus left the first-instance judges with ample room for a subjective evaluation of the appropriate punishment in each particular case. Scholars and commentators on the Criminal Code do not provide the judges with any additional guidance. This serious defect in the legal framework impacts not only on the conditions for the application of the provision in question but also on the consequences of its application. Judges have the following two options: either to give a sentence below the minimum set out in the relevant article of the Criminal Code, but in any case not below the minimum established by the Code for each type of punishment (for example, in the case of imprisonment the minimum is two months), or to give a less severe punishment (for example, if an offence is punishable by imprisonment only, the judge may decide to apply a fine or correctional labour). Such is the plethora of possible alternatives for sentencing that defendants cannot anticipate the penalty that they might incur. In sum, the lawfulness of the interference with the applicant's freedom of expression and expressive conduct by the domestic prosecutors and courts is called into question by this additional element of uncertainty involving sentencing.

The disproportionate criminal sanctions for rioting

6. The interference with the applicant's freedom of expression and expressive conduct was twofold: first, she was hindered from demonstrating

inside the public building, and second, she was arrested by the police, held in pre-trial detention, convicted of a criminal offence and sentenced to a suspended prison term. In view of the nature of the actions and decisions of the police and the courts, the interference with the applicant's freedom is to be assessed in terms of the negative obligations arising from Article 10 of the Convention, which narrows the breadth of the margin of appreciation of the respondent State.

7. Shouting and chanting political slogans, waving placards with political messages and distributing leaflets with messages of a similar nature are forms of expression and expressive conduct which clearly fall under the protection of Article 10 and which all deserve the exact same degree of protection. In the present case, the content of the message conveyed by the demonstrators and the underlying intention of the demonstration were political. The objectively and subjectively political nature of the expression and expressive conduct further narrows the margin of appreciation of the respondent State. But both expression and expressive conduct may nonetheless lose the protection of the Convention when they give rise to a clear and imminent danger of public disorder, crime or other infringement of the rights of others[6]. Expression in the marketplace of ideas is only possible where no violence is incited, threatened or exerted[7]. Where there is violence, there is no communication.

8. In principle, States have a narrow margin of appreciation with regard to expression in a public space[8]. In *Appleby and Others*, the Court assessed the limits of the applicants' freedom of expression on another person's private property such as a shopping centre[9]. As an *obiter dictum*, the Court added that under the Convention there was no positive obligation to create rights of entry to all publicly owned property, such as government offices and ministries, in order to allow freedom of expression to be asserted, if there were alternative and effective means for those concerned to convey their message. In the case at hand, the administration building served as the executive office of Russia's President, with its various bureaucratic services and branches. One of these branches was the front desk for the reception of members of the public and their applications and complaints. Thus, the building used by the President of the Russian Federation's Administration can be considered as a non-public forum which, by governmental design, is not an appropriate platform for unrestrained communication, assembly and demonstration. Here, the State is granted much greater latitude in regulating

6. On the clear and imminent danger test see the opinion of Judge Pinto de Albuquerque in *Faber v. Hungary*, no. 40721/08, 24 July 2012.
7. United States Supreme Court, *Brandenburg v. Ohio*, 395 US 444 (1969) and *Samuels v. Mackell*, 401 US 66 (1971).
8. On the public forum doctrine see the opinion of Judge Pinto de Albuquerque in *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, ECHR 2012.
9 *Appleby and Others v. the United Kingdom*, no. 44306/98, §§ 47-49, ECHR 2003-VI.

freedom of expression and expressive conduct. In addition to applying regulations as to time, place and manner, the State may reserve the forum for its intended purposes, as long as the regulation of expression and expressive conduct is reasonable and not an effort to suppress them merely because public officials oppose the forum user's view. Special restrictions may be imposed with regard to the simultaneous entry and gathering of large crowds inside public buildings during working hours. Even when enjoying authorised entry and gathering inside a public building, the forum users are not supposed to misuse their freedom of expression and expressive conduct by means of acts of violence against persons or property. *A fortiori*, no violence may be used for entering and remaining inside a public building under the guise of a political form of expression or assembly. Violence does not become legitimate simply because it takes place in an assembly, even when it pursues political aims[10].

9. In the case at hand, the nature of the interference and of the expression and expressive conduct point in the direction of a narrow margin of appreciation, but the place where they occurred points in the opposite direction. Assessing the weight of these factors on both sides of the scales, the balance is clearly tipped in favour of the essence of the interference and the expression, to the detriment of the circumstantial element of space. Overall, a narrow margin of appreciation prevails in the particular circumstances of the case.

10. After establishing the admissible criteria for the assessment of the State's interference with the applicant's freedom of expression and expressive conduct, and their relative and overall weight, the Court must assess the reasons given by the national courts for the interference with the applicant's freedom of expression. The domestic courts gave two reasons: first, the demonstrators had committed serious breaches of public safety and order by disregarding established norms of conduct and showing manifest disrespect for society; and second, while performing the above disorderly acts, the defendants had destroyed and damaged property in one of the offices of the reception area of the President's Administration building. These arguments are based on the protection of public order and public property and the prosecution of criminal conduct as legitimate aims for the restriction of the freedom of expression and expressive conduct. And they are well founded. Taking into account the fact that the applicant entered the building with a considerable number of demonstrators involved in the action of the National Bolsheviks Party, and that the group bypassed identity and security checks, pushed aside the guard who had attempted to stop them, did not comply with the guards' lawful demands to leave the premises, took

10. See German Federal Constitutional Court, *Sitzblockade III* judgment, 10 January 1995, paragraph 50; Venice Commission and OSCE/ODIHR Guidelines on Freedom of Peaceful Assembly, 2008, paragraphs 63 and 86-90; and Principle 6 of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information.

over office no. 14 on the ground floor, damaged the furniture and the walls of the office, blocked the door with a heavy metal safe and conducted an unauthorised meeting, it was justified to assert not just that there was a clear and imminent danger of commission of criminal acts, but moreover that criminal acts had already been committed by the group of demonstrators which warranted the police action to restore order and bring the demonstrators to justice. In other words, the arrest of the demonstrators by the police and their charging with criminal offences corresponded to a pressing social need and were therefore covered by the second paragraph of Article 10 of the Convention.

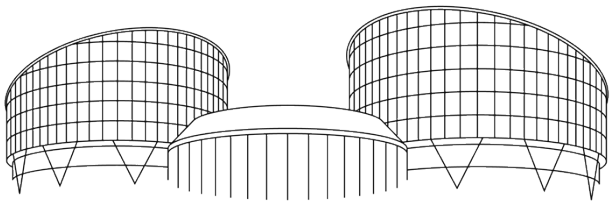
11. In view of the serious disorder and considerable damage caused by the demonstrators, the punishment of the described conduct as a criminal offence was not incompatible with the protection of their freedom of expression and *a fortiori* with their freedom of assembly[11]. Nevertheless, the domestic courts' reaction was disproportionate in the circumstances of the case, because they kept the defendant in pre-trial detention for a year in spite of the fact that two months after the demonstrators' arrest the prosecutor had dropped the initial extremely serious charges of attempted violent overthrow of the State and charged the demonstrators with the less serious offence of participation in mass disorder. Admittedly, the domestic courts applied the minimum prison penalty prescribed by law for the crime imputed to the applicant and subsequently suspended this prison sentence, taking into consideration the fact that the defendants had voluntarily compensated the pecuniary damage caused by their actions and that the applicant had "positive character references". But the domestic courts could have gone further. They had three alternatives: maintaining the charges against the applicant and making use of their power to apply a prison sentence below the minimum set out in the relevant provision; applying a different penalty, such as a fine or correctional labour (Article 64 of the Criminal Code); or even using their power to amend the charges during the trial and try the defendant for a lesser offence, provided that her situation was not aggravated as a result and her defence rights were not impaired (Article 252 § 2 of the Code of Criminal Procedure). At the least, the "positive character references" that led the courts to suspend the prison sentence could have prompted them also to apply Article 64 of the Criminal Code. The legitimate pressing social needs pursued by the domestic authorities of restoration of public order and prosecution and punishment of criminal conduct could have been achieved without such heavy-handed

11. Although the prosecutor accused the demonstrators of "pushing back" several guards at the entrance, and several witnesses confirmed this accusation, the domestic courts did not clarify how the demonstrators had behaved towards the guards at the entrance of the administration building or the exact number of guards involved. These elements would have been relevant for the purpose of sentencing.

interference with the applicant's freedom of expression and expressive conduct.

Conclusion

12. The defendant misused her freedom of expression and expressive conduct when she joined a group of people who forced their way into the President's Administration building in December 2004 and damaged equipment and the building. She was rightly arrested and brought to justice. But the response of the Russian justice system was excessive, in view of her pre-trial detention and her sentencing to a prison term of three years. This excessive response was made possible by the severity and lack of clarity of Russian law on the punishment of participation in mass social disorder and by the wide discretionary powers with regard to the sentencing of defendants to a penalty below the minimum set by the applicable criminal provision. We therefore conclude that there has been a violation of Article 10.



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF MURAT VURAL v. TURKEY

(Application no. 9540/07)

JUDGMENT

STRASBOURG

21 October 2014

FINAL

21/01/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Murat Vural v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Guido Raimondi, *President,*
Işıl Karakaş,
András Sajó,
Nebojša Vučinić,
Egidijus Kūris,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 16 September 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 9540/07) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Murat Vural ("the applicant"), on 16 February 2007.

2. The applicant was represented by Mr Hacı Ali Özhan, a lawyer practising in Ankara. The Turkish Government ("the Government") were represented by their Agent.

3. The applicant alleged, in particular, that his imprisonment on account of having expressed his opinions, and his inability to vote as a convicted prisoner, had been in breach of his rights guaranteed by Article 10 of the Convention and Article 3 of Protocol No. 1.

4. On 20 September 2010 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1975 and lives in Ankara.

6. The facts of the case, as submitted by the parties and as they appear from the documents submitted by them, may be summarised as follows.

7. In the early hours of 28 April 2005 the applicant went to a primary school in the town of Sincan and poured paint on a statue of Atatürk[1] which was situated in the school's garden. On the evening of the same day, he poured paint on a statue of Atatürk in the garden of another primary school.

8. On 6 May 2005 he did the same thing in the same two primary schools.

9. On 8 July 2005 the applicant poured paint on a statue of Atatürk in Sincan town centre.

10. On 12 September 2005 the applicant went to the same statue in Sincan town centre equipped with a tin of paint, paint thinner and a ladder. As he was about to open the tin of paint he was arrested by police officers and taken to a police station where he was questioned. In a statement taken from him on the same day the applicant was reported as having told the police officers that he had carried out the above-mentioned actions because he resented Atatürk and had expressed his resentment by pouring paint on the statues.

11. On the same day the applicant was brought before a prosecutor and then a judge, who ordered his detention on remand pending the opening of criminal proceedings against him. In his statement to the prosecutor the applicant maintained that he had carried out his actions to express his "lack of affection" for Atatürk.

12. In his indictment of 15 September 2005, lodged with the Sincan Criminal Court of First Instance (hereinafter "the trial court"), the Sincan prosecutor charged the applicant with the offence of contravening the Law on Offences Committed Against Atatürk (Law no. 5816; see "Relevant Domestic Law and Practice" below).

13. In the course of the trial the applicant admitted that he had poured paint on the statues. He told the trial court that he had completed his university studies and qualified as a teacher. However, he had been unemployed for a long time because his application to work as a teacher had not been accepted by the Ministry of Education. He had carried out his offences in order to protest against the Ministry's decision.

14. On 10 October 2005 the trial court found the applicant guilty as charged. Having regard to the fact that the offence was committed in a public place and on a number of occasions, the trial court sentenced him to three years' imprisonment instead of the minimum term of imprisonment applicable under Law no. 5816, which is one year. The fact that the offence had been committed in a public place also led the trial court to increase the sentence by half in accordance with section 2 of Law no. 5816. The trial court also considered that the applicant had committed the offence on five

1. Mustafa Kemal Atatürk is the founder and the first President of the Republic of Turkey.

separate occasions, and decided to multiply the sentence by five. The applicant was thus sentenced to a total prison term of twenty-two years and six months for his above-mentioned actions.

15. The applicant appealed. In his appeal he argued that, according to the provisions of the Criminal Code, only one sentence should have been imposed on him because, regardless of the fact that he had poured paint on the statues on five occasions, he had in fact only committed one offence and not multiple offences. In support of his argument, he submitted that his five actions had been carried out within a short span of time.

16. The applicant also pointed out that, instead of imposing on him the minimum one-year prison sentence provided for in Law no. 5816 in respect of each offence, the trial court had handed down a three-year sentence because it had had regard to the number of times he had poured paint on the statues. The trial court had then gone on to rely on the frequency of his actions when multiplying the sentence by five.

17. The applicant also challenged the trial court's reliance on section 2 of Law no. 5816 when increasing his sentence by half because the offence had been committed in a public place. He drew the Court of Cassation's attention to the fact that, by their nature, statues are placed in public places.

18. The applicant added that he had carried out his actions in order to express his "lack of affection" for Atatürk. As such, he had remained within the boundaries of his right to freedom of expression, which was guaranteed by Article 10 of the Convention. Thus, although it would have been reasonable to prosecute and punish him for damaging property, he had in fact been punished for expressing his opinions.

19. On 6 April 2006 the Court of Cassation rejected the applicant's argument that he had been expressing his opinion, but quashed the trial court's judgment on the ground of, *inter alia*, that court's failure to give adequate consideration to the possibility that the five separate incidents could form only one offence and not multiple offences. The Court of Cassation considered that the applicant had carried out his actions in order to protest against the Ministry of Education's decision not to appoint him as a teacher. The case file was sent back to the trial court.

20. In its decision of 5 July 2006 the trial court agreed with the Court of Cassation's conclusion, and held that the applicant's actions had amounted to a single offence and not five offences. However, having regard, *inter alia*, to the "contradictory reasons" put forward by the applicant as justification for his actions, as well as "the effects of his actions on the public", the trial court concluded that the applicant's actions had amounted to "insults", and deemed it fit to sentence him to five years' imprisonment, which is the maximum allowed under Law no. 5816. The sentence was then increased by half because the acts had been committed in a public place. Furthermore, pursuant to Article 43 of the Criminal Code (see "Relevant Domestic Law and Practice" below), the sentence was further increased by three quarters.

The applicant was thus sentenced to a total of thirteen years, one month and fifteen days' imprisonment.

21. Furthermore, in its decision the trial court set out the restrictions under section 53 of the Criminal Code which were to be placed on the applicant on account of his conviction. Accordingly, until the execution of his sentence, the applicant was banned from, among other things, voting and taking part in elections, as well as from running associations, parties, trade unions and cooperatives (see "Relevant Domestic Law and Practice").

22. The applicant appealed and repeated his arguments under various provisions of the Convention. He maintained, in particular, that he had carried out his actions in order to express his "lack of affection" for Atatürk and had thus exercised his freedom of expression guaranteed in Article 10 of the Convention.

23. The appeal was dismissed by the Court of Cassation on 5 February 2007. No mention was made in the Court of Cassation's decision of the arguments raised by the applicant about his freedom of expression.

24. According to a document drawn up by the prosecutor on 16 April 2007 setting out the details of the applicant's prison sentence, the date of the applicant's release from prison was set as 22 October 2018, with a possibility of release on 7 June 2014 for good behaviour.

25. In the meantime, on 1 June 2005 the Law on the Execution of Prison Sentences and Other Security Measures (Law no. 5275) entered into force. This law sets out the circumstances in which prisoners can benefit from early release.

26. On 15 May 2007 the prosecutor responsible for the prison the applicant was serving his sentence in wrote to the trial court and asked for guidance in calculating the date of the applicant's possible early release. The prosecutor stated that, for offences committed before 1 June 2005, Law no. 647 was applicable and, for offences committed after that date, the new Law no. 5275 would be applicable. The applicant had carried out his actions both before and after that date.

27. On 16 May 2007 the trial court considered that the critical date was the date of the commission of the final act and thus the new law was applicable.

28. The applicant lodged an objection against that decision and argued that most of his actions had been carried out before 1 June 2005 and that therefore, when calculating his prison sentence, the old law should be taken into account. If his prison sentence were calculated in accordance with the new law, he would spend four more years in prison. That objection was rejected by the trial court on 18 June 2007 and the date of the applicant's possible release from prison was calculated in accordance with the document drawn up by the prosecutor on 16 April 2007 (see paragraph 24 above).

29. A request made by the applicant to the Ministry of Justice for his conviction to be quashed and another request to the Court of Cassation to rectify the judgment were rejected on 28 September 2007 and 28 December 2007 respectively.

30. On 11 June 2013 the applicant was released conditionally.

II. RELEVANT DOMESTIC LAW AND PRACTICE

31. The Law on Offences Committed Against Atatürk (Law no. 5816, entry into force 31 July 1951) provides as follows:

> "Section 1: Anyone who publicly insults the memory of Atatürk or swears at him shall be liable to imprisonment for a term of between one and three years.
>
> Anyone who demolishes, breaks, ruins or dirties a sculpture, statue, monument or the mausoleum of Atatürk, shall be liable to imprisonment for a term of between one and five years.
>
> Anyone who incites another to commit any of the above-mentioned offences shall be liable to the same punishment as the person committing the offence.
>
> Section 2: In cases where the offences mentioned in section 1 of this Law are committed by two or more persons, committed in public places or committed through the media the prison term shall be increased by half.
>
> If force is used in the commission of the offences mentioned in the second paragraph of section 1 of this Law, or an attempt is made to do so, the prison term shall be doubled.
>
> Section 3: The offences mentioned in this Law shall be prosecuted by public prosecutors of their own motion.
>
> Section 4: This Law shall enter into force on the date of its publication.
>
> Section 5: The Justice Minister shall oversee the enforcement of this Law."

32. Section 43 of the Criminal Code (Law no. 5237 of 2004), in so far as relevant, provides as follows:

> "(1) In circumstances where, in the course of the execution of a decision to commit a particular offence, an offence is committed against a person more than once and at different times, only one punishment shall be imposed [on the offender]. However, the punishment shall then be increased by between a quarter and three quarters ..."
>
> ..."

33. The relevant provisions of section 53 of the Criminal Code (Law no. 5237 of 2004) provide as follows:

> "(1) As the statutory consequence of imposition of a prison sentence for an offence committed intentionally, the [convicted] person shall be deprived of the following [rights]:
>
> a) Undertaking of permanent or temporary public duties, including membership of the Turkish National Assembly and all civil service and other duties which are offered through election or appointment by the State, city councils, town councils, village councils, or organisations controlled or supervised by them;

b) Voting, standing for election and enjoying all other political rights;

c) Exercising custodial rights as a parent; performing duties as a guardian or a trustee;

d) Chairing or auditing foundations, associations, unions, companies, cooperatives and political parties;

e) Carrying out a self-employed profession which is subject to regulation by public organisations or by chambers of commerce which have public status.

(2) The person cannot enjoy the [above-mentioned] rights until the prison term to which he or she has been sentenced as a consequence of the commission of the offence has been served.

(3) The provisions above which relate to the exercise of custodial rights as a parent and duties as a guardian or a trustee shall not be applicable to a convicted person whose prison sentence is suspended or who is conditionally released from prison. A decision may [also] be taken not to apply subsection 1 (e) above to a convict whose prison sentence is suspended.

(4) Sub-section 1 above shall not be applicable a person whose short-term prison sentence is suspended or to persons who were under the age of eighteen at the time of the commission of the offence.

(5) Where the person is sentenced for an offence committed by abusing one of the rights and powers mentioned in sub-section 1 above, a further prohibition of the enjoyment of the same right shall be imposed for a period equal to between a half and the whole length of the prison sentence ...

..."

34. For more information concerning the legislation applicable to the issue of voting in Turkey, see *Söyler v. Turkey* (no. 29411/07, §§ 12-19, 17 September 2013).

III. RELEVANT INTERNATIONAL MATERIALS

35. A description of the relevant international materials and comparative law on the issue of voting can be found in *Scoppola v. Italy (no. 3)* [GC] (no. 126/05, §§ 40-60, 22 May 2012).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 10, 17 AND 18 OF THE CONVENTION

36. Relying on Article 10 of the Convention, the applicant complained that he had been punished for having expressed his opinions. He added that the punishment imposed on him had been excessive, disproportionate to the

offence in question, and incompatible with Articles 17 and 18 of the Convention.

37. The Government contested the applicant's arguments.

38. The Court deems it appropriate to examine the complaint solely from the standpoint of Article 10 of the Convention, which reads as follows:

> "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."

A. Admissibility

39. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Applicability of Article 10 of the Convention and the existence of an interference

40. The applicant argued that he had carried out his actions with a view to expressing his dissatisfaction with those running the country in accordance with the Kemalist ideology[2], and to criticising the Kemalist ideology itself.

41. The Government considered that defiling Atatürk's statues was considered to be an act of vandalism with the element of insulting Atatürk's memory. By virtue of the nation's deep sense of respect and adoration for Atatürk, his memory was protected by law.

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2. Kemalist ideology is the political ideology of Mustafa Kemal Atatürk, and is based on six main pillars of ideology; republicanism, nationalism, populism, secularism, statism and revolutionism.

42. In the opinion of the Government, it was not the expression of views that was punishable under the Law on Offences Committed Against Atatürk, but, rather, insulting Atatürk's memory or vandalising his statues. That law did not prevent individuals from criticising the personality or ideas of Atatürk or Kemalist policies. Vandalising Atatürk's statues was not a legitimate way of expressing views under Article 10 of the Convention.

43. Having regard to its intensity, the applicant's aggression against the statues had been qualified as vandalism and vandalism was a violent way of expressing hatred. Although the applicant had the right to express and disseminate his thoughts and opinions through speech, writing, pictures and other media without recourse to violence, he had chosen not to do so. Instead, in order to justify his acts of vandalism the applicant had sought legal protection before the national courts by invoking his right to freedom of expression. In the opinion of the Government, the applicant's unlawful actions had fallen outside the scope of freedom of expression guaranteed by Article 10 of the Convention.

44. The Court reiterates that Article 10 of the Convention protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see *Oberschlick v. Austria (no. 1)*, 23 May 1991, § 57, Series A no. 204). Indeed, a review of the Court's case-law shows that Article 10 of the Convention has been held to be applicable not only to the more common forms of expression such as speeches and written texts, but also to other and less obvious media through which people sometimes choose to convey their opinions, messages, ideas and criticisms.

45. For example, Article 10 of the Convention was held to include freedom of artistic expression – notably within the scope of freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence there is an obligation on the State not to encroach unduly on the author's freedom of expression (see *Müller and Others v. Switzerland*, 24 May 1988, §§ 27 and 33, Series A no. 133). It is noteworthy that in reaching that conclusion the Court noted that Article 10 of the Convention does not specify that freedom of artistic expression comes within its ambit; but neither, on the other hand, does it distinguish between the various forms of expression (*ibid*., § 27).

46. The wearing or displaying of symbols has also been held to fall within the spectrum of forms of "expression" within the meaning of Article 10 of the Convention. For example, in its judgment in the case of *Vajnai v. Hungary* the Court accepted that the wearing of a red star in public as a symbol of the international workers' movement must be regarded as a way of expressing political views and that the display of such vestimentary symbols fell within the ambit of Article 10 of the Convention

(no. 33629/06, §§ 6 and 47, ECHR 2008; see also *Fratanoló v. Hungary*, no. 29459/10, § 24, 3 November 2011). Similarly, the Court held that the display of a symbol associated with a political movement or entity, like that of a flag, was capable of expressing identification with ideas or representing them and fell within the ambit of expression protected by Article 10 of the Convention (see *Fáber v. Hungary*, no. 40721/08, § 36, 24 July 2012).

47. The Court has held that opinions, as well as being capable of being expressed through the media of artistic work and the wearing or displaying of symbols as set out above, can also be expressed through conduct. For example, in its judgment in the case of *Steel and Others v. the United Kingdom* (23 September 1998, §§ 90 and 92, *Reports of Judgments and Decisions* 1998-VII) the Court held that taking part in a protest against a grouse shoot, during which attempts were made to obstruct and distract those taking part in the shoot, and breaking into a motorway construction site and climbing trees which were to be felled and onto some of the stationary machinery which was to be used in the construction, constituted expressions of opinion within the meaning of Article 10 of the Convention even though they had taken the form of physically impeding certain activities. In doing so it rejected the respondent Government's argument that the protest activities of the applicants had not been peaceful and that Article 10 of the Convention had thus not been applicable.

48. Similarly, in *Hashman and Harrup v. the United Kingdom* ([GC], no. 25594/94, § 28, ECHR 1999-VIII) holding a protest during which a fox hunt was disrupted by blowing a hunting horn and by engaging in hallooing was held to constitute an expression of opinion within the meaning of Article 10 of the Convention.

49. Referring to the above-mentioned judgments in the cases of *Steel and Others* and *Hashman and Harrup*, the Court reaffirmed in its decision in the case of *Lucas v. the United Kingdom* ((dec). no. 39013/02, 18 March 2003) that protests can constitute expressions of opinion within the meaning of Article 10 of the Convention. This case concerned an applicant who was arrested, detained and subsequently convicted of the offence of breach of the peace for having sat in a public road leading to a naval base in order to protest against the decision of the British Government to retain nuclear submarines.

50. In a similar vein, in its judgment in the case of *Tatár and Fáber v. Hungary* the Court considered that the public display for a short while of several items of clothing representing the "dirty laundry of the nation" amounted to a form of political expression. The Court referred to the applicants' actions as an "expressive interaction", and in rejecting the Government's argument that the impugned event had in fact constituted an assembly and thereby required scrutiny under Article 11 of the Convention, it held that the event had "constituted predominantly an expression" and had

thus fallen within the scope of Article 10 of the Convention (no. 26005/08 and 26160/08, §§ 29, 36 and 40, 12 June 2012).

51. The scope of "expression" was once again the subject matter of the Court's examination in the case of *Christian Democratic People's Party v. Moldova (no. 2)* which concerned a political party which had been prevented from holding a protest demonstration in a square because the Municipal Council had considered that during the meeting there would be calls to a war of aggression, ethnic hatred and public violence. The applicant Party's objection was rejected by the Court of Appeal, which held that the Municipal Council's decision had been justified because the leaflets disseminated by the applicant political party had contained such slogans as "Down with Voronin's totalitarian regime" and "Down with Putin's occupation regime". The Court of Appeal also recalled that during a previous demonstration organised by the applicant political party to protest against the presence of the Russian military in Transdniestria, the protesters had burned a picture of the President of the Russian Federation and a Russian flag. In its judgment the Court held that the applicant party's slogans, even if they had been accompanied by the burning of flags and pictures, were a form of expressing an opinion in respect of an issue of major public interest, namely the presence of Russian troops on the territory of Moldova (no. 25196/04, §§ 9 and 27, 2 February 2010).

52. The examples referred to above show that all means of expression are included in the ambit of Article 10 of the Convention. The Court has repeatedly stressed that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate of questions of public interest (see, *inter alia*, *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports* 1996-V). In the same vein, it considers that an assessment of whether an impugned conduct falls within the scope of Article 10 of the Convention should not be restrictive, but inclusive.

53. Moreover, the Court has held in cases concerning freedom of the press that it is neither for the Court nor for the national courts to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists because, as stated above (see paragraph 44 above), Article 10 of the Convention protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see, *inter alia*, *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298). The Court considers that the same can be said for any individual who may wish to convey his or her opinion by using non-verbal and symbolic means of expression, and it thus rejects the Government's argument that "[a]lthough the applicant had the right to express and disseminate his thoughts and opinions through speech, writing, pictures and other mediums without recourse to violence, he had chosen not to do so" (see paragraph 43 above).

54. In light of its case-law the Court considers that, in deciding whether a certain act or conduct falls within the ambit of Article 10 of the Convention, an assessment must be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the purpose or the intention of the person performing the act or carrying out the conduct in question. The Court notes that the applicant was convicted for having poured paint on statues of Atatürk, which, from an objective point of view, may be seen as an expressive act. Furthermore, the Court notes that in the course of the criminal proceedings against him the applicant very clearly informed the national authorities that he had intended to express his "lack of affection" for Atatürk (see paragraphs 11, 18 and 22 above), and subsequently maintained before the Court that he had carried out his actions with a view to expressing his dissatisfaction with those running the country in accordance with the Kemalist ideology and the Kemalist ideology itself (see paragraph 40 above).

55. In this connection, regard must be had to the fact that, contrary to what was submitted by the Government, the applicant was not found guilty of vandalism, but of having insulted the memory of Atatürk (see paragraph 20 above). In fact, the national courts accepted that the applicant had carried out his actions in order to protest against the Ministry of Education's decision not to appoint him as a teacher (see paragraph 19 above).

56. In light of the foregoing the Court concludes that through his actions the applicant exercised his right to freedom of expression within the meaning of Article 10 of the Convention and that that provision is thus applicable in the present case. It also finds that the applicant's conviction, the imposition on him of a prison sentence and his disenfranchisement as a result of that conviction constituted an interference with his rights enshrined in Article 10 § 1 of the Convention.

2. Compliance with Article 10 of the Convention

57. The applicant complained that his actions had been severely and disproportionately penalised and his right to freedom of expression had thus been breached.

58. The Government, beyond disputing the applicability of Article 10 of the Convention, did not seek to argue that the interference had been justified within the meaning of Article 10 of the Convention.

59. Interference with an applicant's rights enshrined in Article 10 § 1 of the Convention will be found to constitute a breach of Article 10 of the Convention unless it was "prescribed by law", pursued one or more legitimate aim or aims as defined in paragraph 2 and was "necessary in a democratic society" to attain them.

60. The Court observes that the restriction on the applicant's freedom of expression was based on the Law on Offences against Atatürk. As can be seen from its relevant provisions (see paragraph 31 above), it is sufficiently clear and meets the requirements of foreseeability. The Court is therefore satisfied that the interference was prescribed by law. Moreover, it considers that it can be seen as having pursued the legitimate aim of protecting the reputation or rights of others (see *Odabaşı and Koçak v. Turkey*, no. 50959/99, § 18, 21 February 2006; see also *Dilipak and Karakaya v. Turkey*, nos. 7942/05 and 24838/05, §§ 117, 130-131, 4 March 2014). It therefore remains to be determined whether the interference complained of was "necessary in a democratic society".

61. The Court reiterates that its supervisory functions oblige it to pay the utmost attention to the principles characterizing a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every individual. Subject to paragraph 2 of Article 10 of the Convention, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society" (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24).

62. This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued (*ibid.*). As set forth in Article 10 of the Convention, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, *inter alia*, *Zana v. Turkey*, 25 November 1997, § 51, *Reports* 1997-VII).

63. The Court has frequently held that "necessary" implies the existence of a "pressing social need" and that the Contracting States have a certain margin of appreciation in assessing whether such a need exists, but that this goes hand in hand with a European supervision (*ibid.*).

64. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole. In particular, it must determine whether the interference in question was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, *inter alia*, *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I). In this connection, the Court reiterates that the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference (see, *inter alia*, *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 66, ECHR 1999-IV).

65. The Court is aware that Atatürk, founder of the Republic of Turkey, is an iconic figure in modern Turkey (*Odabaşı and Koçak*, cited above, § 23), and considers that the Parliament chose to criminalise certain conduct which it must have considered would be insulting to Atatürk's memory and damaging to the sentiments of Turkish society.

66. Nevertheless, the Court is struck by the extreme severity of the penalty foreseen in domestic law and imposed on the applicant, that is over thirteen years of imprisonment. It also notes that as a result of that conviction the applicant has been unable to vote for over eleven years. In principle, the Court considers that peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence (see, *mutatis mutandis*, *Akgöl and Göl v. Turkey*, nos. 28495/06 and 28516/06, § 43, 17 May 2011). While in the present case, the applicant's acts involved a physical attack on property, the Court does not consider that the acts were of a gravity justifying a custodial sentence as provided for by the Law on Offences against Atatürk.

67. Thus, having regard to the extreme harshness of the punishment imposed on the applicant, the Court deems it unnecessary to examine whether the reasons adduced for convicting and sentencing the applicant were sufficient to justify the interference with his right to freedom of expression (see *Başkaya and Okçuoğlu*, cited above, § 65). Nor does it deem it necessary to examine whether the applicant's expression of his resentment towards the figure of Atatürk or his criticism of Kemalist ideology amounted to an "insult", or whether the domestic authorities had any regard to the applicant's freedom of expression, which he had brought to their attention on a number of occasions (see paragraphs 18 and 20 above). It considers that no reasoning can be sufficient to justify the imposition of such a severe punishment for the actions in question.

68. In the light of the foregoing, the Court concludes that the penalties imposed on the applicant were grossly disproportionate to the legitimate aim pursued and were therefore not "necessary in a democratic society". There has accordingly been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 3 OF PROTOCOL NO. 1 TO THE CONVENTION

69. Relying on Article 3 of Protocol No. 1 to the Convention the applicant complained about the ban which had been imposed on him by the domestic courts and which prevents him from voting. Article 3 of Protocol No. 1 to the Convention reads as follows:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

70. The Government contested that argument.

A. Admissibility

71. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

72. The applicant complained that his conviction had not only resulted in his imprisonment, but had also prevented him from, *inter alia*, voting.

73. The Government acknowledged that Article 3 of Protocol No. 1 guaranteed individual rights, including the right to vote and to stand for election, and did not contest that the applicant's right to vote had been restricted in the present case.

74. The Government referred to the Explanatory Report of the Criminal Code where the rationale behind section 53 of the Criminal Code is set out (see *Söyler*, cited above, § 17), and submitted that the legitimate aim of the restriction was the applicant's rehabilitation. They maintained that the restriction on the right to vote in Turkey was not a "blanket ban" because the applicable legislation limited the scope of the restriction in accordance with the nature of the offence. Referring to the judgment in the case of *Hirst v. the United Kingdom (no. 2)* ([GC], no. 74025/01, ECHR 2005-IX), the Government argued that, unlike the situation in the United Kingdom, the Turkish legislation restricting the right to vote was only applicable to persons who had committed offences intentionally. In the United Kingdom the legislation was applicable to all convicted prisoners detained in prisons, irrespective of the length of their sentence, the nature or gravity of the offence, and their individual circumstances.

75. In Turkey the constitutional provisions concerning the issue of prisoners' voting rights had undergone two amendments in 1995 and 2001. In 1995 the Constitution had been amended to exclude remand prisoners from the scope of the restriction because disenfranchising a person detained in prison pending the outcome of criminal proceedings against him was considered incompatible with the principle of presumption of innocence. In the 2001 amendment, persons convicted of offences committed involuntarily had been excluded from the restrictions on voting. As it stood today, the national legislation was applicable only in respect of offences committed intentionally. In the opinion of the Government, offences committed intentionally were "stronger" in nature as they included the element of "intention".

76. The Court points out that the rights guaranteed by Article 3 of Protocol No. 1 to the Convention are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law; a general, automatic and indiscriminate restriction on the right to vote applied to all convicted prisoners serving sentences is incompatible with that Article (see *Hirst (no. 2)* [GC], cited above, §§ 58 and 82). These principles were subsequently reaffirmed by the Grand Chamber in the case of *Scoppola (no. 3)* (cited above, §§ 82-84, 96, 99 and 101-102). The Court also reiterates that Article 3 of Protocol No. 1 applies only to the election of the "legislature" (see *Paksas v. Lithuania* [GC], no. 34932/04, § 71, ECHR 2011 (extracts)).

77. The Court observes that the applicant's conviction became final on 5 February 2007 and he was released from prison on licence on 11 June 2013. During that time he was not allowed to vote. Furthermore, in accordance with the applicable legislation, his disenfranchisement did not end when he was conditionally released from prison on 11 June 2013, but will continue until the date initially foreseen for his release, 22 October 2018 (see paragraph 24 above). Thus, between 5 February 2007 and 22 October 2018, that is, for a period of over eleven years, the applicant has been and will be unable to vote. The Court observes that two parliamentary elections were already held between 5 February 2007 and the date of the examination by the Court - on 22 July 2007 and 12 June 2011 - and the applicant was unable to vote in either of them.

78. In light of the above, the Court concludes that the applicant was directly affected by the measure foreseen in the national legislation which has already prevented him from voting on two occasions in the parliamentary elections.

79. The Court has already found it established that in Turkey disenfranchisement is an automatic consequence derived from the statute and that it is indiscriminate in its application in that it does not take into account the nature or gravity of the offence, the length of the prison sentence – leaving aside suspended sentences shorter than one year (see paragraph 33 above) – or the individual circumstances of those convicted. It has noted moreover that the Turkish legislation contains no express provisions categorising or specifying offences for which disenfranchisement is foreseen and that the automatic and indiscriminate application of this harsh measure in Turkey regarding a vitally important Convention right does not fall within any acceptable margin of appreciation (see *Söyler*, cited above, §§ 36-47).

80. Nothing in the present case allows the Court to reach a different conclusion. In the light of the above, the Court concludes that there has been a violation of Article 3 of Protocol No. 1 to the Convention on account of the applicant's disenfranchisement.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

81. The applicant complained that, by imposing on him the maximum prison sentence applicable under domestic law and calculating his prison sentence on the basis of a new law (Law no. 5275), his rights under Articles 5, 6 and 7 of the Convention had been breached. The applicant further complained that Law no. 5816 was incompatible with Article 14 of the Convention because it gives the judge too wide a discretion to choose a prison sentence of between one year and five years. As a result, different courts handed down different sentences for the same offence. Finally, relying on Article 11 of the Convention, the applicant complained about the ban which was imposed on him by the domestic courts and which prevented him not only from voting and taking part in elections, but also from running associations, parties, trade unions and cooperatives.

82. Having regard to its conclusions under Article 10 of the Convention and Article 3 of Protocol No. 1 (see paragraphs 68 and 80 above), the Court considers it unnecessary to examine the admissibility and merits of these complaints.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

83. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

84. The applicant claimed 60,000 euros (EUR) in respect of pecuniary damage and EUR 65,000 in respect of non-pecuniary damage. In calculating his claim for pecuniary damage the applicant relied on the minimum wage and multiplied it by the total number of months he was sentenced to serve in prison.

85. The Government argued that the applicant's claims were excessive and unsupported by evidence.

86. Having regard to the applicant's failure to submit to the Court any documents showing his employment status, income and loss of income, the Court rejects the applicant's claim for pecuniary damage. On the other hand, it awards the applicant EUR 26,000 in respect of non-pecuniary damage.

B. Costs and expenses

87. The applicant also claimed EUR 50,000 for the costs and expenses incurred before the domestic courts and the Court.

88. The Government considered the claim for costs and expenses to be unsupported by any documentation.

89. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the applicant has not shown that he has actually incurred the costs claimed. In particular, he failed to submit documentary evidence, such as a contract, a fee agreement or a breakdown of the hours spent by his lawyer on the case. Accordingly, the Court makes no award in respect of the fees of his lawyer.

C. Default interest

90. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares,* unanimously, admissible the complaints under Article 10 of the Convention and Article 3 of Protocol No. 1 to the Convention;

2. *Holds*, unanimously, that there has been a violation of Article 10 of the Convention;

3. *Holds*, unanimously, that there has been a violation of Article 3 of Protocol No. 1 to the Convention;

4. *Holds*, unanimously, that there is no need to examine the admissibility and merits of the complaints under Articles 5, 6, 7, 11 and 14 of the Convention;

5. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 26,000 (twenty-six thousand euros), in respect of non-pecuniary damage, plus any tax that may be

chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses*, by six votes to one, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 21 October 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Guido Raimondi
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Sajó and joint separate opinion of Judges Nebojša Vučinić and Egidijus Kūris are annexed to this judgment.

G.R.A.
S.H.N.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE SAJÓ

I.

The applicant Murat Vural was convicted for pouring paint on a statue of Kemal Atatürk. He was sentenced to serve the statutory maximum of five years for the insult. The punishment was increased to a total of thirteen years, one month and fifteen days' imprisonment.

I fully agree with my colleagues that Article 10 of the European Convention of Human Rights was violated in this case. The reason given in the judgment is that, in the absence of violence, the impugned act is of insufficient gravity to justify the extreme harshness of the punishment. I agree that such punishment is *per se* unacceptable but, in my view, this limited consideration that concentrates on the extreme harshness of the punishment does not provide adequate protection for the freedom of expression. This shortcoming forces me to discuss the methodology that was applied in the case. It was the straightjacket of a "standard" proportionality analysis that hampered the full protection of free speech that is envisioned in the Convention.

A three-step "standard" proportionality analysis (the interference is prescribed by law, serves a legitimate aim, and is "proportionate to the legitimate aims pursued") is the hallmark of this Court's judgments in Article 8-11 cases[1].

I have reservations as to the use of that methodology in the present case, where the matter was decided on the grounds of the disproportionality of the punishment. I also find the "standard" proportionality approach inappropriate in all cases where a freedom is unconditionally restricted by legislation.

First, it is not clear what makes the punishment disproportionate. My gut feeling indicates that the sanction is disproportionate, but in regard to what and in which sense? Would a one-year mandatory sentence be proportionate? Is it really a matter of proportionality which concerns us? Second, by grounding the finding of a violation in the severity of the punishment, the Court diverts attention from the more fundamental issue, namely the permissibility of sanctioning an "insult to memory" at all. The present case concerns the Article 10 rights of the applicant, therefore the

1. In other contexts the Court uses a category-based approach. This is the approach in Article 3 cases, and to some extent even in the context of freedom of expression under Article 17, as certain categories of expression are deemed not worthy of protection because they are abusive, therefore belonging to a category that is impermissible and not protected.

Court should have considered the effect of the interference on the applicant's freedom of expression.

Proportionality of the punishment

What are the problems with a finding of a violation based on the excessive nature of the punishment? First, this Court, of all courts, cannot rely on a crude sense of justice (though all judicial decisions rendered in disregard of the sense of justice are open to criticism). This Court is concerned with the legitimacy of restrictions on human rights under the Convention and not with the appropriateness of sanctions measured on some mysterious scale. The Convention contains no prohibition on unusual punishment and we are not called upon to evaluate sentencing.

When judges and laymen talk about disproportionate punishment, they often compare the punishment imposed for a given crime with the punishment of another crime, or with the punishment of another person for a similar, comparable crime, or even with the moral seriousness of the crime in relation to the punishment[2].

In the present case there is no specific reason given as to *why* the punishment is grossly disproportionate. Where judicial intuition determines that a matter does not deserve further clarification, those who are not privy to the intuition remain puzzled. Would one year be acceptable, for example, because the statue had to be cleaned or repaired? The Court does not even provide a comparable reference, a *tertium comparationis*; for example, the fact that thirteen years is a sentence that is ordinarily imposed on murderers. Under that reasoning, the present conviction treats the attack on memory as if were an attack on human life, thus attributing equal weight to life and to the honouring of a deceased person's memory (where the comparator is harm to individuals or harm to the community).

Because the dictates of the sense of justice are satisfied and the talismanic word "disproportionate" is used, the judgment of the Court looks satisfactory. It is not. I share the feelings of my colleagues as to the gross inappropriateness of the sentence, but in an Article 10 case this is not the gist of the rights protection: the Court should look into the necessity of the interference in the light of its impact on the expression concerned.

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2. In *Buitoni v Fonds d'Orientation* [1979] ECR 677, the European Court of Justice found a penalty for failing to report the use of a licence disproportionate because the penalty was the same as for the actual use of the licence. In *Buitoni* it was intuitively accepted that not reporting a crime and committing that crime could not be the same and did not deserve the same treatment. This is so obvious that it needs no further explanation.
I follow here Bernhard Schlink, *Proportionality (1)* and Aharon Barak, *Proportionality (2)* in M. Rosenfeld and A. Sajó: *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press 2012.

The substantive issue: punishing specific content

The text of the Convention requires the Government to prove that an interference was necessary in a democratic society, and it is in the context of such necessity that the question of proportionality arises. The real issue in this case is not that an excessively severe punishment was imposed for an expressive act that did not cause serious damage, but that a whole class of expression (insults to Atatürk's memory) and related expressive acts are considered to be a crime *for their content*. The law that was applied singles out very specific content: all speech (including expressive action, as in the present case) that publicly insults the memory of Atatürk is punishable. The issue is not the protection of all public statues where harm to the statue has been caused by an expressive action. The issue, which is buried under the outrage of the excessive sentence, is the *singling out of specific speech content for punishment*. Law no. 5816 provides first and foremost that any "disrespect for Atatürk's memory" is to be punished by a prison sentence of between one and three years, the use of paint on a monument ("dirtying of a statue") raising the sentence to five years; the applicant was then given an *additional* eight years of punishment *for the aggravating circumstances*.

Of course, eight *additional* years for degrading a statue is excessive in view of the degree of harm caused by the act, but this Court is "only" called upon to see whether a limitation of freedom of expression is necessary in a democratic society.

I would argue that the problem can be better decided using a category-based analysis of the legislation, and even by an enhanced proportionality analysis of the means/end relationship of the legislation and the objective value of the intended aim, as is carried out, for example, in Canada and Germany. These approaches are superior to the Court's "standard", often narrowly case-related analysis because they are more convincing and, above all, offer a better, broader, and more equivalent protection to free speech against governmental abuse.

The legislature's predominant concerns in Law no. 5816 are with the content of the speech as opposed to its secondary effects; it expresses the legislature's disagreement with the message the act conveys. In the category-based approach of the United States First Amendment law, known as the "categorical approach"[3], this is plainly unconstitutional. So what is wrong with content discrimination? It is wrong because the Government disregard content-neutrality without compelling reasons. The requirement of content neutrality follows from the assumption that content-based restrictions ("content-discrimination") target specific messages, thus

3. See *Texas v. Johnson,* 491 U.S. 397 (1989). For the advantages of the categorical approach see below.

resulting in thought control, and "[such a restriction] raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.[4]"

The shortcomings of the "standard" proportionality approach

The judgment operates within the straightjacket of the proportionality analysis; it is for this reason that the Court fails to make explicit the underlying ("structural") problem of Law no. 5816. I am aware of the advantages of the three mechanical prongs of the "standard" proportionality analysis. They offer considerable legal certainty; the approach also offers the advantages of economies of scale. This kind of manufacturing certainty is understandably attractive where a court has thousands of cases and where a court is called upon to give advice to judges reading our judgments in forty-seven different member States.

However, even within the proportionality analysis there are other methods, slightly more complex in nature than the three-pronged approach used by the Court. One may add other levels of scrutiny.

Among others, when determining a measure's quality as a means to reach a (legitimate) end, the search must begin at the abstract level of the legislation. This search is particularly demanding (and therefore efficient) if and when a court enters into a substantive analysis of the veracity of the allegation that a regulatory measure actually serves a purported end. Moreover, the importance of the end itself may be subject to judicial analysis. Using this approach in the Articles 8-11 context, the Court would have to review how important and genuine the references are to one or another aim recognised in the Convention as a ground for restricting a Convention right. Is the end genuine? Or instead, is it a bluff couched in terms of public interest that pretends to be beyond the reach of judicial scrutiny in the name of democratic legitimation of the legislature?

Moreover, is the chosen means narrowly tailored? Is it not the case that the criminal provision is over-broad, even considering the need for sensitivity protection?

Where, as in the present case, the argument is made that the sensitivities and deep feelings of a population are to be protected, a court could and should take a long look at the relationship of this allegation to the "rights of others". To accept that all interests "amount to rights of others" and claim that all these alleged rights are of equal weight to that of Convention human rights is extremely dangerous for human rights: not all rights are created as equal. Is there a right to have one's feelings and deeply held convictions left

4. *Simon and Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116 (1991).

undisturbed? Are feelings to be protected from potential inconvenience as a matter of right? Further, even assuming that all alleged interests constitute rights (a position that I find untenable), is this alleged right *per se* sufficient to justify certain forms of Convention-rights restriction (especially blanket bans, which used to be highly suspect even for the Court, at least until very recently, in the freedom of expression context)? This same analysis may also be appropriate when addressing the specific circumstances of the case at a later stage of the analysis; something that is often done in the form of balancing, as if Convention rights and other interests were of equal importance!

It may well be that certain measures simply do not serve the purported end or at least that they are not the least restrictive possible. One should ask the question: is mandatory imprisonment the only available means to protect political memory?

Of course, even if in the abstract the rights-restrictive means are acceptable and rationally connected to the legitimate and genuine end, their application in the specific context (the conduct of the applicant) may be disproportionate, because there are *lesser rights-restrictive means* to achieve the end in the circumstances of the case. In other instances it can be said (sometimes using the language of balancing) that the restriction on a right as a means to an end is excessive because it undermines the very right which one values more than the end. It should be added, in this logic, that Convention human rights are of a specific value (being singled out as superior values in an international convention).

Going beyond the above-mentioned, more demanding forms of scrutiny within the proportionality methodology, freedom of expression cases are sometimes (even regularly in the United States) resolved using a *categorical* approach[5]. In principle, such an approach guarantees freedom of expression unequivocally and with more certainty than a case-by-case analysis, where the metrics of proportionality and balancing are not spelled out. The uncertainty that is inherent in the case-based proportionality analysis invites authorities to attempt to impose further restrictions. More importantly, it discourages speakers.

A court of human rights must go to the heart of this matter. In Turkey it is possible to imprison someone for an offence against the memory of Atatürk. I have no doubts that the Turkish nation has strong feelings of respect towards the founder of the modern Turkish State, and it is within the constitutional powers of the Turkish nation to express such feelings. I have full respect for these sentiments, but equally strong reservations as to the legal enforcement of sensitivities in matters of speech[6]. I understand that the

5. A categorical approach is used against applicants, but not against States, in the Article 17 context (see *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX).

form of the expression is problematic here but, as the judgment demonstrates, it falls within expressive conduct; the pouring of paint is a form of expression, disputable though it may be[7]. Destruction caused to a statue or other piece of art is an ordinary crime; to destroy Michelangelo's "Pieta" would indeed be a serious crime. But in the present case it was the expressed content that was the ground for the conviction: the object of the crime is clearly "the memory of Atatürk" and not the alleged vandalism, which of course might otherwise be subject to criminal sanctions. Moreover, I can envision the need for such a dramatic form of expression of political discontent in certain circumstances, a matter that did not have to be addressed in the present case. The Turkish courts never entered into a discussion of the appropriateness of the expressive act. In any event, all forms of expression of dislike of Atatürk and his memory, all the underlying discontent with the political system created by Atatürk and based on his political vision, are prohibited: this is the primary and fundamental issue.

I can envision situations where punishment for a similar offence is appropriate or even necessary in a democratic society, where insult to memory amounts to a call to violence or hatred against identifiable individuals, but that element is not required by the present law and no such danger is present in this case. It is the mere fact of the insult that is criminalised.

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6. The Court accepted in *Otto-Preminger-Institut v. Austria* (20 September 1994, Series A no. 295-A) that protection against indignation caused by "offensive" speech was a legitimate aim within the concept of the rights of others, at least where the right was freedom of religion. *A, B and C v. Ireland* ([GC], no. 25579/05, § 232, ECHR 2010) goes beyond a Convention-right-related concern. Here it was not popular religious sensitivity that was to be protected and considered by the Court in a balancing exercise. The Court said that where the case raised sensitive moral or ethical issues, the margin of appreciation would be wider (but compared to what?), so the Court was technically not even compelled to go into genuine balancing (which it did anyway, in an Article 8 context). The Court concluded that "profound moral values" of the majority entered into the realm of legitimate aims of rights limitation, namely "protection of morals", hence the matter was to be treated under the necessity test. Both judgments resulted in strong dissents and criticism. Under this logic, if applied to freedom of expression, the argument might go like this: the "deep sense of respect and adoration" amounts to a profound moral value; therefore – as is common in the context of disparagement of national symbols – national unity or respect for the nation as such are foundational for public morals. History shows the speech-restrictive consequences of such authority-respecting (if not outright authoritarian) approaches.

7. I am not denying that the use of such a form of expression, although it clearly falls within the ambit of Article 10, may not be necessary in a democratic society in given circumstances. Furthermore, there are other legitimate aims that could make such a restriction proportionate. But the present law simply precludes such analysis. (For a similar problem see *Vajnai v. Hungary*, no. 33629/06, ECHR 2008.)

The limited analysis, resulting from the standard proportionality test, precludes the consideration of the law's impact on all speech acts. It is for this reason that the Court did not have the opportunity to look into the real problem. However, the Convention and even our own methodology calls us to consider the impact of the restriction on freedom of expression. "It is recalled that there is little scope under Article 10 § 2 for restrictions on debates on questions of public interest.[8]" The Court has always accepted that "there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest.[9]" The expressive act of the applicant, being political speech, should have triggered strict scrutiny, and the Government certainly failed to provide justification based on compelling reasons why they had to criminalise insults to memory. Given that the law is content-discriminatory, we do not have to look into the effects of a content-neutral law such as the criminalisation of the destruction of statues.

Where disrespect for the memory of a political figure is punished, this has a chilling effect on all speakers. The State has not shown any compelling interest for this restriction. I cannot see the reasonable purpose of such a measure in a democratic society, given that no democratic society can exist without free expression on political matters[10]. Even assuming that the deep feelings of the Turkish people will be hurt at the sight of the paint on the statue or on hearing disrespectful words, I cannot see how this can be a sufficient justification in a democratic society, where even disturbing political opinions are to be accepted.

This fundamental consideration is grievously absent in Turkish law when the mandatory sanction is one year in prison, let alone the thirteen years imposed on applicant. A law which enables, and even mandates, such interference is incompatible with the necessities of a democratic society. This Court should not shy away from considering the impermissibility of

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8. See *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports of Judgments and Decisions* 1996-V.

9. See *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV.

10. The best part of this Court's Article 10 jurisprudence requires that a demanding scrutiny be applied to political speech, precisely because of the crucial importance of such expression for a democratic society. (See *Ceylan v. Turkey* [GC], no. 23556/94, § 34, ECHR 1999-IV, *Öztürk v. Turkey* [GC], no. 22479/93, § 66, ECHR 1999-V, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, § 92, ECHR 2009; citing: *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103; *Castells v. Spain*, 23 April 1992, § 43, Series A no. 236; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239; *Wingrove*, cited above, § 58; and *Monnat v. Switzerland*, no. 73604/01, § 58, ECHR 2006-X). The present case is about political speech. Under this traditional approach of proportionality the measure is disproportionate not for the severity of the conviction but because of the insufficiency of the reasons justifying the interference.

the alleged purpose of legislation that seemingly fits into one of the (over) broad categories of permissible restriction ("rights of others")[11].

Given the chilling effect of the sanction in Law no. 5816, I would have used a categorical approach: the criminal law is never appropriate as a means to protect other people's political sensitivity, where the disrespect caused to a political figure does not amount to an actual (true) threat or call to violence. Such laws are simply not necessary in a democratic society (outside emergencies), being contrary to the fundamental assumptions of such a society based on free debate and exchange of ideas. The mere existence of content-prohibiting laws endangers and sometimes kills freedom of thought. It is fundamental for a democratic society that its citizens be treated as adults who accept, or learn to tolerate, even speech that they find offensive. This is the price to be paid for a free and democratic society.

A rather similar speech-protective result could have been achieved even within an enhanced proportionality analysis: the end, namely the protection of the alleged right of others, is such that it does not necessitate a prison sentence – not just in the present circumstances of a thirteen-year term, but also in general. In a proportionality analysis that looks first at the very law that is the source of an interference, one looks at the law as a means chosen and at the end served (the protection of alleged feelings). The means are excessive here in the light of the end, among other things because the end itself is problematic; the end in itself is simply not worth the inevitable sacrifice of freedom of expression resulting from the means chosen, but also from any less radical means. Alternatively, the present end is not legitimate; or, to the extent it might be legitimate for some, the means chosen are certainly not the least restrictive possible.

Following the "standard" methodology I have signed on to many judgments where the severity of punishment was held to be an important or the decisive element of the disproportionality finding. The underlying message in those cases was clear: it is inappropriate in a democratic and free society at the level of civility and "civilisation" that Europe hopes to have

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11. To consider legislation as being compatible *in abstracto* with the grounds for restriction enumerated in paragraph 2 of Article 10 has in principle been recognised by the Court. This is how Sir Nicolas Bratza summarised the Court's position: "Where, however, as here, the interference springs directly from a statutory provision which prohibits or restricts the exercise of the Convention right, the Court's approach has tended to be different. In such a case, the Court's focus is not on the circumstances of the individual applicant, although he must be affected by the legislation in order to claim to be a victim of its application; it is, instead, primarily on the question whether the legislature itself acted within its margin of appreciation and satisfied the requirements of necessity and proportionality when imposing the prohibition or restriction in question." (Concurring opinion of Judge Bratza in *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, ECHR 2013).

achieved to use sanctions, especially criminal sanctions, for thought crime (and criminal sanctions in cases of reputational harm)[12]. But in those cases the Court did not find it appropriate to make express statements in this sense, probably as a result of its putative role related to Article 27 § 1 and Article 34 of the Convention, although pursuant to Article 19 the Court is called upon to ensure the observance of the engagements undertaken by the Parties; "engagements" that are of a general and structural nature. The Law at issue constitutes a blanket ban on the expression of specific political content for the sake of public sensitivities elevated to the status of a "right". In view of these engagements, content discrimination for the sake of the protection of the memory of a national hero by criminal law is incompatible with the Convention. In the present circumstances of extreme harshness, which will inevitably be repeated, this has to be made clear.

II.

The present judgment provides just satisfaction for the non-pecuniary damage suffered by the applicant. This is proportionate in the sense that it falls within the range of satisfaction provided in other similarly grave freedom of expression and disenfranchisement cases. (One may have doubts that such an amount is equitable in view of the seven years of unmerited suffering in prison). I accept that the amount follows our practice. But with all due respect, I cannot agree with my colleagues as regards pecuniary (material) damage, even if denial of an award on this ground is not uncommon in comparable cases. The applicant certainly suffered material damage (loss of income) because of his incarceration: there is a causal link with a loss of income. This loss is hard to quantify, but technical difficulties of calculation cannot negate the existence of a loss: the applicant was a qualified teacher, albeit unemployed before his conviction, who would have earned a living like any average person in his situation, had he not been incarcerated in violation of the Convention. The loss is thus quantifiable, either on the basis of the average income of a teacher in his position, or at least with regard to the minimum income of an employed person (using the unfair assumption that he could not have found a position in education). Moreover, because of the conviction, he will not be able to work again as a civil servant (it is even unlikely that, having been released on licence, he will find a position as a teacher in private education). To determine the loss

12. After all, this is the unequivocal message of those judgments which state that even a sanction of one euro (i.e. any sanction) might be disproportionate (see *Eon v. France*, no. 26118/10, 14 March 2013, and *Colombani and Others v. France*, no. 51279/99, ECHR 2002-V). For the *per se* inappropriateness of criminal sanctions for certain categories of expression, see, for example, *Lehideux and Isorni v. France*, 23 September 1998, § 57, *Reports* 1998-VII.

of future income is not rocket science and courts do use estimates in such circumstances, taking life expectancy into consideration. I have had the opportunity to express my reservations regarding the Court's parsimonious approach in matters of pecuniary damage, concerned as it is with the risk of "speculative" awards. The "gross injustice" suffered by the applicant in the present case forces me to reach the sad conclusion that the Court has departed from those standards of remedy that national courts and international law find to be a matter of course; and a matter of reason[13].

Finally, the Court should have applied the Gençel[14] clause: the case should be reopened and the continuing effects of the applicant's conviction, in particular his release on licence, must be remedied.

13. For a criticism of departure from international law in the property context see *Guiso-Gallisay v. Italy* (just satisfaction) [GC], no. 58858/00, 22 December 2009, dissenting opinion of Judge Spielmann: "Through its judgment in this case the Court has departed from its settled case-law, a case-law that, moreover, is in conformity with the principles of international law on reparation, ... I refer to the principle of *restitutio in integrum*. This principle enshrines the obligation on a State that is guilty of a violation to make reparation for the consequences of the violation found." I voiced my discontent as regards a similarly parsimonious denial of just satisfaction in *Kayasu v. Turkey*, nos. 64119/00 and 76292/01, 13 November 2008 (dissenting opinion of Judge Sajó).
14. *Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003.

JOINT CONCURRING OPINION OF JUDGES VUČINIĆ AND KŪRIS

It is more than obvious that the situation examined in this case discloses certain fundamental issues related to the limits of freedom of expression and especially to their impact on the persons concerned. Like Judge Sajó, we also regret that these issues have been evaded in the judgment. Our approach to these issues in great part, but by no means in full, corresponds to that which is advanced in Judge Sajó's separate opinion.

FRUMKIN v RUSSIA

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Application No.74568/12

The President, Judge López Guerra; Judges Jäderblom, Nicolaou, Keller, Silvis, Dedov, Lubarda: 5 January 2016

(2016) 63 E.H.R.R. 18

Arrest; Demonstrations; Freedom of assembly and association; Police; Positive obligations; Remand; Right to fair and public hearing; Right to liberty and security; Russia

H1 On 6 May 2012 the applicant was arrested during the dispersal of a political rally at Bolotnaya Square in Moscow, detained for at least 36 hours, and found guilty of an administrative offence. On 23 April 2012 notice of the rally was submitted to the mayor of Moscow. On 3 May 2012 a route for the demonstration was approved. Notification of another public event on the same date had been rejected by the Moscow authorities and the organisers had expressed an intention to proceed in defiance of the ban, squat on Manezhnaya Square and resist the police. At a meeting on 4 May 2012 between the organisers of the first rally and the authorities it was agreed that the route would be the same as a previous demonstration they had organised in February 2012 which included accessing the meeting point through the park. On 5 May 2012 the authorities published the route of the march which included access to Bolotnaya Square through the park. A security plan was adopted to safeguard public order which included the police and military to police designated security areas and to prevent unauthorised public gatherings and terrorist attacks. The plan included a police cordon which excluded the park from the meeting venue which was restricted to Bolotnaya embankment.

H2 The number of participants in the march exceeded expectations. As the protestors approached Bolotnaya Square the leaders found that the layout of the meeting venue and placement of the police cordon had changed and they were unable to access the park. The protestors demanded that the police move the cordon to allow access to the assembly point for the meeting. The cordon officers did not discuss the matter with the protest leaders and no senior officer was delegated to negotiate. The leaders commenced a sit-down protest and called on other demonstrators to do the same. Two state Duma deputies contacted senior officers to negotiate moving the cordon behind the park. The crowd around the sit-down protest increased causing congestion. The leaders abandoned the protest and headed towards the meeting point. The police cordon was briefly broken in several places and the crowd were pushed into the restricted area. At 18.00 the police announced that the meeting was closed but the message was not heard by most of the demonstrators.

At 18.15 riot police broke into the demonstration to disperse the crowd and make arrests. Some of the protestors resisted and the police used combat techniques and truncheons. The police arrested two of the leaders on the stage because they told the protestors to disobey police orders to leave.

H3 In May 2012 a criminal investigation was opened into the suspected mass disorder and violent acts used against the police and the offence of organising mass disorder contrary to art.212(1) of the Criminal Code. The Investigative Committee was asked to open a criminal investigation into the conduct of the police. On 13 August 2012 the Moscow Interior Department stated that after the working meeting on 4 May 2012 a security plan and map which provided for the park to be cordoned off were prepared at short notice and not discussed with the organisers or published as they were for internal use regarding the placement of police forces. The Investigative Committee concluded that the sit-down protest provoked mass disorder and the police detained those involved with justifiable use of force. The institution of criminal proceedings against the police was refused in the absence of *corpus delicti*.

H4 The applicant stated that he arrived at Bolotnaya Square at about 18.00 to take part in the meeting and that the stage area was peaceful but there was general confusion. He denied hearing an announcement terminating the meeting and was unable to follow police orders to disperse due to the general commotion. The applicant alleged that he was arbitrarily arrested at 19.00. The Government alleged that he was arrested for obstructing the traffic and disregarding police orders to disperse. The applicant was charged with committing an administrative offence under art.19.3(1) of the Code of Administrative Offences and detained in custody for at least 36 hours. On 8 May 2012 the applicant was produced in court. His requests that: the case be adjourned because he was unfit to stand trial; the case be open to the public; and two officers be examined as witnesses were dismissed. The applicant was found guilty of disobeying lawful police orders and sentenced to 15 days' administrative detention. The decision was upheld on appeal.

H5 **Held** unanimously:

(1) that the complaints under arts 5, 6, 11 and 18 were admissible and the remainder of the application inadmissible;
(2) that there had been a violation of art.11 on account of the authorities' failure to ensure the peaceful conduct of the assembly at Bolotnaya Square;
(3) that there had been a violation of art.11 on account of the applicant's arrest, pre-trial detention and administrative sentence;
(4) that there had been a violation of art.5(1);
(5) that there had been a violation of arts 6(1) and (3)(d);
(6) that there was no need to examine the remainder of the complaints under art.6;
(7) that there was no need to examine the complaint under art.18;
(8) that the respondent State pay the applicant a sum in respect of non-pecuniary damage, costs and expenses; and
(9) that the remainder of the applicant's claim for just satisfaction be dismissed.

1. Security measures; early termination of demonstration; arrest (art.11)

H6 (a) The security plan to safeguard public order on 6 May 2012 was complex and provided for an unprecedented scale of police presence and equipment due to anticipated unauthorised street protests. The authorities suspected that had opposition activists planned a popular uprising which included unlawful public assemblies and campsites. They obstructed access to the park of Bolotnaya Square and restricted the assembly venue to the embankments where tents could not be easily set up. The setting up of a campsite was capable in certain circumstances of constituting a form of political expression, the restriction of which had to comply with art.10(2) and compliance under art.11 had to be considered in the light of art.10. The decision to close the park to the rally was not in itself hostile because the embankment had sufficient capacity to accommodate the assembly even with an increased number of participants. Equally, it was not unreasonable for the organisers to have expected that the park was included in the assembly venue. The security plan and maps drawn up by the police after the working meeting were not shared with the organisers. A different map of the venue was published which included the park and implied some sort of official endorsement. It was unlikely that the authorities were unaware of the content of the published map given the scale of the security operation. There was therefore at least tacit, if not express, agreement that the park formed part of the meeting venue. [105]–[112]

H7 (b) It had been established that the sit-in leaders had demanded that the police move the cordon to allow access to the park. It was clear from the available evidence that the sit-in was totally peaceful, however intervention by the authorities was required to resolve the situation. The standoff lasted for about 45–50 minutes and there were no senior officers present to discuss the issue with the protestors. The identity of the official who took the decision regarding the cordon was not disclosed in the evidence. Senior officers had the opportunity to contact the organisers by telephone and to personally approach the sit-in participants. The security plan was not followed in terms of the individuals assigned to meet the organisers prior to the march and did not assign an officer to liaise with the assembly organisers. The tension caused by the placement of the police cordon could have been reasonably dealt with if competent officials had come forward to communicate with the organisers. The police had failed to provide a reliable channel of communication with the organisers and to respond to the developments in a constructive manner. The authorities had made insufficient effort to communicate with the assembly organisers to resolve the tension caused by confusion over the venue layout and as a result the situation escalated into disruption. The authorities had failed to discharge their positive obligation to ensure the peaceful conduct of the assembly, to prevent disorder and to secure the safety of all the citizens involved and there had been a violation of art.11. [116]–[130]

H8 (c) The failure to resolve the police cordon resulted in congestion which caused the cordon to break briefly and the closure of the meeting at 18.00 but there had not been any widespread disorder or intensive fighting. The assembly was not suspended prior to termination in breach of s.15.3 of the Public Assemblies Act. The tensions were isolated to the area at Malyy Kamenny Bridge and the rest of the venue remained calm. The authorities did not attempt to separate the problem area and resolve the problems. The termination of the meeting was not inevitable and even if there had been a real and imminent risk that violence would spread and

intensify, the decision could have been implemented in different ways and using various methods. The area within the cordoned perimeter of the meeting venue at Bolotnaya embankment remained peaceful throughout and was virtually empty during the sit-in. After the sit-in and the arrest of two of the organisers people congregated in that area and passively refused to follow police orders to leave. The police did not use force against those protestors to the same extent as they did at Malyy Kamenny Bridge and steadily pressed them towards the exits and arresting selected individuals. The time of the applicant's arrest was irrelevant for the purposes of art.11 which continued to apply even after the assembly was officially terminated. The applicant had not been accused of violent acts or of resisting the termination of the assembly. His arrest was not justified and was grossly disproportionate to the aim of public safety. There was no "pressing social need" to arrest, detain and sentence him to a prison term. The sanction had a serious potential to deter other opposition supporters and the public form attending demonstrations and participating in open political debate. The applicant's arrest, pre-trial detention and administrative penalty violated art.11. [131]–[142]

2. Arrest and pre-trial detention (art.5(1))

H9 Even if the applicant's arrest had been justified by the preceding disorder at Malyy Kamenny Bridge, his detention at the police station was not. As a general rule the duration of administrative detention should not exceed three hours. The applicant was remanded for 36 hours. In the absence of any evidence that the case was exceptional or that his detention was necessary for the examination of the alleged offence, the length of the applicant's detention was unjustified and arbitrary. There had been a violation of art.5(1) on account of the lack of reasons and legal grounds for remanding him in custody pending the hearing of his case. [148]–[152]

3. The administrative proceedings (art.6(1))

H10 The applicant's conviction was based on: the reports of the arresting officers; the explanatory note of one of the arresting officers; the statement on the administrative offence; the detention and escorting orders. The documents were inconsistent regarding the time of the applicant's arrest. The applicant stated that he had been arrested during the authorised time-slot of the assembly and there had not been any traffic in the area. His account was corroborated by three eye witnesses, one of whom had never met the applicant before. The court rejected the video recording submitted and refused to call or examine the two arresting officers. The court based their judgement exclusively on standardised documents submitted by the police without considering other available evidence and failed to consider the "lawfulness" of the police order. The administrative proceedings against the applicant, taken as a whole, were conducted in violation of his right to a fair hearing. [163]–[167]

4. Conditions of detention (arts 3 & 13)

H11 The Russian legal system did not have an effective remedy in respect of complaints about conditions of pre-trial detention and the six-month period ran from the end of the situation complained of. The applicant's pre-trial detention

ended on 8 May 2012. His complaint was lodged outside the six-month time limit on 9 November 2012 and was rejected. [177]–[178]

H12 **The following cases are referred to in the Court's judgment:**
Al-Khawaja v United Kingdom (2012) 54 E.H.R.R. 23
Ananyev v Russia (2012) 55 E.H.R.R. 18
Barberà v Spain (1989) 11 E.H.R.R. 360
Bulut v Austria (1997) 24 E.H.R.R. 84
Coster v United Kingdom (2001) 33 E.H.R.R. 20
Delta v France (1993) 16 E.H.R.R. 574
Engel v Netherlands (1979–80) 1 E.H.R.R. 647
Ezeh v United Kingdom (2004) 39 E.H.R.R. 1
Ezelin v France (1992) 14 E.H.R.R. 362
Galstyan v Armenia (2010) 50 E.H.R.R. 25
Giuliani v Italy (2012) 54 E.H.R.R. 10
Kudrevičius v Lithuania (2016) 62 E.H.R.R. 34
Lucà v Italy (2003) 36 E.H.R.R. 46
Makhmudov v Russia (2008) 46 E.H.R.R. 37
Menesheva v Russia (2007) 44 E.H.R.R. 56
Plattform Ärzte für das Leben v Austria (1991) 13 E.H.R.R. 204
S v United Kingdom (2009) 48 E.H.R.R. 50
Schwabe v Germany (2014) 59 E.H.R.R. 28
Steel v United Kingdom (1999) 28 E.H.R.R. 603
Taxquet v Belgium (2012) 54 E.H.R.R. 26
United Communist Party of Turkey v Turkey (1998) 26 E.H.R.R. 121
United Macedonian Organization Ilinden-Pirin v Bulgaria (2007) 44 E.H.R.R. 4
Vidal v Belgium (A/235-B) 22 April 1992
Gerger v Turkey (24919/94) 8 July 1999
Drieman v Norway (33678/96) 4 May 2000
Stankov v Bulgaria (29221/95 and 29225/95) 2 October 2001
Osmani v Yugoslav Republic of Macedonia (50841/99) 11 October 2001
Solakov v Yugoslav Republic of Macedonia (47023/99) 31 October 2001
Cisse v France (51346/99) 9 April 2002
Lavents v Latvia (58442/00) 28 November 2002
Ziliberberg v Moldova (61821/00) 4 May 2004
Popov v Russia (26853/04) 13 July 2006
Oya Ataman v Turkey (74552/01) 5 December 2006
Giulia Manzoni v Italy (19218/91) 1 July 1997
Grishin v Russia (30983/02) 15 November 2007
Achouguian v Armenia (33268/03) 17 July 2008
Melich and Beck v Czech Republic (35450/04) 24 July 2008
Molnar v Hungary (10346/05) 7 October 2008
Sergey Kuznetsov v Russia (10877/04) 23 October 2008
Polyakov v Russia (77018/01) 29 January 2009
Denisenko and Bogdanchikov v Russia (3811/02) 12 February 2009
Protopapa v Turkey (16084/90) 24 February 2009
Barraco v France (31684/05) 5 March 2009
Rai and Evans v United Kingdom (26258/07 and 26255/07) 17 November 2009
Christian Democratic People's Party v Moldova (No.2)

Alekseyev v Russia (4916/07 25924/08 and 14599/09) 21 October 2010
Romanova v Russia (23215/02) 11 October 2011
Fáber v Hungary (40721/08) 24 July 2012
Malofeyeva v Russia (36673/04) 30 May 2013
Gün v Turkey (8029/07) 18 June 2013
Kasparov v Russia (21613/07) 3 October 2013
Taranenko v Russia (19554/05) 15 May 2014
Primov v Russia (17391/06) 12 June 2014
Nemtsov v Russia (1774/11) 31 July 2014
Navalnyy and Yashin v Russia (76204/11) 4 December 2014
Schatschaschwili v Germany (9154/10) 15 December 2015

THE FACTS

I. The circumstances of the case

5 The applicant was born in 1962 and lives in Moscow.

6 On 6 May 2012 the applicant was arrested during the dispersal of a political rally at Bolotnaya Square in Moscow. He was detained at the police station for at least 36 hours pending the administrative proceedings in which he was found guilty of failure to obey lawful police orders, an offence under art.19.3 of the Code of Administrative Offences, and sentenced to 15 days' administrative detention. The parties' submissions on the circumstances of the public assembly and its dispersal are set out in Pt A, and the specific facts relating to the applicant are set out in Pt B below.

A. The public assembly of 6 May 2012

1. The planning of the assembly

7 On 23 April 2012 five individuals (Mr I. Bakirov, Mr S. Davidis, Ms Y. Lukyanova, Ms N. Mityushkina and Mr S. Udaltsov) submitted notice of a public demonstration to the mayor of Moscow. The march, with an estimated 5,000 participants, was to begin at 16.00 on 6 May 2012 from Triumfalnaya Square followed by a meeting at Manezhnaya Square, which was to end at 20.00. The aim of the demonstration was "to protest against abuses and falsifications in the course of the elections to the State Duma and of the President of the Russian Federation, and to demand fair elections, respect for human rights, the rule of law and the international obligations of the Russian Federation".

8 On 26 April 2012 the Head of the Moscow Department of Regional Security, Mr A. Mayorov, informed the organisers that the requested route could not be allocated because of preparations for the Victory Day parade on 9 May 2012. They proposed that the organisers hold the march between Luzhniki Street and Frunzenskaya embankment.

9 On 27 April 2012 the organisers declined the proposal and requested an alternative route from Kaluzhskaya Square, down Bolshaya Yakimanka Street and Bolshaya Polyanka Street, followed by a meeting at Bolotnaya Square. The march was to begin at 16.00, and the meeting had to finish by 19.30. The number of participants was indicated as 5,000.

10 On 3 May 2012 the Moscow Department of Regional Security approved the alternative route, having noted that the organisers had provided a detailed plan of the proposed events.

11 On 3 May 2012 the Moscow Department of Regional Security informed the Chief of the Moscow Department of the Interior, Mr V. Kolokoltsev, that a different group of organisers had submitted notification of another public event—a meeting at Manezhnaya Square—which the Moscow authorities had rejected. The organisers of that event had expressed their intention to proceed in defiance of the ban and to squat on the square from 6 to 10 May 2012, ready to resist the police if necessary. The Department of the Interior was therefore requested to safeguard public order in Moscow.

12 At 20.00 on 4 May 2012 the First Deputy Head of the Moscow Department of Regional Security, Mr V. Oleynik, held a working meeting with the organisers of the demonstration at Bolotnaya Square, at which they discussed the security issues. The Deputy Chief of the Public Order Directorate of the Moscow Department of the Interior, police colonel D. Deynichenko, took part in the meeting. The organisers stated at the meeting that the turnout could significantly exceed the expected 5,000 participants. They were warned that exceeding the number originally declared would be unacceptable. According to the applicant, during that meeting the organisers and the authorities agreed that since there was insufficient time for an on-the-spot reconnaissance, which would otherwise have been carried out, the assembly layout and the security arrangements would be identical to the previous public event organised by the same group of opposition activists on 4 February 2012. On that occasion, the march had proceeded down Yakimanka Street, followed by a meeting at Bolotnaya Square, and the venue of the meeting had included the park at Bolotnaya Square (in some documents referred to as "Repin Park") and the Bolotnaya embankment.

13 On the same day the Deputy Mayor of Moscow, Mr A. Gorbenko, charged the Tsentralnyy district prefect with assisting the organisers in maintaining public order and security during the event. He ordered the Moscow Department of Regional Security to inform the organisers that their assembly notice had been accepted and to control its implementation. Other public agencies were assigned the duties of street cleaning, traffic control and ensuring the presence of ambulances at the site of the assembly.

14 On 5 May 2012 the Moscow Department of Regional Security requested the Moscow City Prosecutor's Office to issue a warning to the organisers against exceeding the notified number of participants and against erecting camping tents at the meeting venue, an intention allegedly expressed by the organisers at the working meeting. The Moscow Department of Regional Security also referred to information found on the internet that the demonstrators would go to Manezhnaya Square after the meeting. On the same day the Tsentralnyy District Prosecutor's Office issued the relevant warning to two of the organisers, Mr Davidis and Mr Udaltsov.

15 On the same day the Moscow Department of the Interior published on its website the official information about the forthcoming demonstration on 6 May 2012, including a map. The map indicated the route of the march, the traffic restrictions and an access plan to Bolotnaya Square; it delineated the area allotted to the meeting, which included the park at Bolotnaya Square. Access to the meeting was marked through the park.

16 On the same day the Police Chief of the Moscow Department of the Interior, Police General-Major V. Golovanov, adopted a plan for safeguarding public order in Moscow on 6 May 2012 (the security plan). The 99-page security plan was an internal document which had not been disclosed to the public or to the organisers. In view of the forthcoming authorised demonstration at Bolotnaya Square and anticipated attempts by other opposition groups to hold unauthorised public gatherings, it provided for security measures in Moscow city centre and set up operational headquarters to implement them.

17 Thirty-two high-ranking police officers, including eight general-majors, two military commanders and one emergency-relief official, were appointed to the operational headquarters. Deputy Police Chief of the Moscow Department of the Interior, Police General-Major V. Kozlov, was appointed as head of the operational headquarters; the Chief of the Special-Purpose Operational Centre of the Moscow Department of the Interior, Police General-Major V. Khaustov, and the Deputy Chief of the Public Order Directorate of the Moscow Department of the Interior, Police Colonel D. Deynichenko, were appointed as deputy heads of the operational headquarters.

18 The security plan provided for an 8,094-strong crowd-control taskforce, comprising the police and the military, to police the designated security areas and to prevent unauthorised public gatherings and terrorist attacks. The main contingent was the police squad charged with cordon and riot-control duties in accordance with a structured and detailed action plan for each operational unit. Furthermore, it provided for a 785-strong police unit for the apprehension of offenders, escorting them to the police stations and drawing up administrative offence reports, assigned to operational posts across the city centre. They were instructed, in particular, to prepare templates for the administrative offence reports and to have at least 40 printed copies of them at every police station. The security plan also provided for a 350-strong police unit for interception and apprehension of organisers and instigators of unauthorised gatherings. The squad had to be equipped with full protection gear and police batons. Each unit had to ensure effective radio communication within the chain of command. They were instructed to keep loudspeakers, metal detectors, handcuffs, fire extinguishers and wire clippers in the police vehicles.

19 The security plan set out in detail the allocation and deployment of police vehicles, police buses, interception and monitoring vehicles and equipment, dog-handling teams, fire-fighting and rescue equipment, ambulances and a helicopter. It also foresaw a 1,815-strong reserve unit equipped with gas masks, aerosol grenades, flash grenades, bang grenades, a 40mm hand-held grenade launcher, and a 43mm hand-held grenade launcher; tubeless pistols with 23mm rubber bullets and propelling cartridges, and rifles. Two water-cannon vehicles were ordered to be on standby, ready to be used against persistent offenders.

20 All units were instructed to be vigilant and thorough in detecting and eliminating security threats and to be polite and tactful in their conduct vis-à-vis citizens, engaging in a lawful dialogue with them without responding to provocations. If faced with an unauthorised gathering they were instructed to give a warning through a loudspeaker, to arrest the most active participants and to record video-footage of those incidents. The police chiefs were instructed to place plain-clothes officers among the protestors in order to monitor the threat of violence and terrorist attacks

within the crowd and to take measures, where appropriate, to prevent and mitigate the damage and to pursue the perpetrators.

21 The Chief of the Interior Department of the Tsentralnyy Administrative District of Moscow, Police General-Major V. Paukov, was required, among other tasks, to prepare, together with the organisers, the text of the public announcement to be made if the situation deteriorated. The head of the press communication service of the Moscow Department of the Interior, internal service Lieutenant Colonel Y. Alekseyeva, was in charge of communication with the press. The head of the Department for Liaison with Civil Society of the Moscow Department of the Interior, internal service Colonel V. Biryukov, had to ensure "co-ordination with the representatives of public organisations and also co-ordination and information flow with other services of the Moscow Department of the Interior".

22 The units assigned to police the march and the meeting belonged to "Zone no. 8" (Kaluzhskaya Square, Bolotnaya Square and the adjacent territory). The zone commander was the Chief of the Riot Police of the Moscow Department of the Interior, Police Colonel P. Smirnov, with nine high-ranking police officers (Police Colonel P. Saprykin, Police Colonel A. Zdorenko, Police Lieutenant Colonel A. Tsukernik, Police Colonel A. Kuznetsov, Police Colonel V. Yermakov, Police Colonel A. Kasatkin, Police Colonel A. Dvoynos, Police Captain R. Bautdinov and internal service Lieutenant Colonel D. Bystrikov) as his deputies.

23 The units assigned to Zone No.8 counted 2,400 riot police officers, of which 1,158 were on duty at Bolotnaya Square. They were instructed, in particular, to search the demonstrators to prevent them from taking camping tents to the site of the meeting and to obstruct access to Bolshoy Kamenyy Bridge, diverting the marchers to Bolotnaya embankment, the place of the meeting. The adjacent park at Bolotnaya Square had to be cordoned off, and the only entrance to Bolotnaya embankment—from Malyy Kamenny Bridge—had to be equipped with 14 metal detectors, which were to be removed just before the march approached the site of the meeting. An exception was made for the organisers and the technical staff, who were allowed access behind the stage through two additional metal detectors. Further arrangements were made for access of the press.

24 Lastly, the commandment of Zone No.8, in particular Police Colonels Smirnov and Saprykin, were under orders to meet the organisers in person at the beginning of the event to remind them of their responsibilities and to have them sign an undertaking. The organisers would undertake to ensure the lawful and safe conduct of the event, and to refrain from any calls for forced change of the constitutional order and from hate speech and propaganda of violence or war. They would also undertake to be present at the venue until the end of the assembly and the departure of the participants. A video recording of the briefing and the signing of the undertaking had to be made.

2. Dispersal of the meeting at Bolotnaya Square

25 At about 13.30 on 6 May 2012 the organisers were allowed access to Bolotnaya Square to set up the stage and sound equipment. The police searched the vehicles delivering the equipment and seized three tents found amid the gear. They arrested several people for bringing the tents, and the installation of the equipment was delayed. During that time communication between the organisers setting up the stage and those leading the march was sporadic.

26 At the beginning of the march, Police Colonel A. Makhonin met the organisers at Kaluzhskaya square to clarify any outstanding organisational matters and to have them sign the undertaking to ensure public order during the demonstration. He specifically asked Mr Udaltsov to ensure that no tents were placed on Bolotnaya Square and that the participants respected the limits on the place and time allocated for the assembly. The organisers gave their assurances on those issues and signed the undertaking.

27 The march began at 16.30 at Kaluzhskaya Square. It went down Yakimanka Street peacefully and without disruption. The turnout exceeded expectations, but there is no consensus as to the exact numbers. The official estimate was that there were 8,000 participants, whereas the organisers considered that there had been about 25,000. The media reported different numbers, some significantly exceeding the above estimates.

28 At about 17.00 the march approached Bolotnaya Square. The leaders found that the layout of the meeting and the placement of the police cordon did not correspond to what they had anticipated. Unlike on 4 February 2012, the park at Bolotnaya Square was excluded from the meeting venue, which was limited to Bolotnaya embankment. The cordon of riot police in full protection gear barred access to the park and continued along the whole perimeter of the meeting area, channelling the demonstration to Bolotnaya embankment. Further down the embankment there was a row of metal detectors at the entrance to the meeting venue. By that time the stage had been erected at the far end of Bolotnaya embankment and a considerable number of people had already accumulated in front of it.

29 Faced with the police cordon and unable to access the park, the leaders of the march—Mr S. Udaltsov, Mr A. Navalnyy, Mr B. Nemtsov and Mr I. Yashin—stopped and demanded that the police open access to the park. According to the protestors, they were taken aback by the alteration of the expected layout and were unwilling to turn to Bolotnaya embankment; they therefore demanded that the police officers at the cordon move the cordon back to allow sufficient space for the protestors to pass and to assemble for the meeting. According to the official version, the protestors were not interested in proceeding to the meeting venue; they stopped because they had either intended to break the cordon in order to proceed towards Bolshoy Kamennyy bridge and then to the Kremlin, or to stir the crowd to incite disorder. It is common ground that the cordon officers did not enter into any discussion with the protest leaders and no senior officer was delegated to negotiate. After about 15 minutes of attempting to engage with the cordon officers, at 17.16 the four leaders announced that they were going on a "sit-down strike" and sat on the ground. The people behind them stopped, although some people continued to go past them towards the stage. The leaders of the sit-in called on other demonstrators to follow their example and sit down, but only a few of their entourage did so (between approximately 20 and 50 people in total).

30 Between 17.20 and 17.45 two State Duma deputies, Mr G. Gudkov and Mr D. Gudkov, contacted unidentified senior police officers to negotiate the enlargement of the restricted area by moving the police cordon behind the park along the lines expected by the organisers. At the same time Mr V. Lukin, the Ombudsman of the Russian Federation, at the request of police colonel Biryukov, attempted to convince the leaders of the sit-in to resume the procession and to head towards the meeting venue at Bolotnaya embankment where the stage had been set up. During that time no senior police officer or municipal official came to the site of the sit-down protest,

and there was no direct communication between the authorities and the leaders of the sit-in.

31 At 17.40 one of the meeting participants announced from the stage that the leaders were calling on the demonstrators to support their protest. Some people waiting in front of the stage headed back to Malyy Kamennyy bridge, either to support the sit-down protest or to leave the meeting. The area in front of the stage almost emptied.

32 At 17.43 the media reported that Mr Udaltsov had demanded that the protestors be given air time on Russia's main television channels, that the presidential inauguration of Mr Putin be cancelled and that new elections be called.

33 At 17.50 the crowd around the sit-down protest built up, which caused some congestion, and the leaders abandoned the protest and headed towards the stage, followed by the crowd.

34 At 17.55 the media reported that the police authorities were regarding the strike as a provocation of mass disorder and were considering prosecuting those responsible for it.

35 At the same time a commotion near the police cordon occurred at the place vacated by the sit-down protest, and the police cordon was broken in several places. A crowd of about 100 people spilled over to the empty space beyond the cordon. Within seconds the police restored the cordon, which was reinforced by an additional riot police force. Those who found themselves outside the cordon wandered around, uncertain what to do next. Several people were apprehended, others were pushed back inside the cordon, and some continued to loiter outside or walked towards the park. The police cordon began to push the crowd into the restricted area and advanced by several metres, pressing it inwards.

36 At 18.00 Police Colonel Makhonin told Ms Mityushkina to make an announcement from the stage that the meeting was closed. She did so, but apparently her message was not heard by most of the demonstrators or the media reporters broadcasting from the spot. The live television footage provided by the parties contained no mention of her announcement.

37 At the same time a Molotov cocktail was launched from the crowd at the corner of Malyy Kamenny Bridge over the restored police cordon. It landed outside the cordon and the trousers of a passer-by caught fire. It was promptly extinguished by the police.

38 At 18.15 at the same corner of Malyy Kamenny Bridge the riot police began breaking into the demonstration to split the crowd. Running in tight formations, they pushed the crowd apart, arrested some people, confronted others and formed new cordons to isolate the sections of the crowd. Some protestors held up metal barriers and aligned them so as to resist the police, threw various objects at the police, shouted and chanted "Shame!" and other slogans, and whenever the police apprehended someone from among the protestors they attempted to pull them back. The police applied combat techniques and used truncheons.

39 At 18.20, Mr Udaltsov climbed onto the stage at the opposite end of the square to address the meeting. At that time many people were assembled in front of the stage, but, as it turned out, the sound equipment had been disconnected. Mr Udaltsov took a loudspeaker and shouted:

> "Dear friends! Unfortunately we have no proper sound, but we will carry on our action, we are not going away because our comrades have been arrested,

> because tomorrow is the coronation of an illegitimate president. We shall begin an indefinite protest action. You agree? We shall not leave until our comrades are released, until the inauguration is cancelled and until we are given air time on the central television channels. You agree? We are power here! Dear friends, [if] we came out in December [2011] and in March [2012], it was not to put up with the stolen elections, … it was not to see the chief crook and thief on the throne. Today we have no choice – stay here or give the country to crooks and thieves for another six years. I consider that we shall not leave today. We shall not leave!"

40 At this point, at 18.21, several police officers arrested Mr Udaltsov and took him away. Mr Navalnyy attempted to go up onto the stage, but he was also arrested at the stairs and taken away. As he was pushed out by the police officers he turned to the crowd shouting "Nobody shall leave!"

41 At 18.25 the police arrested Mr Nemtsov, who had also attempted to address people from the stage.

42 Meanwhile, at the Malyy Kamenny Bridge the police continued dividing the crowd and began pushing some sections away from the venue. Through the loudspeakers they requested the participants to leave for the metro station. The dispersal continued for at least another hour until the venue was fully cleared of all protestors.

3. The reports of the events of 6 May 2012 and the investigation of the "mass disorder" case

43 On 6 May 2012 police colonel Deynichenko, drew up a report summarising the security measures taken on that day in Moscow. The report stated that the march, in which about 8,000 people had participated, had begun at 16.15 and had followed the route to Bolotnaya Square. It listed the represented groups and organisations, the number of participants in each group, the number and colours of their flags and the number and content of their banners. It further stated as follows:

> "… at 5.04 p.m. the organised column … arrived at the [cordon] and expressed the intention to proceed straight to Bolshoy Kamennyy bridge and [to cross it] to Borovitskaya Square. The police … ordered them to proceed to Bolotnaya Square, the venue of the meeting. However, the leaders at the head of the column – [Mr Udaltsov, Mr Nemtsov and Mr Navalnyy] – … called on the marchers through the loudspeaker not to move. Together with some 30 protestors they sat on the ground. Another group of about 20, called by [their leaders], sat as well. The police … repeatedly warned them against holding an unauthorised public gathering and required them to proceed to the venue of the meeting or to leave. Besides that, two State Duma Deputies, Gennadiy Gudkov and Dmitriy Gudkov, the Ombudsman of the Russian Federation, Vladimir Lukin, and a member of the Civic Chamber Nikolay Svanidze talked to them, but those sitting on the ground did not react and continued chanting slogans … From 5.58 p.m. to 7 p.m. persons on Malyy Kamennyy bridge and Bolotnaya embankment made attempts to break the cordon, threw empty glass bottles, fireworks, chunks of tarmac and portable metal barriers at the police officers. From 5 to 6 p.m. music was playing on the stage … At 5.20 p.m. … a deputy of Vologda Regional Duma called on the participants to head to the

> Malyy Kamennyy bridge to support those sitting on the ground … At 6 p.m. one of the organisers, Ms Mityushkina … went on the stage and announced the meeting closed. At 6.20 p.m. Mr Udaltsov went on the stage and called on the people to take part in an indefinite protest action.
> At 7 p.m. a group of about 20 individuals including Ms Mityushkina … attempted to mount three one-sleeper camping tents on Bolotnaya embankment.
> …
> From 6 p.m. to 9 p.m. necessary measures were taken to push the citizens away from Malyy Kamennyy bridge, Bolotnaya embankment and Bolotnaya Street and to arrest the most actively resisting ones …, during which 28 police officers and military servicemen [sustained injuries] of various gravity, four of which have been hospitalised.
> In total, 656 people were detained in Moscow to prevent public disorder and unauthorised demonstrations …
> …
> The total number of troops deployed for public order and security duties in Moscow was 12,759 servicemen, including 7,609 police officers, 100 traffic police officers, 4,650 military servicemen and 400 members of voluntary brigades.
> As a result of the measures taken by the Interior Department of Moscow the tasks of maintaining public order and security have been completed in full, no emergency events have been allowed."

44 On the same day the Investigative Committee of the Russian Federation opened a criminal investigation into the suspected mass disorder and violent acts against the police.[1]

45 On 28 May 2012 an investigation was also launched into the criminal offence of organising mass disorder.[2] The two criminal cases were joined on the same day.

46 On 22 June 2012 the Investigative Committee set up a group of 27 investigators and put them in charge of the criminal file concerning the events of 6 May 2012.

47 On an unspecified date two human-rights activists filed a request with the Investigative Committee to open a criminal investigation into the conduct of the police in the same events; they complained, in particular, of the suppression of a lawful public assembly. Another petition was filed, also on an unspecified date, by 44 human-rights activists and members of NGOs, calling for the curbing of repression against those arrested and prosecuted in relation to the events of 6 May 2012 and denying that mass riots had taken place at Bolotnaya Square.

48 Following the Investigative Committee's enquiry about publication of the maps of the assembly of 6 May 2012, on 13 August 2012 the Moscow Interior Department replied as follows:

> "… on 5 May 2012 the Moscow Interior Department published on its official website … a notice 'On safeguarding public order in Moscow during the public events on 6 May'. The notice included information about the route, the map of traffic restrictions and information about the place of the

[1] Articles 212(2) and 31(1) of the Criminal Code.
[2] Article 212(1) of the Criminal Code.

socio-political events, which a large number of participants was expected to attend, the security measures and the warning against any unlawful acts during the events.

The decision to publish this notice was taken by the head of the Department on Liaison with the Mass Media of the Interior Department of Moscow with the aim of ensuring the security of citizens and media representatives planning to take part in the event.

The pictures contained in the notice were schematic and showed the approximate route of the [march] as well as the reference place of the meeting – 'Bolotnaya Square' – indicated in the 'Plan for Safeguarding Public Order in Moscow on 6 May 2012'.

On 4 May 2012 a working meeting took place at the Moscow Department of Regional Security with the participation of [the organisers and the Interior Department] where they discussed the arrangements for the march …, the placement of metal detectors, the stage set-up and other organisational matters.

After the meeting … the [Moscow Interior Department] prepared a [security plan] and map providing for the park of Bolotnaya Square to be cordoned off with metal barriers [and] for the meeting participants to be accommodated on the road at the Bolotnaya embankment.

Given that the agreement on the route of the demonstration and the meeting venue had been reached at the aforementioned working meeting at 9 p.m. on 4 May 2012, the [security plan] and the security maps were prepared at extremely short notice (during the night of 4th to 5th May 2012 and the day of 5 May 2012), to be approved afterwards, on 5 May 2012, by the senior officials at the Moscow Interior Department.

The Interior Department did not discuss the security maps and [security plan] with the organisers. Those documents were not published as they were for internal use, showing the placement of the police forces … and setting out their tasks."

49 On an unspecified date eight prominent international NGOs set up an international expert commission to evaluate the events at Bolotnaya Square on 6 May 2012 (the Expert Commission). The Expert Commission comprised six international experts whose objective was to provide an independent fact-finding and legal assessment of the circumstances in which the demonstration at Bolotnaya Square had been dispersed. In 2013 the Expert Commission produced a 53pp. report containing the chronology and an assessment of the events of May 6 2012. It identified the sources used for the report as follows:

"The work the Commission was based on the following materials:

- evidence from the official investigation, reports and statements made by the relevant authorities and any other official information available on the case;
- information from public investigations and observations gathered by human rights defenders, journalists and others; and
- reports by observers and journalists, witness testimony and video materials.

…

In order to provide an objective and complete picture of the events, the Commission developed a series of questions that it distributed to the city

administration of Moscow, the Investigative Committee of the Russian Federation, police authorities in Moscow, the Ombudsman of the Russian Federation and event organisers. Unfortunately the Commission did not receive replies from the city administration, police authorities or Investigative Committee. As a result, the analysis contained in this report is based on information from open sources, including materials presented by the event organisers, observers and non-governmental organisations, materials from public investigations and information provided by defence attorneys engaged in the so-called 'Bolotnaya case.' These materials include: eyewitnesses testimony, videos from the media and private actors, documents and some open data about the Bolotnaya criminal case. The experts analysed more than 50 hours of video-records and 200 documents related to the Bolotnaya events. In addition, they met organisers, participants and observers of the events and attended several court hearings of the Bolotnaya case."

50 Concerning the way the assembly of 6 May 2012 was organised, the Expert Commission noted the following:

"… the Moscow Department of Regional Security announced on 4 May [2012] that the event would follow a similar route to the previous rally on 4 February [2012]. The participants were to assemble at Kaluzhskaya Square, set off at 4 p.m. along Bolshaya Yakimanka and Bolshaya Polyanka for a rally in Bolotnaya Square, and disperse at 7.30 p.m. The official notification of approval was issued on 4 May 2012 – just two days before the beginning of the event.

That same day, the [Moscow Interior Department] published a plan on its website indicating that all of Bolotnaya Square, including the public gardens, would be given over to the rally, while the Bolshoy Kamenny bridge would be closed to vehicles but would remain open to pedestrians. This was the same procedure [the] authorities had adopted for the two previous rallies on Bolotnaya Square on 10 December 2011 and 4 February 2012.

…

On the evening of [5 May 2012], the police cordoned off the [park] of Bolotnaya Square. According to Colonel Yuri Zdorenko, who was responsible for security at the location, this was done 'in order to prevent the participants from setting up a camp and from other [illegal] acts.' [The] authorities received information [that] the protestors might attempt to establish a protest camp at the site, causing them to decide that the rally should be confined to only the Bolotnaya waterfront area – a much smaller area than had been originally allocated for the assembly.

…

The police did not, however, inform the organisers of the changes they had decided upon, and they only became aware of the police-imposed changes to the event when they arrived at the site on the afternoon of 6 May [2012].

The City Council did not send out a written announcement that a special representative from the city authorities would be present at the event, nor did the chairman of the Moscow local department of the [Interior], Vladimir Kolokoltsev, issue any special orders on sending a special representative of the Ministry to the event.

…

> The organisers requested 12 hours to set up a stage and sound equipment for the rally; however, on the morning of 6 May, the authorities only allocated six hours of advance access. Furthermore, at 1.30 p.m., the police did not allow vehicles with stage equipment onto the site until they had been searched. The searches revealed a small number of tents, and [the] authorities detained a number of people as a result. The police finally allowed the truck with the stage equipment onto Bolotnaya Square at 2.50 p.m., just 70 minutes before the march was due to begin."

51 As regards the circumstances in which the assembly was dispersed, the Expert Commission's report stated as follows:

> "As the march approached Bolotnaya Square, [the] demonstrators found that a police cordon was blocking off most of the square, leaving only a narrow stretch along the waterfront for the rally. The police established a triple cordon of officers on Bolshoy Kammenyy bridge, which prevented any movement in the direction of the Kremlin. The first cordon was positioned close to the junction of Malyy Kamennyy bridge and the Bolotnaya waterfront. Students from the Police College and officers of the Patrol Guard Service (without any protective equipment) made up this line. Behind them were two rows of [riot police] (*OMOH*), a line of voluntary citizen patrol, and another cordon of the OMON [the riot police]. A number of water cannons were visible between the second and third cordons.
>
> [The report contained two photographs comparing the police cordon on 4 February 2012, a thin line of police officers without protection gear, and the one on 6 May 2012, multiple ranks of riot police with full protection gear backed up by heavy vehicles.]
>
> The police cordons, which blocked off movement in the direction of the Kremlin, created a bottleneck that slowed the march's progress to such an extent that it came to a virtual stop as demonstrators attempted to cross the bridge. Moreover, just beyond Luzhkov bridge, the marchers had to go through a second set of metal detectors, where progress was very slow since there were only 14 detectors.
>
> By 5.15 p.m., the majority of the march was immobile. A number of leaders, including Sergey Udaltsov, Alexey Navalny and Ilya Yashin, encouraged demonstrators to sit down on the road in front of the 'Udarnik' cinema facing the police cordon to protest [against] the inability of the march to continue and to demand that they be given access to the originally allocated space for the rally on Bolotnaya Square. An estimated 50-200 people joined the sit-down protest. The leaders stressed the need to maintain a peaceful protest and appealed to demonstrators to remain calm. Participants chanted: 'We will not go away' and 'Police together with the people'. The leaders attempted to address the crowds using loudspeakers, but those behind the sit-down protest could not hear or see events as they transpired. The sit-down protest did not completely block the road, but it did restrict the movement of those approaching the police lines and the bottleneck caused by the police cordon. As a result, the crowd grew denser as more demonstrators arrived from Bolshaya Yakimanka Street.
>
> At 5.42 p.m., the chief of the Moscow Interior Department issued a statement: 'The organizers of the rally and other participants refuse to proceed to the

agreed place of the rally (to Bolotnaya Square). They [have] stopped on the roadway near the 'Udarnik' theatre. Some of them [have] sat on the ground and thus blocked the movement of the column. Despite repeated warnings on the part of the police to proceed to the place of the rally, they won't move thereby creating a real threat of a jam and trauma for the participants. An inquiry commission is working on the spot to document their actions related to appeals to commit mass public disorder with a view to further consider the issue of instituting criminal proceedings.'

Some demonstrators appeared to become frustrated with standing and waiting and began to walk away. Some tried to pass through the police cordon to leave the area, but the police refused to let them through. Instead, they were directed to go back through the crowd to Bolshaya Polyanka Street, even though this was practically impossible.

The police used loud speakers to inform demonstrators of the rally location. They asked participants to pass directly to Bolotnaya Square and not stop at the bridge, despite the fact that the major part of the square was closed to demonstrators. They announced that all actions on the bridge could be considered illegal. However, given the poor quality of the sound equipment, only those nearest the police could hear this information; the majority of protesters did not hear the police instructions.

…

From the moment difficulties first arose for demonstrators attempting to cross Malyy Kammenyy bridge, demonstrators made repeated attempts to negotiate with the police over moving their cordons to allow protesters onto Bolotnaya Square.

Dmitry Oreshkin, a member of the Presidential Human Rights Council, and Member of Parliament Gennady Gudkov tried to talk to the police authorities at around 5.30 p.m., but there was no response. Shortly after participants broke through the police cordon at 6.20 p.m., a group of human rights activists spoke to Colonel Birukov, head of the Moscow Interior Department's press service. At 7 p.m., Member of Parliament Ilya Ponomarev tried to stop violence during the clashes on the embankment by speaking to the authorities, but he did not get a positive response.

Many of those involved in organising the event stated that they tried to engage with [the] police throughout the day to ensure the event took place in a peaceful manner.

Nadezhda Mityushkina: 'I tried unsuccessfully to find the responsible people in the Ministry of the [Interior] in order to solve the organisational problems. I knew whom to contact in case we needed help when issues arose … Only at 6 – 6.30 p.m. did a police officer approach me. I knew from previous demonstrations that he was a senior officer responsible for communication with event organisers … and he told me that the authorities had suspended the demonstration. He told me, as one of the rally organizers, to announce from the stage that the event was over, which I did following our conversation.'

Igor Bakirov: 'A police officer in a colonel's uniform contacted me only once, and I showed him the documents confiming my credentials as an event organiser. Later clashes with the police erupted, I couldn't find anyone with whom to communicate and cooperate.'

Sergey Davidis: 'I personally did not meet nor have time to get into contact with the authorities regarding the fences set up around the perimeter of the rally. I assumed some other organisers had already spoken to the authorities regarding this issue or were speaking with them at that time. There was no one to contact and nothing to talk about. I only saw the OMON officers who behaved aggressively and were not predisposed to get into a conversation. …'

At 5.55 p. m., as people tried to move through the narrow gap between the police cordon and the waterfront to reach Bolotnaya Square, the police line moved two steps forward, further pressing the crowd. This in turn generated a counter response from the crowd, and protesters began pushing back. In several places, the police cordon broke, and a few dozen people found themselves in the empty space behind the first police line. It is impossible to determine whether the breaking of the cordon was the result of conscious action by sections of the crowd or if the police cordon simply broke due to the pressure from such a large number of people. Some of those who made it past the police lines were young men, but there were also many elderly citizens and others who did not resemble street fighters. Those who found themselves behind the police cordon did not act in an aggressive manner but appeared to move towards the entrance to the Bolotnaya [park], the supposed rally point. Different demonstrators reacted very differently to the breaking of the police line. Some tried to move away, others called for people to break the cordon, while some tried to restrain the crowd from [trampling on] those who were still taking part in the sit-down protest. As pressure and tension grew, the sit-down protesters stood up rather than risk being trampled. There was a high degree of confusion, and people were not clear on what was happening.

Just after the breaking of the police cordon at approximately at 6 p.m., a single Molotov cocktail was thrown from the crowd. It landed behind the police ranks and ignited the trousers of … a 74 year old demonstrator who had passed through the cordon. The police used their fire extinguishers to put out the fire. This was the only such incident recorded during the day …

…

Soon after the cordons were broken, the authorities began to detain those who remained behind the police lines, taking them to special holding areas. The police also arrested some protesters at the front of the crowd who had not tried to break the cordon. The police cordon was fully restored after about four minutes.

…

At 6.10 p.m., Sergey Udaltsov, Alexey Navalny and Boris Nemtsov managed to walk from the Udarnik cinema to the stage at the waterfront followed by a large number of people. A police cordon blocked access to the stage, but they were allowed through. As they tried to start the rally, the police intervened … the OMON officers then detained Sergey Udaltsov on stage and shortly afterwards detained Boris Nemtsov and Alexey Navalny as well. By 6.50 p.m. the organizers began to disassemble the stage.

…

In the two hours between 6 p.m. and 8 p.m., the demonstration was marked by two distinct types of activity. For much of the time, demonstrators and the police stood face to face without much happening. These moments were

interspersed with periods when the police advanced and the crowd moved back. There does not appear to have been any clear reason for the police decision to advance other than to divide the crowd up into smaller sections. More than anything, the police advances served to raise tensions and provoke some members of the crowd to push back. There is little evidence that demonstrators initiated the violence. Rather, they appear to have become aggressive only in response to the authorities' advances.

During these interchanges some protesters threw objects at the police, and the police used their batons freely. The crowd threw plastic bottles, shoes and umbrellas …

At around 6.20 p.m. the police announced that the rally was cancelled and asked protesters to disperse. The police used a loudspeaker to state, 'Dear citizens, we earnestly ask you not to disturb public order! Otherwise, in accordance with the law, we will have to use force! Please, leave here, and do not stop. Go to the metro.' Although the police used a loudspeaker, the announcement was not loud enough to reach the majority of the crowd. It is likely that only those nearest to the loudspeakers could have heard the call to disperse.

There was confusion over the police demands because at the same time … Colonel Birukov, head of the Moscow Interior Department's press service, told a group of human rights defenders (including Vladimir Lukin, Dmitri Oreshkin, Victor Davydov and Nikolai Svanidze) that the demonstrators could continue to Bolotnaya Square to take part in the rally.

…

By 6.30 p.m. the crowd at the corner of Malyy Kamennyy bridge and the waterfront was cut in two. Those on Malyy Kamennyy bridge were pushed in the direction of Bolshaya Polyanka Street, while those on the waterfront were cut off from both Bolshoy and Malyy Kamennyy bridges.

Around 6.54 p.m., the police cordon that acted as a barrier along the waterfront near the Luzhkov bridge was removed, and demonstrators were able to move freely along the Bolotnaya waterfront. Approximately 15 minutes later, some 200 police officers in protective equipment who had formed a cordon at the Luzhkov Bridge began pushing protesters in the direction of Lavrushinsky Lane, which runs from Bolotnaya Square to the Tretyakovskaya metro station. At the same time, police began to push people back along the Bolotnaya waterfront from the Luzhkov bridge towards the Udarnik cinema. Those who remained on the waterfront linked arms in passive resistance. The police pushed forward, divided the crowd and began to detain demonstrators.

At about 7.47 p.m. authorities created a corridor to allow demonstrators to leave the Bolotnaya area.

…

At 7.53 p.m. a group of the OMON officers appeared from the bushes of Bolotnaya Gardens and divided those demonstrators that remained on the square. Those on one side were able to move towards Malyy Kamennyy bridge, while those on the other remain totally blocked between the police lines.

At 8.08 p.m. the last groups of people slowly left the waterfront along a corridor formed by the policemen. The police also began to move people away

from the Kadashevskaya waterfront on the other side of the Obvondoy Channel. Some people were detained, while others were pushed along Bolshaya Polyanka Street in the direction of the Lavrushinsky Lane.

Between 9 and 10 p.m. around two thousand demonstrators moved along Bolshaya Ordynka Street chanting slogans … and the OMON officers began to detain people and actively disperse the column."

52 On 20 March 2013 the Zamoskvoretskiy branch of the Investigative Committee dismissed 10 individual complaints and two official enquiries made in regard to the matter, one by Mr Ponomarev, State Duma Deputy, and another one by Mr A. Babushkin, President of the Public Supervisory Committee of Moscow. The complaints and enquiries concerned the allegedly unlawful acts of the police dispersing the rally on 6 May 2012, including excessive use of force and arbitrary arrests. The Investigative Committee interviewed one of the 10 persons who had lodged the complaint and four police officers deployed in the cordon around Bolotnaya Square, including squadron and regiment commanders. They stated, in particular, that they had been acting under orders to maintain public safety and to identify and arrest the most active instigators of unrest; only those resisting the demands of the police had been arrested and no force had been used unnecessarily. The police officers stated that when the police had had to intervene, they had used combat manoeuvres and truncheons but no tear gas or other exceptional means of restraint. Squadron commander S explained that he had been deployed in the sector adjacent to the stage and that there had been no incidents or disorder in that sector; no one had been arrested. The decision listed 13 other internal inquiries held following individual complaints and medical reports; in six cases the allegations of abuse had been found unsubstantiated and in seven cases the police conduct had been found lawful. As regards the substance of the complaints at hand, the Investigative Committee found as follows:

"… having crossed Malyy Kamennyy bridge, the column leaders stopped. Many march participants bypassed the organisers and proceeded to Bolotnaya Square towards the stage … When the march participants had filled nearly all Bolotnaya embankment, limited by the police cordon on one side and by the stage on the other side, the organisers were still at the point between Malyy Kamennyy bridge, Bolotnaya Square, [the park] and the 'Udarnik' cinema …

At this time the organisers demanded that the police officers let them pass to the Kremlin. The police told them that they would not let anyone pass to the Kremlin because the event was authorised to take place at Bolotnaya Square where the stage had been specially set up and they were told to proceed. After that, the organisers decided to call a sit-down protest and called upon those present to disobey the lawful orders of the police. After that, the meeting participants congregated opposite the Udarnik cinema where after a while they attempted to break the cordon, which [the police] did not manage to prevent. Therefore the police began arresting the most active participants of the break; they were put in a police van and then taken to police stations in Moscow. After the confrontation had been localised, the police officers slightly dispersed the crowd having apprehended the most active perpetrators. From the very beginning of the sit-down protest the police requested the participants through loudspeakers to proceed to the stage, not to act on provocation and

not to commit unlawful acts, but these requests had no effect and therefore [it was clear that] the breaking of the cordon had been organised. In suppressing it the police officers acted in co-ordination and concert. They did not apply force or special means of restraint. However the work of the officers charged with apprehending offenders did involve the use of force and special means of restraint, in so far as necessary, against persons putting up resistance. Later on, in the area of Malyy Kamennyy bridge and at the [park] corner some localised confrontations took place … force and special means of restraint were used. All those detained at Bolotnaya Square were taken to the police stations … Administrative offence reports were then remitted to the Justices of the Peace for consideration on the merits.

…

According to Article 42 of the Criminal Code, the acts of a public official connected with the use of his or her official powers which have caused damage to interests protected by law, may not be qualified as a criminal offence if they were committed under a binding order or instruction.

…

After the organisers had decided to call a sit-down protest … [they] provoked mass disorder during which the participants threw various objects at the police, thus causing injuries to some of them. Because of this turn of events the police officers detained those participating in the mass disorder with justifiable use of force, and by special means of restraint against those who resisted.

…

In view of the foregoing, the institution of criminal proceedings against the police officers … is refused for the absence of *corpus delicti*."

53 On 24 May 2013 the first criminal case against 12 persons suspected of participation in mass disorder was transferred to the Zamoskvoretskiy District Court of Moscow for the determination of criminal charges (the first "Bolotnaya" case).

54 On 2 December 2012 Mr Navalnyy gave testimonies as a witness in the first Bolotnaya case. He testified, in particular, as follows:

"The political organisers and the formal organisers, we all had a clear idea … and the Moscow Mayor's office confirmed that the march would be the same as the one that had taken place on 4 February 2012. Bolotnaya Square is a traditional place for holding various opposition events. We all had a clear understanding what the route would be, where the stage would be, what the layout would be. We came there at that time for a rather traditional, customary event, the scenario of which was well-known to everybody … two days beforehand the maps showing where people would assemble and the direction of the march were published on the official [news] website RiaNovosti, they are still posted there. The map was published on the [police] website 'Petrovka, 38' and this map is still posted there. Not only the organisers, but the participants too, they knew where they were going … When we approached the venue of the meeting … we saw that the map showing where people would assemble on the square had been essentially altered. It was essentially different from the map of 4 February [2012], and, above all, different from the document which had been agreed with the Moscow Mayor's office which had been published on website[s] RiaNovosti and 'Petrovka, 38' … [in which] people

were to assemble on Bolotnaya embankment as well as in the park of Bolotnaya Square. However, when we came we saw that the park of Bolotnaya Square, that is about 80 per cent of the square, was barred and cordoned off … since [the cordon] did not correspond [to the map] the column stopped. The event organisers and the people who came just waited for this question to be resolved, for the police to remove the wrong cordon, for the police chiefs to reply as to what had changed, why the approved meeting was not being conducted according to the scenario that had been approved … I had previously [organised events] … Somebody had taken the map and changed the location of the meeting. This had practically never happened before … to show visually that we were not moving anywhere, we sat on the ground … the first line of [the police] cordon was composed of 20-year-old conscripts, and with a thousand people pressing on it the cordon broke. It could only break. This led to an uncontrollable situation, as several policemen were walking and trying to say something through megaphones, impossible to tell what they were saying. Some activists passing by were also speaking through megaphones, impossible to tell what they were saying. No authority present on the spot. And impossible to understand who was in command of that. So all of that caused the rupture of the police cordon. People started spreading across that spot … Then I tried to walk over to the stage to try and explain to the gathering what was going on, using the amplifiers. I did not know then that the police had already cut off the amplifiers.

[Question to the witness] Did anybody try to negotiate with the participants of the sit-down protest?

- Attempts had been made as much as possible in the circumstances … everybody had stopped because we all wanted to understand where were the representatives from the mayor's office, where was the responsible representative of the Interior Department. All the [high-ranking] police officers were asked, but they only shrugged. Nobody could understand what was going on. The State Duma deputies present on the spot tried to act as negotiators, but … they said that nobody wanted to come up to us. We could see some police officers resembling chiefs, at a distance … but it was impossible to get to them … it was impossible to reach the [police] command. Nobody would come to us. Nobody could negotiate despite everyone's wish to do so.

… when I was in the detention facility I lodged a complaint about the hindrance of a peaceful public event. This complaint was with the Moscow Interior Department. I have set out the arguments [why] I considered that there had been ample evidence that the officials of the Moscow Interior Department had deliberately provoked the crowd to panic so that [they] could later make claims about mass disorder."

55 On the same day Mr Davidis gave testimonies as a witness in the first Bolotnaya case. He testified, in particular, as follows:

"The negotiations with the [Mayor's office] have been very difficult this time … I had been the organiser of most events from 25 December 2011. It was always possible to meet the deadline, to find a compromise, [but not this time]. … It was [only] on 4 [May 2012] that we received the written agreement. On the same day the working meeting took place … Usually, everything is decided no later than five days before the event. This time there was practically

24-hours' notice. We could not even bring the vehicles carrying the stage to the square before 1 p.m. [on 6 May 2012]. We were put under very harsh conditions … we had to mount the stage within three hours … At the [working meeting] technical issues were discussed, but for the previous events we held, as a matter of practice, [there was] an on-site reconnaissance: the representatives of the organisers [together with] the representatives of the police … would visit the site, walk through the route and determine where the barriers would be put, the stage, the lavatories, so that there is no ambiguity in understanding the event. This time, because [the working meeting] was on 4 [May 2012], and the event was on 6 [May 2012], it was already clear at the working meeting that we wouldn't have time for an on-site reconnaissance, therefore at Mr Deynichenko's proposal it was stated that in organising the event we would follow the example of the assembly held on 4 February [2012]. Then, it was also a march from Kaluzhskaya Square and a meeting at Bolotnaya Square. The only thing that was noted was that this time the stage would be a bit closer to the park of Bolotnaya Square, at the corner of the square, because originally the event had been declared for 5,000 participants. We had a feeling that people were disappointed, somehow low-spirited and that not many would come. When we realised that there would be more people I told that to Mr Oleynik [the First Deputy Director of the Regional Security Department], but he told us that it was unacceptable. But it was clear that we could not do anything about it. We warned that there would be significantly more participants … When we called Mr Deynichenko the following day he told [us] that he had had a map drawn up by the Interior Department, and that Mr Udaltsov could come during the day to see it to clarify any issues. During the day he postponed the meeting several times and then he was no longer picking up the phone. Therefore it was not possible to see or discuss the map.
[Question to the witness] Was the blocking of the park discussed at the working meeting, or later?
- No, of course not. The event of 4 February [2012] had been organised so that the meeting was held at Bolotnaya Square. Bolotnaya Square is an area comprising the park and Bolotnaya embankment. It was supposed that people would … turn [like before] towards the park. It was said that everything except the position of the stage, which would be moved forwards 20 metres, would be the same as [the last] time, this was expressly spelled out. We were guided by it.
[Question to the witness] With whom was it discussed that the positioning of the security forces would be the same, [give us] the names?
- This was spelled out at the big working meeting at the office of Mr Oleynik and in his presence. Since we realised that we had no time for an on-the-spot reconnaissance, Mr Deynichenko suggested that it would be like the last time as we had already walked along this route.
…
… Nadezhda Mityshkina called me several times and complained that they were having trouble bringing in the equipment … that they could not find anyone in charge. Usually it is the police representative who is responsible for the event, separately for the march and for the meeting. When I crossed [to] the area allocated to the march, even before passing through the metal detectors, colonel Makhonin who is traditionally in charge of the march called

me. We met. I gave him a written undertaking not to breach the law … I told him that [two members of staff] had been arrested [at the stage area] … he promised to release them …

[Question to the witness] What exactly did colonel Makhonin say? The areas allocated to the march and to the meeting, were they determined in front of the camera?

- No we did not discuss it …

… at the turning [from Malyy Kamenny Bridge] the procession came to a standstill … some people sat on the ground … those who sat down had justifiably asked for an expansion. I could not push through to get there. I learned that both [State Duma deputies] were conducting negotiations; I thought that it was probably going to settle this situation … at a certain point Ms Mityushkina called me and said that the police were demanding to close the event. I explained … that if [the police] considered that there had been breaches, they had to give us time to remedy these defects, they could not end the event at once. I called Mr Udaltsov … and said that we were coming, [that there was] no need to end anything. Actually when I reached the corner the sit-in protest had already ended. The organisers who had participated in the sit-in protest and [other] people tried to approach the stage …

…

The official web-site of the Moscow Interior [Department] published the map on which it was shown, just as agreed [and] just as on 4 February 2012 [that] the border [of the meeting venue] was outlined at the far end of the park and not the near one … all agreements were breached.

[Question to the witness] During the working meeting on 4 [May 2012] or at the beginning of the [march], did the Interior Department warn you about any preparations for provocations, breach of public order, the campsite?

- No, there were no such talks with the police.

…

[Question to the witness] If one has a badge, does it help in principle for talking to the police?

- No, it does not make any difference. I personally called Mr Deynichenko and asked him to take measures. There was no communication with the police. The police officers did not pick up the phone calls. [I] did not manage to find anyone in charge of the police.

…

[Question to the witness] When, according to the rules, … should the appointments be made to co-ordinate … on the part of the organisers and [on the part of] the Mayor's office?

- The law does not expressly say [when] … we received no documents from the [Moscow Government] or the Interior Department. We had no information as to who was responsible.

[Question to the witness] That means that at the beginning and during the event you did not know the names of those in charge?

- Except for the officer in charge of the march, colonel Makhonin.

…

[Question to the witness] When the emergency occurred, who did you try calling at the Interior Department commandment …?

- By then I was no longer trying to call anyone. I had heard that [the two State Duma deputies] were holding negotiations. I called Mr Udaltsov to tell him that they were trying to close the meeting, but he told me that they were already heading to the stage, that they had ended the sit-in protest.

…

[Question to the witness] Why did the police announce that the event was banned?

- I cannot explain why such a decision was taken. They themselves impeded the conduct of the event and then they ended it by themselves …

…

[Question to the witness] The reason why [the event was] closed was the sit-down protest?

- As I understood from Ms Mityushkina, yes.

[Question to the witness] How did the police make their demands? Through loudspeakers?

- I would not say that it was some sort of large-scale [announcement]. It was more through physical force. But some demands were made via megaphones, there were no other means."

56 On 5 December 2012 Mr Nemtsov gave testimonies as a witness in the first Bolotnaya case. He testified, in particular, as follows:

"… I was not an event organiser, but I was well-informed about the way it had been authorised. On the web-site of the Moscow Interior Department a map was posted showing the location of the police [cordon] and the access points. The map was in the public domain and one could see that the park of Bolotnaya Square should have been opened. But it turned out to be closed. Moreover, we openly announced it on the Internet, and the media reported it, that the route would be exactly the same as on 4 February 2012 … On 4 February 2012 there was an authorised event … all of [Bolotnaya] square was open, no cordons on Bolshoy Kamennyy bridge. We easily turned into the square, there had been no scuffles … we were sure that on 6 May 2012 it would be exactly the same picture … but the police had deceived us, blocked Bolotnaya Square having left a very narrow passage for the demonstrators. We understood that it would be hard to pass through this bottleneck. We stopped, and to show the police that we were not going to storm the Kremlin and the [Bolshoy] Kamennyy bridge we sat on the ground … Mr Gudkov [the State Duma deputy], … proposed to be an intermediary in the negotiations between the protestors and the police … we waited, all was peaceful … he several times attempted to negotiate but this came to nothing. It became clear that … the crowd were about to panic. We got up. And an awful scuffle began … I was moving [to the stage] … when I arrived there I saw a strange scene for an authorised event. The microphones had all been switched off, Mr Navalnyy and Mr Udaltsov had been arrested just before me. The police never act like that at authorised events. I took a megaphone and addressed the people. I did not speak for long. In few minutes the police apprehended me. …

[Question to the witness] Why, as you say, were the police particularly aggressive?

- The demonstration took place just one day before Mr Putin's inauguration. Naturally, the police had received very strict orders. Naturally, they were

paranoid about 'Maidan'. The fact that they had treacherously breached the agreement and closed off the square, this proves the political directives. I was particularly surprised at Mr Gorbenko, the Deputy Mayor, with whom Mr Gudkov was negotiating. He is a reasonable man, but here he was like a zombie, he would not negotiate with Mr Gudkov. This was strange … did not want to talk as a human. …

[Question to the witness] Did you know about the intention to set up tents, or about the breaking of the cordon?

- No, I did not know about it then.

…

We demanded only that [the authorities] implement what had been agreed with [the organisers]."

57 On 18 December 2012 Ms Mirza, the head of the Ombudsman's secretariat, gave testimonies as a witness in the first Bolotnaya case. She testified, in particular, as follows:

"… [on 6 May 2012] I was present as an observer … unlike the usual events held at Bolotnaya Square, [this time] the park was cordoned off … when we passed the metal detectors … Mr Biryukov called and asked us to return urgently because … at Malyy Kamennyy bridge … [protestors] had sat down on the ground … [The Ombudsman] tried to persuade these people to stand up and to go and conduct the meeting … At this time the [second] riot police cordon which had stood between Bolshoy Kamennyy bridge and Malyy Kamenny bridge, apparently approached the crowd, therefore the pressure built up from both sides … I tried to leave the congested area … showed my observer's badge … but the riot police were not listening to me, laughed slightly and continued to press, there was no reaction on their part. This somewhat surprised me because we found ourselves there at the request of the Moscow Interior Department.

…

Usually there was no such multi-layered defence. Bolshoy Kamenny bridge was blocked as if it was warfare, beyond requirements, as we thought … among the protestors we saw several people in masks, and we reported that to the police, [as] this was unusual. The mood of the Interior Department was also unusual, and so was the mood of the riot police. A police chief from the Moscow Interior Department, Mr Biryukov, told me, for example, that that he could do nothing, that he was not in charge of the riot police and that the riot police reported to the [federal] police, and this was also unusual to us. I spoke to the Deputy Mayor … and saw how upset he was, and his very presence there was also [a rare occasion].

…

As I was later told by Mr Biryukov from the Interior Department, [the protestors had sat down on the ground] because the passage had been narrowed down. The passage had indeed been narrowed down, I can confirm that, I saw that, the passage was much narrower than usual, and there were metal detectors which were not supposed to be there.

…

Mr Biryukov was in charge on behalf of the Moscow Interior Department – this is absolutely sure because he is always in charge of such events. His name,

his function and his telephone number were written on our badges so that he could be contacted if any questions or doubts arose. As to the [representative of the Mayor's office], [I am not sure].
[Question to the witness] You have explained about the cordon. Why was it not possible, for example, to move it [back] so as to prevent a scuffle?
- Mr Biryukov is a very constructive person and he knows his job, but he could not explain to me why he could not influence the riot police.
… [the Deputy Mayor also] told me that he could not do anything, it was said to me personally. At this time the breaking of the cordon occurred. [The Ombudsman] and our staff, together with a few other people, walked out through [the gap] …
[Question to the witness] Did you receive any information while at the cordon? Perhaps you heard from the police officers about the official closure of the public event?
- No.
… After the cordon had already been broken, when the arrests had begun, [then] they were telling us through a megaphone to disperse, that the meeting was over, I heard it."

58 On 23 December 2013 Mr N. Svanidze, member of the Civic Chamber of the Russian Federation gave testimonies as a witness in the first Bolotnaya case. He testified, in particular, as follows:

"… [on 6 May 2012] I was present as an observer … [when] everybody headed towards the narrow bottleneck of the embankment … it created a jam. Several dozens of people sat on the ground, and the cordon moved towards it … I asked 'Why won't they open up the passage?', but Viktor Aleksandrovich [Biryukov] would turn his face away and would not answer when one told him that the passage had to be opened. I understood that there was no point talking to him, he was not in command.
…
[Question to the witness] Did [the Ombudsman] or anyone else attempt to negotiate the widening of the passage?
- We could not do anything. We requested it, [Ms Mirza] requested it and I think that [the Ombudsman] did too, but nothing was done. The passage was not widened.
…
[Question to the witness] Were there any calls to move towards the Kremlin?
- No.
…
[Question to the witness] During your presence at the event did you know on what territory the meeting had been authorised?
- Yes, I was convinced that [it was] Bolotnaya Square and the park of Bolotnaya Square."

59 On the same day Mr Vasiliev, staff member at the Ombudsman's office, gave testimonies as a witness in the first Bolotnaya case. He testified, in particular, as follows:

"… [on 6 May 2012] I was present as an observer … on that day we gathered at the press centre of the Interior Department, we were given maps, the instructions how to behave, the list of public observers …
… the Ombudsman asked [the protestors sitting on the ground] why they were not going to the meeting venue. I could not hear the answer, they got up and headed on, after that, congestion occurred … [the Ombudsman] began looking for the officer responsible for the cordon. There was [the chief press officer] Mr Buryukov there, [the Ombudsman] told him: 'let's move the cordon back so that people can pass' [but] Mr Biryukov told him that it was outside his powers. [The Ombudsman] asked in whose powers it was, he replied 'I don't know'. At that moment the police began splitting the crowd …"

60 On 21 February 2014 the Zamoskvoretskiy District Court of Moscow pronounced a judgment in the first Bolotnaya case. It found eight persons guilty of participation in the mass disorder and of violent acts against police officers during the public assembly on 6 May 2012. They received prison sentences of between two-and-a-half and four years; one of them was released on parole. Three co-defendants had previously been pardoned under the Amnesty Act and a fourth had his case disjoined from the main proceedings.

61 On 22 May 2014 the Zamoskvoretskiy branch of the Investigative Committee dismissed five complaints by individuals who had sustained injuries on 6 May 2012 allegedly through the excessive use of force by the police. The complaints had originally been a part of the criminal investigation file concerning the mass disorder, but were subsequently disjoined from it. During the investigation of the mass disorder case, confrontations were conducted between those who had lodged complaints (in the capacity of the accused in the criminal case) and the police officers accused of violence (in the capacity of victims in the criminal case). The relevant part of the decision read as follows:

"In suppressing attempts to break the police cordon, the police officers acted in co-ordination and concert, without applying physical force or special means of restraint; however the work of the officers charged with apprehending offenders did involve physical force and special means of restraint, in so far as necessary [to restrain] those resisting.
After the crowd of protestors had calmed down and thinned out a little, the police officers began to tighten the cordon, [and] by doing so encouraged the citizens to proceed to the stage. At the same time many meeting participants who did not want to go there began to return to Bolshaya Yakimanka Street of Moscow. The police also accompanied them.
Later, in the area of Malyy Kamennyy bridge and at the corner of the park [of Bolotnaya Square] confrontations took place between the provocateurs, the persons calling for defiance and the persons committing such defiance. During the apprehension of the said persons force was used by the police because of their resistance, and in a number of cases, also special means of restraint for apprehending the most active instigators.
…
Because of such a turn of events the police officers justifiably used physical force for the apprehension of the participants in the mass disorder, and in relation to some of them who attempted to resist, also special means of restraint."

62 On 20 June 2014 the Moscow City Court upheld the judgment of 21 February 2014, having slightly reduced the prison sentences of two defendants.

63 On 24 July 2014 the Moscow City Court found Mr Udaltsov and Mr Razvozzhayev guilty of organising mass disorder on 6 May 2012. The judgment contained the following findings:

> "Witness Deynichenko testified that on 4 May 2012 he had taken part in a working meeting at the Moscow Department of Regional Security … as a follow-up to the meeting a draft security plan was prepared, and all necessary agreements were reached with the organisers concerning the order of the march and meeting, the movement of the column, the stage set up, access to the meeting venue, barriers and the recess from the stage; the [organisers] had agreed on that. The question of using the park of Bolotnaya Square was not raised because the declared number of participants was 5,000, whereas over 20,000 people could be accommodated in the open area of the square and the embankment, and [the organisers] had known that in advance. It had been discussed with them how the cordon would be placed from Malyy Kamennyy bridge to the park of Bolotnaya Square, so the organisers knew about the cordon in advance. The placement of the cordon was indicated in the [security plan]. This document was for internal use and access to it was only given to the police; the location of the forces could be changed in an emergency by the operational headquarters. The organisers did not insist on an on-the-spot visit; such visits are held at the initiative of the organisers, which had not been requested because they had known the route … and the meeting venue … [Witness Deynichenko] had known that at the beginning of the march the event organisers, including Mr Udaltsov, had discussed between them that they were not going to turn to the meeting venue but would stop and try to break the cordon to proceed to Bolshoy Kamennyy bridge.
>
> …
>
> Witness N. Sharapov testified that Mr Udaltsov had known the route of the march and had not raised a question about opening up the park of Bolotnaya Square. Moreover, the park was a natural reserve with narrow lanes … the park had been opened up previously [for a public event], exceptionally, only on one occasion, on 4 February 2012, but then it was winter, it was snowing and the declared number of participants had significantly exceeded 5,000. No such exception was made for 6 May 2012.
>
> … according to the statement of the Moscow City Security Department, … the meeting venue at Bolotnaya embankment could accommodate 26,660 people …
>
> …
>
> The fact that no map of the assembly route or the placement of the police had been produced at the working meeting of 4 May 2012, that these questions had not been expressly discussed, … that the event organisers present at the working meeting had not been shown any maps, was confirmed by them.
>
> … the court concludes that no official map had been adopted with the organisers and, in the court's opinion, [the published map] had been based on Mr Udaltsov's own interview with journalists …

Therefore the map presented by the defence has no official character, its provenance is unknown and therefore unreliable and does not reflect the true route of the demonstration and the placement of the police forces.
… witness Mr Makhonin … testified that on 5 May 2012 he received the [security plan] … Before the start of the march he personally met the event organisers Ms Mityushkina, Mr Udaltsov [and] Mr Davidis and in the presence of the press and with the use of video recording explained to them the order of the meeting and the march, warned against the breach of public order during the conduct of event; and the need to inform him personally about any possible provocations by calling the telephone number known to the organisers. He asked Mr Udaltsov about the intention to proceed towards the Kremlin and to cause mass disorder because the police had received information about it from undercover sources; Mr Udaltsov had assured him that there would be no breaches of order at the event and that they had no intention to move towards the Kremlin … He (Mr Makhonin) arrived at Bolotnaya Square after the mass disorder had already begun … After the mass disorder began he tried calling Mr Udaltsov on the phone but there was no reply. Mr Udaltsov did not call him … Other event organisers had not asked him to move the cordon. Given the circumstances, Ms Mityushkina, at his request, announced the end of the meeting, and the police opened additional exits for those willing to leave. In addition to that, the police repeated through a loudspeaker the announcement about the end of the meeting …
… witness Mr Zdorenko … testified that … pursuant to information received [from undercover sources] about the possible setting up of a camp site, at about 9 p.m. on 5 May 2012 he arrived at Bolotnaya Square and organised a search of the area including the park. The park was cordoned off and guarded … if necessary, at the decision of the operational headquarters, the venue allocated for the meeting could be significantly extended at the expense of the park [of Bolotnaya Square]. However, there was no need for that given that there was no more than 2,500-3,000 persons on Bolotnaya Square … [others being stopped at] Malyy Kamennyy bridge.
…
Witness A. Zharkov testified that … while the stage was being set up he had seen an unknown man smuggling four camping tents in rubbish bins.
…
Witness M. Volondina testified that … before the beginning of the march police information from undercover sources came through that the event organisers intended to encircle the Kremlin holding hands to prevent the inauguration of the Russian President.
Witness M. Zubarev testified that … he had been [officially] filming … while police officer Makhonin … explained the order … and warned the organisers … and asked Mr Udaltsov to inform him of any possible provocations. Mr Udaltsov stated that they would act lawfully and that he had requested the police to stop any unwanted persons from joining the public event …
Witness Y. Vanyukhin testified that on 6 May 2012 … at about 6 p.m. Mr Udaltsov, while on the way to the stage, told people around him that they were going to set up a campsite …
… witness Ms Mirza testified that … police officer Biryukov had asked her and [the Ombudsman] to come to Malyy Kamennyy bridge where some of

the protestors, including Mr Nemtsov and Mr Udaltsov, had not turned right to the stage but had gone straight to the cordon where they had begun a sit-in protest on the pretext that access to the park of Bolotnaya Square had been closed and cordoned off … While [the Ombudsman] was talking to those sitting on the ground they remained silent, did not reply but would not stand up.

Witness Mr Babushkin testified that … after the first confrontations between the protestors and the police had begun, the latter announced through a loudspeaker that the meeting was cancelled and invited the citizens to leave.

Witness Mr Ponomarev testified that … the police cordon had been placed differently from [the cordon placed for] a similar march on 4 February 2012 … he proposed to Mr Udaltsov to push the cordon so that the police stepped back a few steps and widened the access to Bolotnaya Square, and the latter replied that he would figure it out when they reached the cordon … he knew that Mr G. Gudkov was negotiating with the police about moving the cordon, which had now been reinforced by the riot police.

… witnesses Mr Yashin and Mr Nemtsov testified that … during the steering committee meeting the question of setting up tents during the public event had not been discussed … while [Mr G. Gudkov] and [Mr D. Gudkov] were negotiating with the police … the crowd built up [and] suddenly the police began moving forward, the protestors resisted and the cordon broke …

Witness Mr G. Gudkov [State Duma Deputy] testified that … at the request of the organisers who had told him that they would not go anywhere and would remain sitting until the police moved the cordon back and opened up access to the park of Bolotnaya Square, he had taken part in the negotiations with the police on that matter. He had reached an agreement with the officers of the Moscow Department of the Interior that the cordon would be moved back, but the organisers who had filed the notice [of the event] should have signed the necessary documents. However those who had called for a sit-in, including Mr Udaltsov, refused [to stand up] to go to the offices of the Moscow Department of the Interior to sign the necessary documents, although he (Mr Gudkov) had proposed several times that they should do so …

… witness Mr D. Gudkov [State Duma Deputy] testified that … together with Mr G. Gudkov he had conducted negotiations with the police … an agreement had been reached that the cordon at the Malyy Kamennyy bridge would be moved back and the access to the park would be opened up, but at that point some young men in hoodies among the protestors began first to push the citizens onto the cordon provoking the [same] response, after that the breaking of the cordon occurred, the [police] began the arrests and mass disorder ensued.

…

… the court [dismisses] the testimonies that it was the police who had begun moving towards the protestors peacefully sitting on the ground and thus provoked the breaking of the cordon … [and finds] that it was the protestors, and not the police … who began pushing against the cordon, causing the crowd to panic, which eventually led to the breaking of the cordon and the ensuing mass disorder.

…

The court takes into account the testimonies of Mr Davidis that … at about 6 p.m. Ms Mityushkina, who was responsible for the stage, informed him about

the demand of the police that she announce, as an event organiser, that it was terminated. He passed this information on to Mr Udaltsov by phone, [and he] replied that they were standing up and heading towards the stage … he knew that on 6 May 2012 [some] citizens had brought several tents to Bolotnaya Square, but Mr Udaltsov had not informed him about the need to put up tents during the public event.

…

The court takes into account the testimonies of Mr Bakirov …, one of the [formal] event organisers … that nobody had informed him about the need to put up tents during the public event.

…

[The court examined] the video recording … of the conversation between Mr Makhonin and Mr Udaltsov during which the latter assured Mr Makhonin that they would conduct the event in accordance with the authorisation, he would not call on people to stay at Bolotnaya Square and if problems occurred he would maintain contact with the police.

…

… [the court examined another video recording] in which Mr Makhonin and Mr Udaltsov discussed the arrangements. Mr Makhonin showed Mr Udaltsov where the metal detectors would be placed, after that they agreed to meet at 3 p.m. … and exchanged telephone numbers …

…

According to [expert witnesses Ms N. and Ms M.], the borders of Bolotnaya Square in Moscow are delimited by Vodootvodnyy channel, Serafimovicha Street, Sofiyskaya embankment and Faleyevskiy passage, and the [park] forms a part of Bolotnaya Square. During public events at Bolotnaya Square the park is always cordoned off and is not used for the passage of citizens.

These testimonies are fully corroborated by the reply of the Head of Yakimanka District Municipality of Moscow of 27 July 2012 and the map indicating the borders of Bolotnaya Square.

…

[The court finds] that the place of the sit-in … was outside the venue approved by the Moscow authorities for the public event …

…

The organisation of mass disorder may take the form of incitement and controlling the crowd's actions, directing it to act in breach of the law, putting forward various demands to the authorities' representatives. This activity may take different forms, in particular the planning and preparation of such actions, the selection of groups of people to provoke and fuel mass disorder, incitement to commit it, by filing petitions and creating slogans, announcing calls and appeals capable of electrifying the crowd and causing it to feel appalled, influencing people's attitudes by disseminating leaflets, using the mass media, meetings and various forms of agitation, in developing a plan of crowd activity taking into account people's moods, accumulated grievances, guiding the crowd directly to commit mass disorder.

… this offence is considered accomplished as soon as at least one of the actions enumerated under Article 212 § 1 of the Criminal Code has been carried out

…

> … the criminal offence of organisation of mass disorder is considered accomplished when organisational activity has been carried out and does not depend on the occurrence or non-occurrence of harmful consequences.
> …
> There are no grounds to consider the closure of access to the park of Bolotnaya Square and the placement of a guiding police cordon at the foot of Malyy Kamennyy bridge to be a provocation … since it was only to indicate the direction and it did not obstruct access to the meeting venue at Bolotnaya Square.
> … the reinforcement of the cordon … was necessary in the circumstances … to prevent it from breaking … but the police [cordon] did not advance towards the protestors.
> It is therefore fully proven that the mass disorder organised by Mr Udaltsov [and others]… led to the destabilisation of public order and peace in a public place during the conduct of a public event, put a large number of people in danger, including those who had come to fulfil their constitutional right to congregate in peaceful marches and meetings, led to considerable psychological tension in the vicinity of Bolotnaya Square in Moscow, accompanied by violence against the police … and the destruction of property.
> …"

64 The Moscow City Court sentenced Mr Udaltsov and Mr Razvozzhayev to four-and-a-half years of imprisonment. On 18 March 2015 the Supreme Court of the Russian Federation upheld the judgment of 24 July 2014, with amendments.

65 On 18 August 2014 the Zamoskvoretskiy District Court of Moscow examined another "Bolotnaya" case and found four persons guilty of participating in the mass disorder and of committing violent acts against police officers during the demonstration on 6 May 2012. They received prison sentences of between two-and-a-half and three-and-a-half years; one of them was released on parole. This judgment was upheld by the Moscow City Court on 27 November 2014.

B. The applicant's arrest, detention and conviction for an administrative offence

66 On 6 May 2012 the applicant arrived at Bolotnaya Square at about 18.00 to take part in the meeting. He stood in front of the stage on Bolotnaya embankment, within the area designated as the meeting venue.

67 According to the applicant, between 18.00 and 19.00 the area around him remained peaceful, although there was general confusion. He claimed that he had not heard any announcement about the termination of the meeting; he had heard the police orders made through a megaphone to disperse, but in the general commotion he was unable to leave immediately and remained within the authorised meeting area until 19.00 when he was arbitrarily arrested by the police dispersing the demonstration. The applicant denied that he had received any warning or orders before being arrested. The police apprehended him and took him to a police van, where he waited for an hour before it left Bolotnaya Square for the police station. According to the applicant, there was no traffic at Bolotnaya Square at the time of his arrest; it was still suspended.

68 According to the Government, the applicant was arrested at 20.30 at Bolotnaya Square because he was obstructing the traffic and had disregarded the police order to move away.

69 At 21.30 the applicant was taken to the Krasnoselskiy District police station in Moscow. At the police station an on-duty officer drew up a statement on an administrative offence on the basis of a report by Police Officer Y who had allegedly arrested the applicant. Y's report contained the following hand-written statement:

> "I [Y] report that on 6 May 2012 at 9.30 p.m., at 5/16 Bolotnaya Square, together with police lieutenant [A] I arrested Mr Frumkin."

70 The rest of the report was a printed template stating as follows:

> "… who, acting in a group of citizens, took part in an authorised meeting, went out onto the road and thus obstructed the traffic. [He] did not react to the multiple demands of the police to vacate the road …, thereby disobeying a lawful order of the police who were fulfilling their service duty of maintaining public order and ensuring safety. He thereby committed an administrative offence under Article 19.3 § 1 of the Code of Administrative Offences."

71 The statement on the administrative offence contained an identical text, but indicated that the applicant had been arrested at 20.30. The applicant was charged with obstructing the traffic and disobeying lawful police orders, an offence under art.19.3 of the Code of Administrative Offences. His administrative detention was ordered with reference to art.27.3 of the Code of Administrative offences. The "reasons" section of the order remained blank.

72 At 14.00 on 7 May 2012 the applicant was taken to court, but his case was not examined. After having spent the day in a transit van without food or drink, at 23.55 he was taken back to the cell at the Krasnoselskiy District police station. A new order for the applicant's administrative detention was issued, indicating that he had been detained "for the purpose of drawing up the administrative material".

73 At 08.00 on 8 May 2012 the applicant was brought before the Justice of the Peace of Circuit No.100 of the Yakimanka District, who examined the charges. The applicant requested that the case be adjourned on the grounds that he was unfit to stand trial after the detention; he also requested that the hearing be opened to the public and that two police officers be examined as witnesses. Those requests were rejected in order to expedite the proceedings. A further request for the examination of several eyewitnesses was partly refused and partly granted. Three witnesses for the defence were examined.

74 On the basis of the report written by Police Officer Y, the court established that at 20.30 on 6 May 2012 the applicant was walking along the road at Bolotnaya Square and was obstructing the traffic, and that he then disobeyed lawful police orders to vacate the venue. The Justice of the Peace rejected as unreliable two eyewitnesses' testimonies that the police had not given the applicant any orders or warnings before arresting him. The applicant was found guilty of disobeying lawful police orders, and was sentenced under art.19.3 of the Code of Administrative Offences to fifteen days' administrative detention.

75 On 11 May 2012 the Zamoskvoretskiy District Court of Moscow examined an appeal lodged by the applicant. At the applicant's request the court examined Ms S as a witness. She testified that at 19.46 on 6 May 2012 she had been looking for her son when she saw the applicant in a police van and spoke to him. She also testified that at 21.03 she had been at Bolotnaya Square; the place had already been fully cordoned off but the traffic had not resumed. The court rejected the applicant's

argument that the police report and the police statement were inconsistent as regards the time of his arrest and found that the correct interpretation of those documents was that the time of arrest had been 20.30 and the detention at the police station 21.30. The court dismissed the video recording submitted by the applicant on the grounds that it did not contain the date and the time of the incident but found that the applicant's guilt had been proven by other evidence. It upheld the first-instance judgment.

76 On 11 January 2013 the Deputy President of the Moscow City Court examined the applicant's administrative case in supervisory review proceedings and upheld the earlier judicial decisions.

II. Relevant domestic law

77 The Federal Law on Assemblies, Meetings, Demonstrations, Marches and Pickets, No.FZ-54 of 19 June 2004 (the Public Assemblies Act), provided at the material time as follows:

> **"Section 7. Notification of a public event**
> Notification of a public event (except for a gathering or solo picketing) shall be filed by its organiser in writing with the executive body of the subject of the Russian Federation or the municipal authorities no earlier than fifteen days and no later than ten days prior to the scheduled date of the event …
> **Section 8. Venue for holding a public event**
> A public event may be held at any venue suitable for the purposes of the event, provided that it does not create a risk of the collapse of buildings or structures or any other threats to the safety of the participants in the public event. …
> **Section 12. Obligations of the executive body of the subject of the Russian Federation or the municipal authorities**
> 1. Upon receipt of the notification of a public event, the executive body of the subject of the Russian Federation or the municipal authorities shall:
> …
> (iii) depending on the form of the public event and the number of participants, appoint an authorised representative to assist the event organisers in conducting the event in accordance with the law. The authorised representative shall be formally appointed by a written decision which shall be sent to the event organiser prior to the scheduled date of the event;
> (iv) inform the organiser of the public event about the authorised perimeter of the territory (venue) where the public event is to be held;
> (v) ensure, within its competence and jointly with the organiser of the public event and the authorised representative of the Ministry of Internal Affairs, public order and safety of citizens during the public event and, if necessary, provide them with urgent medical aid; …
> 2. If the information contained in the text of the notification of a public event and other data give grounds to suppose that the aims of the planned event and the way in which it will be conducted do not comply with the Constitution of the Russian Federation and/or are in breach of prohibitions established by the legislation of the Russian Federation concerning administrative offences or the criminal legislation of the Russian Federation, the executive body of the subject of the Russian Federation or the municipal authorities shall immediately

notify the organiser of the public event by issuing a reasoned written warning that the organiser, as well as other participants in the public event, may be held duly liable in the event of such non-compliance or breach.

Section 13. Rights and obligations of the representative of the executive body of the Russian Federation or the municipal authorities

1. The representative of the executive body of the subject of the Russian Federation or the municipal authorities has the right:

(i) to require the organiser of a public event to comply with the conditions for holding the event;

(ii) to decide on the suspension or termination of the public event following the procedure and on the grounds set out in this Federal Law.

2. The representative of the executive body of the subject of the Russian Federation or the municipal authorities must:

(i) be present at the public event;

(ii) assist the event organiser in the conduct of the public event;

(iii) ensure, jointly with the organiser of the public event and the authorised representative of the Ministry of Internal Affairs, public order and the safety of citizens, as well as compliance with the law, during the event.

Section 14. Rights and obligations of the authorised representative of the Ministry of Internal Affairs

1. At the proposal of the executive body of the subject of the Russian Federation or the municipal authorities the chief of the department of the interior in charge of the territory (venue) where the public event is intended to be held must appoint an authorised representative of the Ministry of Internal Affairs to assist the event organiser in maintaining public order and the safety of citizens. The said representative shall be formally appointed by a written decision of the chief of the department of the interior.

2. The authorised representative of the Ministry of Internal Affairs has the right:

(i) to require the organiser of a public event to announce the closure of access to the event to citizens and to take his or her own action to prevent citizens from accessing the venue if the authorised perimeter of the territory (venue) is breached;

(ii) to require the organiser and the participants of the public event to comply with the conditions for holding the event;

(iii) at the request of the event organiser, to remove any citizens disobeying the organiser's lawful orders.

3. The authorised representative of the Ministry of Internal Affairs must:

(i) facilitate the conduct of the public event;

(ii) ensure, jointly with the organiser of the public event and the executive body of the subject of the Russian Federation or the municipal authorities, public order and safety of citizens and compliance with the law, during the public event.

Section 15. Grounds and procedure for suspension of a public event

1. If during the holding of a public event there occurs, through the fault of the participants, a breach of lawful order which does not entail a risk to the life or health of the participants, the representative of the executive body of the

subject of the Russian Federation or the municipal authorities may require the event organiser to remedy the breach alone or jointly with the authorised representative of the Ministry of Internal Affairs.

2. In the event of non-compliance with the requirement referred to in paragraph 1 above, the authorised representative of the executive body of the subject of the Russian Federation or the municipal authorities may suspend the public event for a time determined by him in order to remedy the breach. Upon rectification of the breach, the public event may be continued as agreed between the organiser and the respective representative.

3. If the breach has not been remedied at the expiry of the time-limit set by the authorised representative of the executive body of the subject of the Russian Federation or the municipal authorities, the public event shall be terminated in accordance with section 17 of this Federal Law.

Section 16. Grounds for termination of a public event

A public event may be terminated on the following grounds:

(i) if the event has created a real danger for the life and health of citizens as well as for the possessions of individuals or legal persons;

(ii) if the participants of the public event have committed unlawful acts and the organisers have deliberately breached the provisions of this Federal Law relating to the conditions for holding the event.

Section 17. Procedure for termination of a public event

1. In the event that a decision to terminate a public event is taken, the authorised representative of the executive body of the subject of the Russian Federation or the municipal authorities shall:

(i) order the event organiser to terminate the public event, giving the justification for its termination, and within 24 hours issue this order in writing and serve it on the event organiser;

(ii) determine a time-limit for compliance with the order to terminate the public event;

(iii) In the event of non-compliance with the order to terminate the public event by the organiser, address the participants of the public event directly and allow additional time for compliance with the order to terminate it.

2. In the event of non-compliance with the order to terminate a public event, the police shall take all necessary measures to terminate the event, acting in accordance with the legislation of the Russian Federation.

3. The procedure for termination of a public event provided for by paragraph 1 above shall not apply if mass disorder, riots, arson attacks or other emergency situations occur. In these situations the termination of a public event shall be carried out in accordance with the legislation of the Russian Federation."

78 The Criminal Code of the Russian Federation provides as follows:

"Article 212. Mass disorder

1. The organisation of mass disorder accompanied by violence, riots, arson, destruction of property, use of firearms, explosives and explosive devices, as well by armed resistance to a public official shall be punishable by four to ten years' deprivation of liberty.

2. Participation in the mass disorder provided for by paragraph 1 of this Article shall be punishable by three to eight years' deprivation of liberty.

3. The instigation of mass disorder provided for by paragraph 1 of this Article, or the instigation of participation in it, or the instigation of violence against citizens shall be punishable by restriction of liberty for up to two years, or community work for up to two years, or deprivation of liberty for the same term.

…

Article 318. Use of violence against a public official

1. The use of violence not endangering life or health, or the threat to use such violence, against a public official or his relatives in connection with the performance of his or her duties shall be punishable by a fine of up to 200,000 Russian roubles or an equivalent of the convicted person's wages for 18 months, or community work for up to five years, or up to five years' deprivation of liberty …."

79 The relevant provisions of the Code of Administrative Offences of 30 December 2001 at the material time read as follows:

"Article 19.3 Refusal to obey a lawful order of a police officer …

Failure to obey a lawful order or demand of a police officer … in connection with the performance of their official duties related to maintaining public order and security, or impeding the performance by them of their official duties, shall be punishable by a fine of between 500 and 1,000 Russian roubles (RUB) or by administrative detention of up to fifteen days.

…

Article 20.2 Breaches of the established procedure for the organisation or conduct of public gatherings, meetings, demonstrations, marches or pickets

1. Breaches of the established procedure for the organisation of public gatherings, meetings, demonstrations, marches or pickets shall be punishable by an administrative fine of between ten and twenty times the minimum wage, payable by the organisers.

2. Breaches of the established procedure for the conduct of public gatherings, meetings, demonstrations, marches or pickets shall be punishable by an administrative fine of between RUB 1,000 and RUB 2,000 for the organisers, and between RUB 500 and RUB 1,000 for the participants.

…

Article 27.2 Escorting of individuals

1. The escorting or the transfer by force of an individual for the purpose of drawing up an administrative offence report, if this cannot be done at the place where the offence was discovered and if the drawing up of a report is mandatory, shall be carried out:

(1) by the police …

…

2. The escort operation shall be carried out as quickly as possible.

3. The escort operation shall be recorded in an escort operation report, an administrative offence report or an administrative detention report. The escorted person shall be given a copy of the escort operation report if he or she so requests.

Article 27.3 Administrative detention

1. Administrative detention or short-term restriction of an individual's liberty may be applied in exceptional cases if this is necessary for the prompt and proper examination of the alleged administrative offence or to secure the enforcement of any penalty imposed by a judgment concerning an administrative offence. …

…

3. Where the detained person so requests, his family, the administrative department at his place of work or study and his defence counsel shall be informed of his whereabouts.

…

5. The detained person shall have his rights and obligations under this Code explained to him, and the corresponding entry shall be made in the administrative arrest report.

Article 27.4 Administrative detention report

1. Administrative detention shall be recorded in a report …

2 …. If he or she so requests, the detained person shall be given a copy of the administrative detention report.

Article 27.5 Duration of administrative detention

1. The duration of administrative detention shall not exceed three hours, except in the cases set out in paragraphs 2 and 3 of this Article.

2. Persons subject to administrative proceedings concerning offences involving unlawful crossing of the Russian border … may be subject to administrative detention for up to 48 hours.

3. Persons subject to administrative proceedings concerning offences punishable, among other administrative sanctions, by administrative detention may be subject to administrative detention for up to 48 hours.

4. The term of the administrative detention is calculated from the time when [a person] escorted in accordance with Article 27.2 is taken [to the police station], and in respect of a person in a state of alcoholic intoxication, from the time of his sobering up."

III. Relevant international material

80 The Guidelines on Freedom of Peaceful Assembly adopted by the Venice Commission at its 83rd Plenary Session (Venice, 4 June 2010) provide as follows:

"Section A – guidelines on freedom of peaceful assembly

1. Freedom of Peaceful Assembly

…

Only peaceful assemblies are protected.

An assembly should be deemed peaceful if its organisers have professed peaceful intentions and the conduct of the assembly is non-violent. The term 'peaceful' should be interpreted to include conduct that may annoy or give offence, and even conduct that temporarily hinders, impedes or obstructs the activities of third parties.

…

5. Implementing Freedom of Peaceful Assembly Legislation

5.1 Pre-event planning with law enforcement officials
Wherever possible, and especially in the case of large assemblies or assemblies on controversial issues, it is recommended that the organiser discuss with the law enforcement officials the security and public safety measures that are put in place prior to the event. Such discussions might, for example, cover the deployment of law enforcement personnel, stewarding arrangements, and particular concerns relating to the policing operation.
…

5.3 A human rights approach to policing assemblies
The policing of assemblies must be guided by the human rights principles of legality, necessity, proportionality and non-discrimination and must adhere to applicable human rights standards. In particular, the State has a positive duty to take reasonable and appropriate measures to enable peaceful assemblies to take place without participants fearing physical violence. Law enforcement officials must also protect participants of a peaceful assembly from any person or group (including agents provocateurs and counter-demonstrators) that attempts to disrupt or inhibit it in any way.

5.4 The use of negotiation and/or mediation to de-escalate conflict
If a standoff or other dispute arises during the course of an assembly, negotiation or mediated dialogue may be an appropriate means of trying to reach an acceptable resolution. Such dialogue – whilst not always successful – can serve as a preventive tool helping to avoid the escalation of conflict, the imposition of arbitrary or unnecessary restrictions, or recourse to the use of force.
…
Section B – Explanatory Notes
15 …. For the purposes of the Guidelines, an assembly means the intentional and temporary presence of a number of individuals in a public place for a common expressive purpose …
…
18. The question of at what point an assembly can no longer be regarded as a temporary presence (thus exceeding the degree of tolerance presumptively to be afforded by the authorities towards all peaceful assemblies) must be assessed in the individual circumstances of each case. … Where an assembly causes little or no inconvenience to others then the authorities should adopt a commensurately less stringent test of temporariness … the term 'temporary' should not preclude the erection of protest camps or other non-permanent constructions.
…
'Peaceful' and 'non-peaceful' assemblies
25. **'Peaceful' assemblies**: Only 'peaceful' assembly is protected by the right to freedom of assembly …
26. The term 'peaceful' should be interpreted to include conduct that may annoy or give offence to persons opposed to the ideas or claims that it is

seeking to promote, and even conduct that temporarily hinders, impedes or obstructs the activities of third parties. Thus, by way of example, assemblies involving purely passive resistance should be characterized as 'peaceful' …

…

28. If this fundamental criterion of 'peacefulness' is met, it triggers the positive obligations entailed by the right to freedom of peaceful assembly on the part of the State authorities … It should be noted that assemblies that survive this initial test (thus, prima facie, deserving protection) may still legitimately be restricted on public order or other legitimate grounds …

…

Legality

38. To aid certainty, any prior restrictions should be formalised in writing and communicated to the organiser of the event within a reasonable timeframe (see further paragraph 135 below). Furthermore, the relevant authorities must ensure that any restrictions imposed during an event are in full conformity with the law and consistent with established jurisprudence. Finally, the imposition, after an assembly, of sanctions and penalties which are not prescribed by law is not permitted.

…

Content-based restrictions

95. Whether behaviour constitutes the intentional incitement of violence is inevitably a question which must be assessed on the particular circumstances … Some difficulty arises where the message concerns unlawful activity, or where it could be construed as inciting others to commit non-violent but unlawful action. Expressing support for unlawful activity can, in many cases, be distinguished from disorderly conduct, and should not therefore face restriction on public order grounds. The touchstone must again be the existence of an imminent threat of violence …

96 …. resort to [hate] speech by participants in an assembly does not of itself necessarily justify the dispersal of the event, and law enforcement officials should take measures (such as arrest) only against the particular individuals involved (either during or after the event).

…

Restrictions imposed during an assembly

108. The role of the police or other law enforcement personnel during an assembly will often be to enforce any prior restrictions imposed in writing by the regulatory body. No additional restrictions should be imposed by law enforcement personnel unless absolutely necessary in light of demonstrably changed circumstances. On occasion, however, the situation on the ground may deteriorate (participants, for example, might begin using or inciting imminent violence), and the authorities may have to impose further measures to ensure that other relevant interests are adequately safeguarded. In the same way that reasons must be adduced to demonstrate the need for prior restrictions, any restrictions imposed in the course of an assembly must be equally rigorously justified. Mere suspicions will not suffice, and the reasons must be both relevant and sufficient. In such circumstances, it will be appropriate for other civil authorities (such as an Ombudsman's office) to have an oversight role in relation to the policing operation, and law enforcement personnel should be accountable to an independent body. Furthermore … unduly broad

discretionary powers afforded to law enforcement officials may breach the principle of legality given the potential for arbitrariness. The detention of participants during an assembly (on grounds of their committing administrative, criminal or other offences) should meet a high threshold given the right to liberty and security of person and the fact that interferences with freedom of assembly are inevitably time sensitive. Detention should be used only in the most pressing situations when failure to detain would result in the commission of serious criminal offences.

…

Decision-making and review process

132. The regulatory authority … should fairly and objectively assess all available information to determine whether the organisers and participants of a notified assembly are likely to conduct the event in a peaceful manner, and to ascertain the probable impact of the event on the rights and freedoms of other non-participant stakeholders. In doing so, it may be necessary to facilitate meetings with the event organiser and other interested parties.

133. The regulatory authority should also ensure that any relevant concerns raised are communicated to the event organiser, and the organiser should be offered an opportunity to respond to any concerns raised. This is especially important if these concerns might later be cited as the basis for imposing restrictions on the event. Providing the organiser with such information allows them the opportunity to address the concerns, thus diminishing the potential for disorder and helping foster a cooperative, rather than confrontational, relationship between the organisers and the authorities.

134. Assembly organisers, the designated regulatory authorities, law enforcement officials, and other parties whose rights might be affected by an assembly, should make every effort to reach mutual agreement on the time, place and manner of an assembly. If, however, agreement is not possible and no obvious resolution emerges, negotiation or mediated dialogue may help reach a mutually agreeable accommodation in advance of the notified date of the assembly. Genuine dialogue between relevant parties can often yield a more satisfactory outcome for everyone involved than formal recourse to the law. The facilitation of negotiations or mediated dialogue can usually best be performed by individuals or organisations not affiliated with either the State or the organiser. The presence of parties' legal representatives may also assist in facilitating discussions between the assembly organiser and law enforcement authorities. Such dialogue is usually most successful in establishing trust between parties if it is begun at the earliest possible opportunity. Whilst not always successful, it serves as a preventive tool helping to avoid the escalation of conflict or the imposition of arbitrary or unnecessary restrictions.

135. Any restrictions placed on an assembly should be communicated in writing to the event organiser with a brief explanation of the reason for each restriction (noting that such explanation must correspond with the permissible grounds enshrined in human rights law and as interpreted by the relevant courts). The burden of proof should be on the regulatory authority to show that the restrictions imposed are reasonable in the circumstances … Such decisions should also be communicated to the organiser within a reasonable

timeframe – *i.e.* sufficiently far in advance of the date of a proposed event to allow the decision to be judicially appealed to an independent tribunal or court before the notified date of the event.

136. The regulatory authority should publish its decisions so that the public has access to reliable information about events taking place in the public domain. This might be done, for example, by posting decisions on a dedicated web-site.

…

6. Policing Public Assemblies

…

147. Governments must ensure that law enforcement officials receive adequate training in the policing of public assemblies. Training should equip law enforcement agencies to act in a manner that avoids escalation of violence and minimises conflict, and should include 'soft skills' such as negotiation and mediation …

…

149. Law enforcement agencies should be proactive in engaging with assembly organizers: [o]fficers should seek to send clear messages that inform crowd expectations and reduce the potential for conflict escalation … Furthermore, there should be a nominated point of contact within the law enforcement agency whom protesters can contact before or during an assembly. These contact details should be widely advertised …

150. The policing operation should be characterized by a policy of 'no surprises': [l]aw enforcement officers should allow time for people in a crowd to respond as individuals to the situation they face, including any warnings or directions given to them …

…

157. Using mediation or negotiation to de-escalate tensions during an assembly: [i]f a standoff or dispute arises during the course of an assembly, negotiation or mediated dialogue may be an appropriate means of trying to reach an acceptable resolution …

…

159. Law enforcement officials should differentiate between peaceful and non-peaceful participants: [n]either isolated incidents of sporadic violence, nor the violent acts of some participants in the course of a demonstration, are themselves sufficient grounds to impose sweeping restrictions on peaceful participants in an assembly … Law enforcement officials should not therefore treat a crowd as homogenous if detaining participants or (as a last resort) forcefully dispersing an assembly.

164. Policing peaceful assemblies that turn into non-peaceful assemblies: [a]ssemblies can change from being peaceful to non-peaceful and thus forfeit the protection afforded under human rights law … Such an assembly may thus be terminated in a proportionate manner. However, the use of violence by a small number of participants in an assembly (including the use of inciting language) does not automatically turn an otherwise peaceful assembly into a non-peaceful assembly, and any intervention should aim to deal with the particular individuals involved rather than dispersing the entire event.

165. Dispersal of assemblies: [s]o long as assemblies remain peaceful, they should not be dispersed by law enforcement officials. Indeed, dispersal of assemblies should be a measure of last resort and should be governed by prospective rules informed by international standards. These rules need not be elaborated in legislation, but should be expressed in domestic law enforcement guidelines, and legislation should require that such guidelines be developed. Guidelines should specify the circumstances that warrant dispersal, and who is entitled to make dispersal orders (for example, only police officers of a specified rank and above).
166. Dispersal should not occur unless law enforcement officials have taken all reasonable measures to facilitate and protect the assembly from harm (including, for example, quieting hostile onlookers who threaten violence), and unless there is an imminent threat of violence …
167. Dispersal should not therefore result where a small number of participants in an assembly act in a violent manner. In such instances, action should be taken against those particular individuals. Similarly, if 'agents provocateurs' infiltrate an otherwise peaceful assembly, the authorities should take appropriate action to remove the 'agents provocateurs' rather than terminating or dispersing the assembly, or declaring it to be unlawful …
168. If dispersal is deemed necessary, the assembly organiser and participants should be clearly and audibly informed prior to any intervention by law enforcement personnel. Participants should also be given reasonable time to disperse voluntarily. Only if participants then fail to disperse may law enforcement officials intervene further."

JUDGMENT

I. Alleged violation of art.11 of the Convention

81 The applicant alleged a violation of his right to peaceful assembly. He complained, in particular, of disruptive security measures implemented at the site of the meeting at Bolotnaya Square, about the early termination of the assembly and about his own arrest followed by his conviction for an administrative offence. He relied on art.11 of the Convention, which reads as follows:

"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."

A. Admissibility

82 The Court notes that this complaint is not manifestly ill-founded within the meaning of art.35(3)(a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

83 The Government contended that the authorities had acted lawfully and reasonably in the preparation of the public assembly of 6 May 2012, during the event and in assessing the need and the means to disperse it at the point when it ceased to be peaceful. They pointed out that the Moscow authorities and the event organisers had worked out the terms of the public assembly in their written exchange and in person at the working meeting on 4 May 2012. However, the police suspected the protestors of having intended to act in breach of the agreed terms, and on 5 May 2012 the prosecutor's office issued the organisers with a warning in this respect. At the same time, the police developed a detailed security plan providing for the necessary security measures.[3]

84 The Government further alleged that the disorder at Bolotnaya Square had occurred when some of the organisers and participants had refused to follow the agreed plan and had attempted to march outside the agreed area. They disregarded the police instructions to proceed to the designated venue at Bolotnaya embankment, even though it was accessible, and sat on the ground causing scuffles and disorder. According to the Government, two State Duma deputies, the Ombudsman of the Russian Federation and a member of the Civic Chamber of the Russian Federation had supported the police demands and tried to convince the protestors to follow the route, to no avail. Then, at 18.00 one of the organisers, acting at the request of the police, declared the early closure of the meeting; from 17.58 to 19.00 some of the protestors attempted to break the police cordon and threw various objects at the police. From 18.00 to 21.00 the police gradually forced the protestors to leave and arrested those showing the most active resistance. The Government considered that the intervention of the police had been justified since the assembly had ceased to be "peaceful" within the meaning of art.11 of the Convention. In dispersing the protestors, the police had not resorted to excessive force: only police truncheons had been used; only the most aggressive perpetrators had been targeted; and no tear gas or smoke bombs had been deployed.

85 The Government further affirmed that the circumstances at issue had been subject to a large-scale domestic inquiry, which had resulted in the prosecution and criminal conviction of the organisers for mass disorder[4] and of those who had committed violent acts against the police.[5] In addition, the Government referred to two decisions refusing to open a criminal investigation into alleged police brutality.[6] They

[3] See [16] et seq. above.
[4] See [63] above.
[5] See [53]–[60] and [65] above.
[6] See [52] and [61] above.

considered that overall the establishment of the facts and their assessment by the domestic investigative and judicial authorities had been thorough and correct.

86 As regards the particular circumstances of the case, the Government alleged that the applicant had incurred sanctions for failing to obey police orders to leave the site of the public assembly at the end of the authorised meeting. They maintained that he had been arrested at 20.30 and taken to the police station, where he had been detained pending the administrative proceedings and subsequently convicted of failure to comply with a lawful police order, an offence under art.19.3 of the Code of Administrative Offences.

87 The Government argued that the charges brought against the applicant had stemmed from a specific act of disobedience committed after the dispersal of the rally, and in any event after the expiry of the authorised time slot, rather than from his disagreement with the decision to terminate the assembly prematurely. They considered that there had been no interference with the exercise of the applicant's right to peaceful assembly and that in any event the penalty imposed on him, 15 days' detention, had not been disproportionate because he had been previously convicted of a similar offence.

88 The Government concluded that both the general measures taken in relation to the assembly as a whole and the individual measures taken against the applicant personally had been justified under art.11(2) of the Convention. They considered that they had complied with domestic law, were necessary "for the prevention of disorder or crime" and "for the protection of the rights and freedoms of others" and remained strictly proportionate.

(b) The applicant

89 The applicant maintained that he had been prevented from taking part in an authorised public assembly. First, he argued that the heavy-handed crowd-control measures had caused tension between the protestors and the police, resulting in some isolated confrontations which had been used as a pretext to terminate the meeting and to disperse it. Secondly, he argued that the termination of the meeting had not been clearly announced and that, owing to the general confusion, he had remained at the site of the meeting until his arrest. He contested having committed the act of disobedience imputed to him.

90 As regards the general measures, the applicant first pointed out that the restrictions set out in the police security plan were not aimed at ensuring the peaceful conduct of the assembly, but at limiting and suppressing it. Secondly, he argued that the authorities had unilaterally altered the original meeting layout without informing the organisers or the public. He considered that the restriction of the area had had no purpose other than to prevent the hypothesis that tents might be erected in the park. Rather than serving to prevent public disorder, that restriction had created a bottle-neck at the entrance to the meeting venue and had caused tension resulting in a spontaneous sit-in by a small number of participants, including organisers. Furthermore, as the tension had built up, the authorities had failed to communicate with the organisers and to facilitate peaceful co-operation.

91 The applicant further alleged that the authorities had failed to effectively inform the demonstrators of the termination of the meeting and of the order to disperse. He had been unaware of the decision to end the assembly and it had not been obvious to him, since he had not seen any clashes. He pointed out that under the

domestic law the police were required to suspend the assembly first and to give the organisers time to remedy any breach before they could terminate it. In any event, he denied that the assembly had ceased to be peaceful, despite numerous incidents of confrontation with the police. No confrontations had taken place within the authorised perimeter in front of the stage. Overall, he considered that the response by the police had been uncoordinated and disproportionate and that it had had the effect of escalating the confrontation rather than diffusing it. The immense number of police officers and extensive crowd-control resources deployed at the site of the assembly should have allowed the authorities to ensure the peaceful continuation of the meeting, but they chose to close it instead. The applicant relied on the expert report[7] in support of his allegations.

92 As regards his own arrest, the applicant claimed that he had been a peaceful participant in an authorised public assembly. He submitted that he had been arrested at 19.00, still within the hours of the authorised assembly, contrary to the Government's claim, as the police were mopping up the scene of the rally after its early closure; prior to his arrest the police gave him no warning and no order which he could have disobeyed; he was not obstructing the traffic since it was still suspended for the assembly, and was not committing any objectionable acts. He considered that he had been arrested merely for his presence at the site of the rally simply to discourage him and others from participating in opposition rallies. He further complained that the domestic courts had taken no account of his arguments and exonerating evidence and had imposed the most severe penalty possible. Overall, he contested his arrest and the ensuing conviction as unlawful, lacking a legitimate aim and not necessary in a democratic society, thus in violation of art.11 of the Convention.

2. The Court's assessment

(a) General principles

93 The right to freedom of assembly, one of the foundations of a democratic society, is subject to a number of exceptions which must be narrowly interpreted and the necessity for any restrictions must be convincingly established. When examining whether restrictions on the rights and freedoms guaranteed by the Convention can be considered "necessary in a democratic society" the Contracting States enjoy a certain but not unlimited margin of appreciation.[8] It is, in any event, for the European Court to give a final ruling on the restriction's compatibility with the Convention and this is to be done by assessing the circumstances of a particular case.[9]

94 When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under art.11 the decisions they took. This does not mean that it has to confine itself to ascertaining whether the state exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine, after having established that it pursued a "legitimate aim", whether

[7] See [49] et seq. above.
[8] See *Barraco v France* (31684/05) 5 March 2009 at [42].
[9] See *Osmani v Yugoslav Republic of Macedonia* (50841/99) 11 October 2001, and *Galstyan v Armenia* (2010) 50 E.H.R.R. 25 at [114].

it answered a "pressing social need" and, in particular, whether it was proportionate to that aim and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient".[10] In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in art.11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.[11]

95 The protection of opinions and the freedom to express them, as secured by art.10, is one of the objectives of freedom of assembly as enshrined in art.11. A balance must always be struck between the legitimate aims listed in art.11(2) and the right to free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places.[12]

96 The Contracting States must refrain from applying unreasonable indirect restrictions upon the right to assemble peacefully. In addition, there may be positive obligations to secure the effective enjoyment of this right.[13] The states have a duty to take reasonable and appropriate measures with regard to lawful demonstrations to ensure their peaceful conduct and the safety of all citizens, although they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used. In this area the obligation they enter into under art.11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved.[14] It is incumbent on the State, in particular, to take the appropriate preventive security measures to guarantee the smooth conduct of a public event, such as ensuring the presence of first-aid services at the site of demonstrations and regulating traffic so as to minimise its disruption.[15]

97 It is important for the public authorities, moreover, to show a certain degree of tolerance towards peaceful gatherings, even unlawful ones, if the freedom of assembly guaranteed by art.11 of the Convention is not to be deprived of all substance.[16] The limits of tolerance expected towards an irregular assembly depend on the specific circumstances, including the duration and the extent of public disturbance caused by it, and on whether its participants had been given sufficient opportunity to manifest their views.[17]

98 On the other hand, where demonstrators engage in acts of violence, interferences with the right to freedom of assembly are in principle justified for the prevention of disorder or crime and for the protection of the rights and freedoms of others.[18] The guarantees of art.11 of the Convention do not apply to assemblies where the organisers and participants have violent intentions, incite to violence or otherwise

[10] See *Coster v United Kingdom* (2001) 33 E.H.R.R. 20 at [104]; *Achouguian v Armenia* (33268/03) 17 July 2008 at [89]; *S v United Kingdom* (2009) 48 E.H.R.R. 50 at [101]; *Barraco* (31684/05) 5 March 2009 at [42]; and *Kasparov v Russia* (21613/07) 3 October 2013 at [86].
[11] See *Rai and Evans v United Kingdom* (26258/07 and 26255/07) 17 November 2009; and *Gün v Turkey* (8029/07) 18 June 2013 at [75]; see also *Gerger v Turkey* (24919/94) 8 July 1999 at [46]; and *United Communist Party of Turkey v Turkey* (1998) 26 E.H.R.R. 121 at [47].
[12] See *Ezelin v France* (1992) 14 E.H.R.R. 362 at [37] and [52]; *Barraco* (31684/05) 5 March 2009 at [27]; *Fáber v Hungary* (40721/08) 24 July 2012 at [41]; and *Taranenko v Russia* (19554/05) 15 May 2014 at [65].
[13] See *Oya Ataman v Turkey* (74552/01) 5 December 2006 at [36].
[14] See *Giuliani v Italy* (2012) 54 E.H.R.R. 10 at [251]; see also Plattform Ärzte für *das Leben v Austria* (1991) 13 E.H.R.R. 204 at [34]; *Oya Ataman* (74552/01) 5 December 2006 at [35]; and *Protopapa v Turkey* (16084/90) 24 February 2009 at [108].
[15] See *Oya Ataman* (74552/01) 5 December 2006 at [39], and *Kudrevičius v Lithuania* (2016) 62 E.H.R.R. 34 at [158]–[160].
[16] *Oya Ataman* (74552/01) 5 December 2006 at [37] and [39].
[17] See *Cisse v France* (51346/99) 9 April 2002 at [51]–[52]; *Molnar v Hungary* (10346/05) 7 October 2008 at [42]–[43]; *Navalnyy and Yashin v Russia* (76204/11) 4 December 2014 at [63]–[64]; and *Kudrevičius* (2016) 62 E.H.R.R. 34 at [155]–17 and [176]–[177].
[18] See *Giuliani* (2012) 54 E.H.R.R. 10 at [251].

deny the foundations of a "democratic society".[19] The burden of proving the violent intentions of the organisers of a demonstration lies with the authorities.[20]

99 In any event, an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour.[21] Even if there is a real risk of a public demonstration resulting in disorder as a result of developments outside the control of those organising it, such a demonstration does not as such fall outside the scope of art.11(1) of the Convention, but any restriction placed on such an assembly must be in conformity with the terms of para.(2) of that provision.[22]

(b) Application of these principles in the present case

100 The applicant alleged a violation of his right to freedom of peaceful assembly, referring to the measures taken as regards the assembly in general and the specific measures taken against him personally. He alleged that the crowd-control measures implemented by the police at Bolotnaya Square had in effect provoked a confrontation between the protestors and the police, and that the police had then used the incident as a pretext for the early termination of the meeting and its dispersal. He claimed, moreover, that the authorities had intended from the outset to suppress the rally in order to discourage street protest and political dissent. He argued that his own arrest at the site of the rally, his pre-trial detention and the ensuing conviction for an administrative offence had been arbitrary and unnecessary.

101 The Court observes that although the first part of the applicant's allegations concern a somewhat general situation, it is clear that those general events have directly affected the applicant's individual state of affairs and his rights guaranteed by art.11 of the Convention. He arrived at the site of the public event with the intention of taking part in the meeting; however, this became impossible because the meeting was disrupted and then cancelled, and the main speakers were arrested. This complaint is distinct from the grievances about the applicant's own subsequent arrest and detention, also lodged under art.11 of the Convention. The Court has thus identified two issues in the applicant's complaints and it will consider each of them separately.

(i) Obligation to ensure the peaceful conduct of the assembly

102 The Court observes that applying security measures in the course of a public assembly constitutes, on one hand, a restriction on the exercise of the right to freedom of assembly, but, on the other hand, it is also a part of the authorities' positive obligations to ensure the peaceful conduct of the assembly and the safety of all citizens.[23] It will begin its analysis with the question whether the authorities took all reasonable measures to ensure that the meeting at Bolotnaya Square was conducted peacefully. The Court observes that the parties have agreed on the

[19] See Stankov v Bulgaria (29221/95 and 29225/95) 2 October 2001 at [77]; *United Macedonian Organization Ilinden-Pirin v Bulgaria* (2007) 44 E.H.R.R. 4 at [99]; *Sergey Kuznetsov v Russia* (10877/04) 23 October 2008 at [45]; *Alekseyev v Russia* (4916/07 25924/08 and 14599/09) 21 October 2010 at [80]; *Fáber* (40721/08) 24 July 2012 at [37]; and *Gün* (8029/07) 18 June 2013 at [70].
[20] See *Christian Democratic People's Party v Moldova (No.2)* (25196/04) 2 February 2010 at [23].
[21] See *Ezelin* (1992) 14 E.H.R.R. 362 at [53]; *Ziliberberg v Moldova* (61821/00) 4 May 2004; and *Primov v Russia* (17391/06) 12 June 2014 at [155].
[22] See *Schwabe v Germany* (2014) 59 E.H.R.R. 28 at [92].
[23] See the case-law cited in [96] above.

essential circumstances of the standoff between the assembly leaders and the police at Malyy Kamennyy bridge, followed by a violent confrontation, the termination of the meeting and its dispersal. They agree on the time-line and the sequence of events as established by the domestic courts, but differ as to their perception, causal links and legal interpretation. They disagree, in particular, on whether the authorised venue layout was altered, on whether the authorities' conduct caused, or at least compounded the onset of the confrontations, and on whether the scale of the disorder justified the closure of the event and its dispersal by the police.

103 According to the official version, on 6 May 2012 mass disorder took place at Bolotnaya Square. The Government contended that on that day the assembly leaders had intended to take the march outside the designated area, to set up a protest campsite and, possibly, to hold an unauthorised assembly near the Kremlin. When they were barred by the police cordon, the organisers called for a sit-in and encouraged assaults on the police cordon. In those circumstances the police had no choice but to terminate the assembly, which had already been irrevocably disrupted, and to restrain the active offenders.

104 The assembly leaders, on the contrary, accused the authorities of having framed the demonstration so that a confrontation would become inevitable and so that a peaceful rally could be portrayed as an aggressive mob warranting a resolute crackdown. They denied that it had been their original intention to go outside the designated meeting area; conversely, the sit-in was a reaction to the authorities' unilateral change of the meeting layout. The protestors sat on the ground in an attempt to negotiate a passage through the park at Bolotnaya Square, which they considered to be a part of the agreed meeting venue, but the authorities showed no willingness to negotiate or even to communicate with them. From this point of view, the ensuing breaking of the cordon and confrontations were a consequence of the authorities' uncooperative conduct. In any event, the applicant contended that despite some isolated rowdy incidents, the assembly had remained generally peaceful and there had been no cause for terminating or dispersing it.

105 It transpires from the materials submitted in this case that safeguarding public order on 6 May 2012 was an elaborate security operation. The Court observes, in particular, that the security plan provided for a complex array of security measures to be taken in the whole city of Moscow on that day, of which a significant part was devoted to the public assembly at Bolotnaya Square.[24] The unprecedented scale of the police presence and of the equipment deployed for this event was noted in the media reports referred to by the parties, by the Expert Commission and the witnesses in the criminal proceedings.[25]

106 It is common ground that the enhanced security was due to anticipated unauthorised street protests. The authorities had closely monitored the activities of the opposition leaders in the period preceding 6 May 2012 by accessing open sources and by means of secret surveillance. They had suspected the opposition activists of plotting a popular uprising, starting with unlawful public assemblies and setting up campsites supposedly inspired by the "Occupy" movement and similar to the "Maidan" protest in Ukraine.[26] It was for fear of such a campsite being erected in the park of Bolotnaya Square that the police had decided to obstruct

[24] See [16] et seq. above.
[25] See [51] and [57] above.
[26] See the testimonies of Mr Deynichenko, Mr Zdorenko, Mr Makhonin and Ms Volondina, [63] above.

access to it, restricting the assembly venue to the embankment where tents could not be easily set up.

107 The Court notes that although art.11 of the Convention does not guarantee a right to set up a campsite at a location of one's choice, such temporary installations may in certain circumstances constitute a form of political expression, the restrictions of which must comply with the requirements of art.10(2) of the Convention.[27] It reiterates that in any event in this context art.10 of the Convention is to be regarded as a *lex generalis* in relation to art.11, a *lex specialis*, and the complaint under art.11 must in these circumstance be considered in the light of art.10.[28] The Court will take this into account when assessing the proportionality of the measures taken in response to the threat posed by the assembly's suspected hidden agenda.[29]

108 Before deciding on the role of undeclared goals, whether the organisers' or the authorities', the Court will comment on the formal reasons for the decisions taken when the assembly was being organised. On the face of it, the decision to close the park to the rally does not appear in itself hostile or underhand vis-à-vis the organisers, given that the embankment had sufficient capacity to accommodate the assembly, even with a significant margin for exceeding the expected number of participants. According to the statement of the Moscow Regional Department of Security,[30] the maximum capacity of Bolotnaya embankment was about 26,000 people. It was therefore large enough not only for the originally declared 5,000 participants, or the officially recorded turnout of 8,000, but even for the organisers' retrospective estimate of 25,000. However, the organisers objected not only to the lack of access to the park, but, above all, to discovering a last-minute alteration of the venue layout, which allegedly led to misunderstanding and disruption of the assembly.

109 The organisers, the municipal authorities and the police had discussed the layout of the assembly venue during the working meeting of 4 May 2012. The assembly organisers claimed that it had been expressly agreed at the working meeting to replicate on 6 May 2012 the route and the format of the assembly held on 4 February 2012. Their testimonies to that effect have been neither confirmed nor denied by the officials who were present at the working meeting. When cross-examined, Mr Deynichenko and Mr Sharapov stated that the inclusion of the park had not been requested or discussed. Assuming that the latter was true and no express agreement had been reached as regards the park, the Court nevertheless considers that it was not entirely unreasonable on the part of the organisers to perceive it as included by default. First, the official boundary of Bolotnaya Square comprised the park, as confirmed by expert witnesses N and M, as well as the head of Yakimanka District Municipality of Moscow. Secondly, the park had been included in the meeting venue on the previous occasion, a fact admitted by the official sources, in particular witness Mr Sharapov.[31]

110 It is common ground that no map was produced at the working meeting and no on-the-spot reconnaissance was carried out because of the time constraints. After the working meeting, the police developed the security plan and drew up their own

[27] See examples of other forms of expression of opinion in *Steel v United Kingdom* (1999) 28 E.H.R.R. 603 at [92]; *Drieman v Norway* (33678/96) 4 May 2000; and *Taranenko* (19554/05) 15 May 2014 at [70]–[71].
[28] See *Ezelin* (1992) 14 E.H.R.R. 362 at [35] and [37].
[29] See [139] below.
[30] See [63] above.
[31] See the testimonies of all aforementioned witnesses quoted in [63] above.

map, which excluded the park. It is not clear whether their map was based on their perception of the discussion at the working meeting, or whether they decided on the park's closure afterwards, taking into account the expected number of participants and the potential public order issues. In any event, both the security plan and the maps used by the police forces remained police internal documents and were not shared with the organisers.[32]

111 At the same time, a different map of the assembly venue was published on the police official website, which included the park. The provenance of the map might have been unofficial, as established by the Moscow City Court, but even if it was based on the information submitted by the organisers and not by the police's own services, its publication by the police press office implied some sort of official endorsement.[33] Moreover, the fact that the map had been in the public domain for at least 24 hours before the assembly allowed the officers responsible for the security of the meeting to spot any errors and to inform the organisers and the public accordingly. Given the high priority attributed to policing this event and the thoroughness with which the security forces followed every piece of information concerning the protest activity, it was unlikely that the published map had inadvertently slipped their attention.

112 In view of the foregoing, the Court concludes that there was at least a tacit, if not an express, agreement that the park at Bolotnaya Square would form part of the meeting venue on 6 May 2012.

113 With this finding in mind, the Court turns to the next contested point: the significance of the sit-in at Malyy Kamennyy Bridge. The Court will examine the reasons for its occurrence, the extent to which it disrupted the assembly and the authorities' conduct in this situation.

114 The Court observes that during the domestic proceedings two conflicting explanations were given for the sit-in. The assembly leaders and participants maintained that it was a reaction to the unexpected change of the venue layout and an attempt to negotiate a passage through the park. This reason is in principle consistent with the Court's finding above that the placement of the police cordon was different from that expected by the assembly organisers.[34]

115 However, certain police officials maintained that the sit-in leaders had demanded access to Bolshoy Kamenny Bridge towards the Kremlin, an ultimatum that could not be granted.[35] It is impossible to establish whether any such request was indeed expressed because no witnesses other than the police heard it. On the other hand, a number of witnesses unrelated to the conflicting parties confirmed that the sit-in leaders had demanded that the police move the cordon back so as to allow access to the park. The independent observers from the Ombudsman's office who had been involved in the negotiations explained that the protestors, faced with the narrowed-down passage, had demanded that it be widened. Moreover, they named the police official, Colonel Biryukov, to whom the Ombudsman had passed that demand.[36] Likewise, the assembly observer from the Civic Chamber of the Russian Federation testified that no demands to open the passage to the Kremlin had been

[32] See the Moscow Interior Department's reply to the Investigative Committee, [48] above, and the Moscow City Court's judgment in Mr Udaltsov's and Mr Razvozzhayev's case, [63] above.
[33] See [48] and [63] above.
[34] See [112] above.
[35] See Mr Deynichenko's report of 6 May 2012, [43] above, and his testimonies, [63] above; and the decision of the Investigative Committee of 20 March 2013, [52] above.
[36] See the testimonies of Ms Mirza and Mr Vasiliev, [57] and [59] above.

made.[37] Similar testimonies were also given by the two State Duma deputies, Mr G. Gudkov and Mr D. Gudkov, who had also attempted to mediate in the conflict; they specified that the sit-in leaders had insisted on the cordon being moved back and had asked for access to the park.

116 On the basis of this evidence the Court finds that the sit-in leaders expressed the demand to have the park opened up for the assembly and that they made that demand known to the police.

117 As to the nature of the sit-in and the degree of disturbance it caused, the Court notes the following. It appears from the video footage submitted by the parties, and it is confirmed by the witness accounts, that the sit-in narrowed the passage to Bolotnaya Square even further and that it caused some confusion and impatience among the demonstrators aspiring to reach the meeting venue. Nevertheless, the same sources made it clear that with only 20–50 people sitting on the ground, the sit-in remained localised and left sufficient space for those wishing to pass. It is beyond doubt that the sit-in was strictly peaceful. However, it required the authorities' intervention—and those taking part in it openly invited it—since the cordon could not be moved without the authorities' consent and relevant orders. The question therefore arises whether at this stage the authorities took all reasonable steps to preserve the assembly's peaceful character.

118 Having received the request to move the cordon back, the police commanders had to accept or reject it, or seek a compromise solution. It is not for the Court to indicate what manoeuvre was the most appropriate one for the police cordon in the circumstances. The fact that the police were exercising caution against the park being taken over by a campsite, or their unwillingness to allow the protestors to proceed in the direction of the Kremlin, or both, might justify the refusal to allow access to the park, given that in any event the assembly had sufficient space for a meeting. Crucially, whatever course of action the police deemed correct, they had to engage with the sit-in leaders in order to communicate their position openly, clearly and promptly.

119 The standoff near the cordon lasted for about 45–50 minutes, a considerable period of time. From about 17.00 to 17.15 the organisers were addressing the police officers forming the cordon, but it appears that there were no senior police officers among them competent to discuss those issues; those senior officers were apparently watching the event from some distance behind the cordon. The negotiators got involved at about 17.15 and the talks continued until at least 17.45. The police chose first to contact the protest leaders through an intermediary, the Ombudsman, who had to tell them to stand up and go towards the stage. He passed the message and returned to the police the protestors' demand to open the passage to the park. It is unclear whether, after that initial exchange, the police replied to the protestors and, if so, whether the Ombudsman managed to transmit the reply. However, at the same time two State Duma deputies, Mr G. Gudkov and Mr D. Gudkov, were in concurrent negotiations and had allegedly reached an agreement that the cordon could in principle be moved.

120 It appears that the mediators had some high-ranking interlocutors on the police side. The Ombudsman was talking to Colonel Biryukov. According to the security plan, on 6 May 2012 he was responsible for "co-ordination with the representatives of public organisations and also co-ordination and information flow with other

[37] See the testimonies of Mr Svanidze, [58] above.

services of the Moscow Department of the Interior".[38] However, Colonel Biryukov told the Ombudsman that the decision about the police cordon was outside his powers.[39] The deputies, Mr G. Gudkov and Mr D. Gudkov had apparently spoken to Mr Gorbenko, the Deputy Mayor; they did not identify the police officers to whom they had also spoken, but they claimed to have achieved a different result from the Ombudsman.

121 The documents available in the case file do not disclose the identity of the official who took the decision as regards the cordon, or what the decision actually was. According to the security plan, the relevant segment of the cordon belonged to "Zone no. 8" under the command of Police Colonel Smirnov with nine officers as his deputies.[40] However, it is not clear whether he had the authority to negotiate with the assembly organisers or to alter the position of the cordon stipulated in the security plan. Police Colonel Deynichenko was in charge of the overall command of the security operation; on 4 May 2012 he took part in the working meeting, and on 6 May 2012 after the assembly he drew up a report on the implementation of the security plan. However, there is no information as to whether he was involved in the negotiations with the sit-in leaders or whether he gave any orders concerning the cordon.

122 The Court notes that another official, Colonel Makhonin, played an active role in policing the event. Before the march he met the assembly organisers for a final briefing, gave them instructions and had them sign a formal undertaking against any breach of public order. He also indicated to the organisers that he was their emergency contact and instructed them to call him for any outstanding public order issues.

123 It is unknown whether Mr Udaltsov tried to call colonel Makhonin during the standoff. Likewise, the Court is unable to verify the testimonies of Mr Davidis that he tried to call Mr Deynichenko. The domestic courts did not rule on those points, and no relevant evidence has been presented to the Court. In any event, the senior police officers had ample opportunity to contact the organisers by telephone and to personally approach the sit-in participants by simply walking a few metres. Mr Makhonin, for his part, testified that he had not tried to call Mr Udaltsov until he arrived at Bolotnaya Square "after the mass disorder had already begun".[41] Given that the first incident occurred a few minutes after the sit-in had ended, this means that he did not call Mr Udaltsov during the sit-in and was away from Bolotnaya Square while it lasted. At 18.00 he appeared in the stage area, where he instructed Ms Mityushkina to end the assembly.[42]

124 It is noteworthy that Mr Makhonin's official function in relation to the assembly at Bolotnaya Square has not been specified. His name did not appear on the security plan among hundreds of named police officials personally responsible for various tasks, including checking the bins, apprehending offenders, video recording and press relations. He was not a member of the operational headquarters either. According to the security plan, it was Colonel Smirnov's and Colonel Saprykin's task to personally meet the organisers before the beginning of the march in order

[38] See [21] above.
[39] See the testimonies of Ms Mirza and Mr Vasiliev, [57] and [59] above.
[40] Listed in [22] above.
[41] See [63] above.
[42] See [131] et seq. below.

to brief them and to have them sign the undertakings,[43] although in practice it was Colonel Makhonin who did it.

125 It is also peculiar that the security plan did not assign an officer to liaise with the assembly organisers, although it specifically designated officers for liaising with civil society organisations and with the press.[44] As it happened, Colonel Makhonin exercised some operational functions in relation to the assembly organisers, but without knowing the limits of his mandate it is impossible to tell whether he had the authority to decide on the cordon manoeuvre or to negotiate with the sit-in leaders.

126 The Court has found above that the march leaders were taken by surprise because of the substantial restriction of space for the meeting, since the police cordon at Malyy Kamennyy Bridge excluded a significant part of the venue as originally agreed. In the face of that situation, instead of proceeding to the place available in front of the stage, they began a sit-in which aggravated the congestion.[45] In the Court's view, the controversy about the placement of the police cordon could reasonably have been dealt with had the competent officials been prepared to come forward in order to communicate with the assembly organisers and to discuss the placement of the cordon with them. Their involvement could have alleviated the tensions caused by the unexpected change of the venue layout and could have helped avoid the standoff and the consequent discontent on the part of the protestors.

127 The Court's findings in the foregoing paragraphs lead to the conclusion that the police authorities had not provided for a reliable channel of communication with the organisers before the assembly. This omission is striking, given the general thoroughness of the security preparations for anticipated acts of defiance on the part of the assembly leaders. Furthermore, the authorities failed to respond to the real-time developments in a constructive manner. In the first fifteen minutes after the march's arrival at Malyy Kamenny Bridge, no official took any interest in talking to the march leaders showing signs of distress in front of the police cordon. Eventually, when the sit-in began, they sent the Ombudsman with a message to the leaders to stand up and move on, which provided no answer to the protestors' concerns. Whether or not the senior police officers beyond the cordon had initially understood the demands of the sit-in leaders, nothing prevented them from immediately clarifying the issue and from giving them a clear answer.

128 In the light of the foregoing, the Court finds that in the present case the authorities made insufficient effort to communicate with the assembly organisers to resolve the tension caused by the confusion about the venue layout. The failure to take simple and obvious steps at the first signs of the conflict allowed it to escalate, leading to the disruption of the previously peaceful assembly.

129 The Court has already referred to the Venice Commission's Guidelines on Freedom of Peaceful Assembly, which recommends negotiation or mediated dialogue if a standoff or other dispute arises during the course of an assembly as a way of avoiding the escalation of conflict.[46] It considers, however, unnecessary to define in relation to the Guidelines or otherwise the standard required. The Court considers that on any view the authorities in this case did not comply with even the minimum requirements in their duty to communicate with the assembly leaders,

[43] See [22] above.
[44] See [21] above.
[45] See [114] and [117] above.
[46] See Guideline 5.4, [80] above.

which was an essential part of their positive obligation to ensure the peaceful conduct of the assembly, to prevent disorder and to secure the safety of all the citizens involved.

130 The authorities have thus failed to discharge their positive obligation in respect of the conduct of the assembly at Bolotnaya Square. There has accordingly been a violation of art.11 of the Convention on that count.

(ii) Termination of the assembly and the applicant's arrest, detention and charges

131 At the end of the negotiations the position of the police cordon remained unchanged; it was only reinforced by the riot police. The subsequent events developed simultaneously on two opposite sides of Bolotnaya Square. Congestion occurred at Malyy Kamenny Bridge at 17.50, at which point the protestors ended the sit-in and left for the stage. At 17.55 the pressure of the crowd caused the cordon to break for the first time, but it was quickly restored without the use of force, and in the next few minutes protestors from among the crowd began tossing various objects at the police cordon, including a Molotov cocktail. At the same time, at 18.00, at the far end of Bolotnaya Square Ms Mityushkina, acting on the instructions of colonel Makhonin, announced from the stage that the meeting was closed. In the next fifteen minutes several confrontations took place between the protestors and the police at Malyy Kamenny Bridge, until at 18.15 the police began expansive action to disperse the crowd there.

132 The Government did not specify whether it was colonel Makhonin who took the decision to terminate the assembly or whether he was following orders. It is also unclear exactly what prompted that decision, although some witnesses suggested that it was because of the sit-in. The fact that at 17.55 the authorities were threatening the assembly leaders with criminal sanctions corroborates that hypothesis.[47] It is clear, in any event, that at 18.00 when the announcement was made, the crowd had built up, and there had been squeezing and pushing and isolated incidents of small-scale aggression at the cordon of Malyy Kamenny Bridge, but no widespread disorder or intensive fighting.

133 It does not appear that the assembly was suspended before being terminated, as required by s.15.3 of the Public Assemblies Act. According to the authorities, at that stage it was justified to announce an emergency termination under s.17.3, which curtails the termination procedure in the event of mass disorder. The Court considers that irrespective of whether the domestic qualification of "mass disorder" had been met, the tensions were still localised at Malyy Kamenny Bridge while the rest of the venue remained calm. The authorities have not shown that prior to announcing the whole meeting closed they had attempted to separate the turbulent sector and target the problems there, so as to enable the meeting to continue in the sector of the stage where the situation remained peaceful. The Court is therefore not convinced that the termination of the meeting at Bolotnaya Square was inevitable.

134 However, even assuming that the decision to terminate the assembly was taken because of a real and imminent risk that violence would spread and intensify, and that the authorities acted within the margin of appreciation which is to be allowed in such circumstances, such decision could have been implemented in different

[47] See [34] above.

ways and using various methods. Given the diversity in the circumstances of the individual protestors, in particular the degree of their involvement or their non-involvement in clashes and the wide range of consequences incurred, it is impossible to give a general assessment of the police conduct in dispersing the assembly at Bolotnaya Square. For this reason, the Court will abstain from analysing the manner in which the police dispersed the protestors at Malyy Kamenny Bridge, as it falls outside the scope of the applicant's case. The Court will examine the actions taken against the applicant personally, and in doing so it will take into account the general situation in his immediate vicinity, that is, the area in front of the stage inside the designated meeting area at Bolotnaya embankment.

135 It follows from the parties' submissions corroborated by the video and documentary evidence that the area within the cordoned perimeter of the meeting venue at Bolotnaya embankment remained strictly peaceful for the whole time, even during the disorder outside that perimeter, at Malyy Kamenny Bridge. It appears that during the sit-in the area in question was nearly empty, and that when the protest leaders abandoned the sit-in, some people then followed them towards the stage, although many had already left the meeting.

136 After the arrest of Mr Udaltsov, Mr Navalnyy and Mr Nemtsov at the stage, a considerable number of people continued to congregate in that area. The police addressed them through megaphones, ordering them to vacate the area, but many of them refused to leave and "linked arms in passive resistance".[48] Given the benign character of their protests, the police did not use force against those protestors to the same extent as they did at Malyy Kamenny Bridge. For the most part, the police were steadily pressing them out towards the exits and selectively arresting some individuals.

137 The Court refers to the principles reiterated in [99] above which extend the protection of art.11 to peaceful participants of an assembly tarnished by isolated acts of violence committed by other participants. In the present case, the Court finds that the applicant remained within the perimeter of the cordoned meeting venue and that his behaviour remained, by all accounts, strictly peaceful. Moreover, it does not follow from any submissions that he was among those who manifested even "passive resistance".

138 It is in dispute between the parties whether the applicant was arrested before or shortly after the time-slot originally authorised for the assembly, and the Court will address this controversy in the context of art.6 of the Convention.[49] For the purposes of its analysis under art.11 it is sufficient to note that even if the applicant was on the wrong side of the time-limit, measures taken after an assembly has ended fall, as a general rule, within the scope of art.11 of the Convention as long as there is a link between the exercise of the freedom of peaceful assembly by the applicant and the measures taken against him.[50] Accordingly, in the circumstances of this case, even after the assembly was officially terminated, the guarantees of art.11 continued to apply in respect of the applicant, notwithstanding the clashes at Malyy Kamenny Bridge. It follows that any measures taken against him in the given situation had to have complied with the law, pursued a legitimate aim and been necessary in a democratic society within the meaning of art.11(2) of the Convention.

[48] See [51] above.
[49] See [163] et seq. below.
[50] See *Ezelin* (1992) 14 E.H.R.R. 362 at [41], and *Navalnyy and Yashin* (76204/11) 4 December 2014 at [52].

139 The Court is mindful of the authorities' admission that the entirety of the security measures, in particular the crackdown on those charged with offences committed on 6 May on Bolotnaya Square, was motivated by the "fear of Maidan": the enhanced security was specifically aimed at preventing illegal campsites from being set up. At the same time, the Court observes, and the Government have insisted on this point, that the applicant was not arrested and sanctioned for breaching the rules on public assembly. Even if his presence at the meeting venue after its closure were to be considered as a manifestation of his objection to the early termination of the assembly, that was not the offence with which he was charged. According to the domestic courts and the Government's submissions, he was arrested, detained and sentenced to 15 days' imprisonment because he was obstructing traffic and disobeyed lawful police orders to stop doing that.

140 In this context, the severity of the measures applied against the applicant is entirely devoid of any justification. He was not accused of violent acts, or even of "passive resistance" in protest against the termination of the assembly. His motives for walking on the road and obstructing the traffic are left unexplained by the domestic judgments; the applicant's explanation that there was no traffic and that he was simply not quick enough at leaving the venue in the general confusion has not been contested or ruled out. Therefore, even assuming that the applicant's arrest, pre-trial detention and administrative sentence complied with domestic law and pursued one of the legitimate aims enumerated in art.11(2) of the Convention—presumably, public safety—the measures taken against him were grossly disproportionate to the aim pursued. There was no "pressing social need" to arrest the applicant and to escort him to the police station. There was especially no need to sentence him to a prison term, albeit a short one.

141 It must be stressed, moreover, that the arrest, the detention and the ensuing administrative conviction of the applicant could not but have had the effect of discouraging him and others from participating in protest rallies or indeed from engaging actively in opposition politics. Undoubtedly, those measures had a serious potential also to deter other opposition supporters and the public at large from attending demonstrations and, more generally, from participating in open political debate. The chilling effect of those sanctions was further amplified by the large number of arrests effected on that day, which attracted broad media coverage.

142 There has accordingly been a violation of art.11 of the Convention on account of the applicant's arrest, pre-trial detention and administrative penalty.

II. Alleged violation of art.5 of the Convention

143 The applicant further complained that his arrest and pre-trial detention pending the administrative proceedings had been arbitrary and unlawful. art.5(1) of the Convention provides, in so far as relevant, as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

A. Admissibility

144 The Court notes that this part of application is not manifestly ill-founded within the meaning of art.35(3)(a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

145 The Government contended that after the authorised public assembly had been terminated the applicant had stayed on at Bolotnaya Square; he had walked on the road obstructing the traffic, and had disobeyed the police officers' order to stop doing it. According to the Government, the applicant was escorted to the police station where he was issued a statement on the administrative offence provided for by art.19.3 of the Code of Administrative Offences. The Government contended that the legal grounds for the arrest had been art.27.2 of the Code of Administrative Offences, which empowered the police to escort individuals, that is, to take them to the police station in order to draw up an administrative offence report. The Government stated that the applicant had been in police custody since his arrest at 21.30 on 6 May 2012 until 08.00 on 8 May 2012. They explained that the length of the applicant's detention had been calculated from 21.30 on 6 May 2012, the time when he was taken to the Krasnoselskiy District police station, and argued that the term of his pre-trial detention had not exceeded the statutory limit of 48 hours. Overall, the Government considered that the applicant's deprivation of liberty had complied with domestic law and that all requisite formalities, such as issuing a lawful detention order, had been fulfilled.

(b) The applicant

146 The applicant contested the Government's submissions and alleged that it had not been necessary either to arrest him or to detain him at the police station after

the police report and the statement on the administrative offence had been drawn up. Moreover, there had been no legal grounds to remand him in custody pending the hearing before the Justice of the Peace.

2. The Court's assessment

147 The Court reiterates that the expressions "lawful" and "in accordance with a procedure prescribed by law" in art.5(1) of the Convention essentially refer back to national law and state the obligation to conform to the substantive and procedural rules thereof. However, the "lawfulness" of detention under domestic law is not always the decisive element. The Court must in addition be satisfied that detention during the period under consideration was compatible with the purpose of art.5(1) of the Convention, which is to prevent persons from being deprived of their liberty in an arbitrary fashion. Furthermore, the list of exceptions to the right to liberty secured in art.5(1) of the Convention is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his liberty.[51]

148 The Court has noted above that the applicant was arrested for walking on the road and obstructing the traffic, although it remains unclear whether it is alleged that he was doing so within or after the period for which the traffic had been suspended and whether there actually was any traffic.[52] It appears that the police were in haste to disperse the remaining demonstrators from Bolotnaya Square after the early termination of the rally, and since the applicant had not yet left they decided to arrest him. Even if the preceding disorder at Malyy Kamenny Bridge may explain, if not justify, their zealousness in pursuing the peaceful protestors lingering at the site, and accepting that the situation might not have allowed the relevant documents to be drawn up on the spot, there is no explanation, let alone justification, for the applicant's ensuing detention at the police station.

149 It has not been disputed that from the time of his arrest, at the latest at 20.30 on 6 May 2012, to his transfer to court at 08.00 on 8 May 2012 the applicant was deprived of his liberty within the meaning of art.5(1) of the Convention. The Government submitted that his arrest and detention had the purpose of bringing him before the competent legal authority on suspicion of having committed an administrative offence and thus fell within the ambit of art.5(1)(c) of the Convention. The Court notes that the duration of administrative detention should not as a general rule exceed three hours, which is an indication of the period of time the law regards as reasonable and sufficient for drawing up an administrative offence report. Once the administrative offence report had been drawn up at 21.30, the objective of escorting the applicant to the Krasnoselskiy District police station had been met and he could have been discharged.

150 However, the applicant was not released on that day and was formally remanded in custody to secure his attendance at the hearing before the Justice of the Peace. The Government argued that the term of the applicant's detention remained within the 48-hour time-limit provided for by art.27.5(3) of the Code of Administrative Offences. However, neither the Government nor any other domestic authorities have provided any justification as required by art.27.3 of the Code, namely that it was an "exceptional case" or that it was "necessary for the prompt and proper

[51] See *Giulia Manzoni v Italy* (19218/91) 1 July 1997 at [25].
[52] See [140] above; see also [164] below.

examination of the alleged administrative offence". In the absence of any explicit reasons given by the authorities for not releasing the applicant, the Court considers that the 36-hour detention pending trial was unjustified and arbitrary.

151 In view of the foregoing, the Court finds a breach of the applicant's right to liberty on account of the lack of reasons and legal grounds for remanding him in custody pending the hearing of his case by the Justice of the Peace.

152 Accordingly, there has been a violation of art.5(1) of the Convention.

III. Alleged violation of art.6 of the Convention

153 The applicant complained of a violation of the right to a fair and public hearing in the administrative proceedings against him. He relied on art.6(1) and (3)(b), (c) and (d) of the Convention, which provides, in so far as relevant, as follows:

> "1. In the determination of … any criminal charge against him, everyone is entitled to a fair and public hearing … by [a] … tribunal …
> …
> 3. Everyone charged with a criminal offence has the following minimum rights:
> …
> (b) to have adequate time and facilities for the preparation of his defence;
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him …."

A. Admissibility

154 The Court reiterates that in order to determine whether an offence qualifies as "criminal" for the purposes of art.6 the Convention, it is necessary to ascertain whether or not the provision defining the offence belongs, in the legal system of the respondent State, to the criminal law; the "very nature of the offence" and the degree of severity of the penalty risked must then be considered.[53] Deprivation of liberty imposed as punishment for an offence belongs in general to the criminal sphere, unless by its nature, duration or manner of execution it is not appreciably detrimental.[54]

155 In the present case, the Government disagreed that art.6 was applicable to the proceedings in question. However, the applicant in the present case was convicted of an offence which was punishable by detention, the purpose of the sanction being purely punitive. Moreover, he served a 15-day prison term as a result of his conviction. The Court has previously found that the offence set out in art.19.3 of the Code of the Administrative Offences had to be classified as "criminal" for the purposes of the Convention in view of the gravity of the sanction and its purely

[53] See *Menesheva v Russia* (2007) 44 E.H.R.R. 56 at [95].
[54] See *Engel v Netherlands* (1979–80) 1 E.H.R.R. 647 at [82]–[83], and *Ezeh v United Kingdom* (2004) 39 E.H.R.R. 1 at [69]–[130].

punitive purpose.[55] The Court sees no reason to reach a different conclusion in the present case and considers that the proceedings in this case fall to be examined under the criminal limb of art.6.

156 The Court also considers that this part of the application is not manifestly ill-founded within the meaning of art.35(3)(a) of the Convention. No other ground for declaring it inadmissible has been established. Thus, it should be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

157 The Government maintained that the proceedings in the applicant's administrative case had complied with art.6 of the Convention. They argued that the applicant had been given a fair opportunity to state his case, to obtain the attendance of three witnesses on his behalf and to present other evidence. The applicant was given an opportunity to lodge written requests and he availed himself of that right. The Government accepted that neither the police officers who had arrested the applicant and had drawn up the police report nor the officer who had issued the statement on the administrative offence had been called. However, they pointed out that those officers could have been summoned to the court hearing if doubts or questions had arisen.

(b) The applicant

158 The applicant maintained that he had not been given a fair hearing in the determination of the charge against him. He complained that the court had refused to accept the video recordings of his arrest as evidence and to call and examine the police officers as witnesses. Furthermore, the court had not respected the equality of arms in that it had rejected the testimonies of all the defence witnesses while giving weight to the written police report and the statement on the administrative offence. In addition, the applicant complained that the hearing had not been open to the public, that his right to defence had been violated and that the hearing had not been adjourned following his request to allow him to prepare for it. He claimed that having spent about 36 hours in detention and transfer between the police station and court, he had been unfit to stand trial on 8 May 2012 and to defend himself effectively.

2. The Court's assessment

(a) General principles

159 Although the admissibility of evidence is primarily governed by the rules of domestic law, it remains the task of the Court to ascertain whether the proceedings, considered as a whole, were fair as required by art.6(1) of the Convention.[56] In the

[55] See *Malofeyeva v Russia* (36673/04) 30 May 2013 at [99]–[101]; *Nemtsov v Russia* (1774/11) 31 July 2014 at [83]; and *Navalnyy and Yashin* (76204/11) 4 December 2014 at [78].
[56] See *Delta v France* (1993) 16 E.H.R.R. 574 at [35], and *Vidal v Belgium* (A/235-B) 22 April 1992 at [33].

context of the taking of evidence, the Court has required that an applicant must be "afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent".[57]

160 The Court has previously held that in circumstances where the applicant's conviction was based primarily on the assumption of his being in a particular place at a particular time, the principle of equality of arms and, more generally, the right to a fair trial, imply that the applicant should be afforded a reasonable opportunity to challenge the assumption effectively.[58]

161 The guarantees in para.(3)(d) of art.6 are specific aspects of the right to a fair hearing set forth in para.(1) of this provision which must be taken into account in any assessment of the fairness of proceedings. In addition, the Court's primary concern under art.6(1) of the Convention is to evaluate the overall fairness of the criminal proceedings.[59]Article 6(3)(d) of the Convention enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of the proceedings.[60]

162 It follows from the above-mentioned principle that there must be a good reason for the non-attendance of a witness. Furthermore, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by art.6(1) of the Convention.[61]

(b) Application of these principles in the present case

163 The Court observes that the applicant's conviction for the administrative offence of disobeying lawful police orders was based on the following written documents: (i) the police report drawn up by two officers, Y and A, whose orders the applicant had allegedly disobeyed and who had arrested him; the explanatory note by Y reproducing the content of the police report; (iii) the statement on the administrative offence, which was produced at the police station by an on-duty officer on the basis of the aforementioned police report and reiterating it word-by-word; (iv) the escorting order; and (v) the detention order of 6 May 2012. The Court observes that the police report was drawn up using a template and contained no individualised information except the applicant's name, the names and titles of the arresting officers and the time and place of the arrest. The report indicated that the applicant had been arrested at 21.30 for obstructing traffic, whereas the statement on the administrative offence indicated that he had been arrested at 20.30.

[57] See *Bulut v Austria* (1997) 24 E.H.R.R. 84 at [47], and *Kasparov* (21613/07) 3 October 2013 at [58]–[65].
[58] See *Popov v Russia* (26853/04) 13 July 2006 at [183], and *Polyakov v Russia* (77018/01) 29 January 2009 at [34]–[37].
[59] See *Taxquet v Belgium* (2012) 54 E.H.R.R. 26 at [84], with further references therein.
[60] See *Lucà v Italy* (2003) 36 E.H.R.R. 46 at [39], and *Solakov v Yugoslav Republic of Macedonia* (47023/99) 31 Octber 2001 at [57].
[61] See *Al-Khawaja v United Kingdom* (2012) 54 E.H.R.R. 23 at [118]–[119], and *Schatschaschwili v Germany* (9154/10) 15 December 2015 at [107] et seq.

164 The applicant contested the accusations and contended that he had been arrested during the authorised time-slot of the public assembly and that there had been no traffic there that he could possibly have obstructed. Three eyewitnesses confirmed his allegations; one of them had not been previously acquainted with the applicant and had no personal interest in the outcome of the administrative proceedings against him. Furthermore, the applicant had submitted a video recording, which the court rejected. Lastly, the court refused to call and examine the two police officers as witnesses, although there had been no impediment, and the applicant was not given any other opportunity to confront them.

165 It follows that the only evidence against the applicant was not tested in the judicial proceedings. The courts based their judgment exclusively on standardised documents submitted by the police and refused to accept additional evidence or to call the police officers. The Court considers that given the dispute over the key facts underlying the charge, where the only evidence against the applicant came from the police officers who had played an active role in the contested events, it was indispensable for the domestic courts to exhaust every reasonable possibility of scrutinising their incriminating statements.[62]

166 Moreover, the courts limited the scope of the administrative case to the applicants' alleged disobedience, having omitted to consider the "lawfulness" of the police order.[63] They thus punished the applicant for actions protected by the Convention without requiring the police to justify the interference with the applicant's right to freedom of assembly, which included a reasonable opportunity to disperse when such an order is given. The failure to do so ran contrary to the fundamental principles of criminal law, namely, *in dubio pro reo*.[64] The latter principles were applicable to the applicant's administrative proceedings, which fell under the criminal limb of art.6 of the Convention.[65]

167 The foregoing considerations are sufficient to enable the Court to conclude that the administrative proceedings against the applicant, taken as a whole, were conducted in violation of his right to a fair hearing.

168 In view of these findings, the Court does not consider it necessary to address the remainder of the applicants' complaints under art.6(1) and (3)(d) of the Convention.

IV. Alleged violation of art.18 of the Convention

169 Lastly, the applicant complained that the security measures taken in the context of the public assembly, his arrest, detention and the administrative charges against him had pursued the aim of undermining his right to freedom of assembly and freedom of expression, and had been applied for political ends. He complained of a violation of art.18 of the Convention, which reads as follows:

> "The restrictions permitted under [the] Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

[62] See *Kasparov* (21613/07) 3 October 2013 at [64].
[63] See *Nemtsov* (1774/11) 31 July 2014 at [93]; *Navalnyy and Yashin* (76204/11) 4 December 2014 at [84]; cf. *Makhmudov v Russia* (2008) 46 E.H.R.R. 37 at [82].
[64] See, mutatis mutandis, Barberà v Spain (1989) 11 E.H.R.R. 360 at [77]; Lavents v Latvia (58442/00) 28 November 2002 at [125]; *Melich and Beck v Czech Republic* (35450/04) 24 July 2008 at [49]; and *Nemtsov* (1774/11) 31 July 2014 at [92].
[65] See [155] above.

170 In their submissions under this head the parties reiterated their arguments as regards the alleged interference with the right to freedom of assembly, the reasons for the applicants' deprivation of liberty and the guarantees of a fair hearing in the administrative proceedings.

171 The Court notes that this complaint is not manifestly ill-founded within the meaning of art.35(3)(a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

172 The Court has already found that the applicant was arrested, detained and convicted of an administrative offence arbitrarily and that this had the effect of preventing and discouraging him and others from participating in protest rallies and engaging actively in opposition politics.[66]

173 In the light of the above, the Court considers that it is not necessary to examine whether, in this case, there has been a violation of art.18 of the Convention.

V. Alleged violation of arts 3 and 13 of the Convention

174 The applicant further complained of the appalling conditions of his detention at the Krasnoselskiy District Police Station and the lack of effective domestic remedies in respect of this complaint. He referred to arts 3 and 13 of the Convention, which provide as follows:

> **"Article 3 (prohibition of torture)**
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
> …
> **Article 13 (right to an effective remedy)**
> Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

175 The Government contested this part of the application as lodged out of time. They pointed out that the applicant's pre-trial detention at the Krasnoselskiy District Police Station had ended on 8 May 2012, and there had been no domestic proceedings on this matter. His application to the Court was lodged on 9 November 2012, that is, more than six months after the end of the detention in the conditions complained of.

176 Article 35(1) of the Convention permits the Court to deal with a matter only if the application is lodged within six months of the date of the final decision in the process of exhaustion of domestic remedies. Where no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of the knowledge of that act or its effect on or prejudice to the applicant. In cases featuring a continuing situation, the six-month period runs from the cessation of that situation.[67]

177 Since the Russian legal system offers no effective remedy in respect of complaints about conditions of pre-trial detention, conditions of transport between the remand

[66] See [141] above.
[67] See *Ananyev v Russia* (2012) 55 E.H.R.R. 18 at [72], with further references.

prison and the courthouse and conditions of detention in the courthouse,[68] the six-month period should be calculated from the end of the situation complained of.

178 The Court notes that the applicant's pre-trial detention ended on 8 May 2012. Following his conviction on that day he was placed in a different detention facility, which ended the situation complained of. He brought his complaint under arts 3 and 13 of the Convention on 9 November 2012. It has therefore been lodged out of time and must be rejected in accordance with art.35(1) and (4) of the Convention.[69]

VI. Application of art.41 of the Convention

179 Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

180 The applicant requested the Court to award him compensation in respect of non-pecuniary damage, leaving its amount to the Court's discretion.

181 The Government considered that if the Court were to find a violation of the Convention in the present case, this finding would constitute in itself sufficient just satisfaction. They stated that any award to be made by the Court should in any event take into account the applicant's individual circumstances, in particular the length of his deprivation of liberty and the gravity of the penalty.

182 The Court has found a violation of arts 11, 6 and 5 of the Convention, and it considers that, in these circumstances, the applicant's suffering and frustration cannot be compensated for by a mere finding of a violation. Making its assessment on an equitable basis, it awards the applicant €25,000 in respect of non-pecuniary damage.

B. Costs and expenses

183 The applicant also claimed £2,805.28 (approximately €4,000) and €3,300, inclusive of VAT, for the costs and expenses incurred before the Court. He submitted detailed invoices indicating the lawyers' and the translators' fees, the hourly rates and the time billed for the preparation of his observations and other procedural documents in this case.

184 The Government submitted that the applicant had not produced a legal-services agreement and that it had not been necessary to retain three legal counsel in this case.

185 According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present

[68] See *Ananyev* (2012) 55 E.H.R.R. 18 at [119]; *Romanova v Russia* (23215/02) 11 October 2011 at [84]; and *Denisenko and Bogdanchikov v Russia* (3811/02) 12 February 2009 at [104].
[69] See *Grishin v Russia* (30983/02) 15 November 2007 at [83].

case, which was of a certain complexity, the Court has found a breach of the Convention on several counts. Regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award €7,000, plus any tax that may be chargeable to the applicant on this sum, in respect of costs and expenses. This sum is to be converted into pounds sterling at the rate applicable at the date of settlement and to be paid into the representatives' bank account in the United Kingdom, as identified by the applicant.

C. Default interest

186 The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added 3 percentage points.

For these reasons, THE COURT, unanimously:

(1) *Declares* the complaints under arts 5, 6, 11 and 18 of the Convention admissible and the remainder of the application inadmissible.

(2) *Holds* that there has been a violation of art.11 of the Convention on account of the authorities' failure to ensure the peaceful conduct of the assembly at Bolotnaya Square.

(3) *Holds* that there has been a violation of art.11 of the Convention on account of the applicant's arrest, pre-trial detention and administrative sentence.

(4) *Holds* that there has been a violation of art.5(1) of the Convention.

(5) *Holds* that there has been a violation of art.6(1) and (3)(d) of the Convention.

(6) *Holds* that there is no need to examine the remainder of the complaints under art.6 of the Convention.

(7) *Holds* that there is no need to examine the complaint under art.18 of the Convention.

(8) *Holds*, unanimously:

(a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with art.44(2) of the Convention, the following amounts:

(i) €25,000 (twenty five thousand euros), plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, in respect of non-pecuniary damage;

(ii) €7,000 (seven thousand euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant, to be converted into pounds sterling at the rate applicable at the date of settlement and to be paid into his representatives' bank account in the United Kingdom; and

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus 3 percentage points.

(9) *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Neutral Citation Number: [2016] EWHC 953 (Admin)

Case No: CO/1593/2015 & CO/1471/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 27th April 2016

Before :

Mrs Justice Whipple

Between :

R (on the application of Ben-Dor & ors)	**Claimant**
- and -	
University of Southampton	**Defendant**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Ms Shivani Jegarajah, Mr Mark McDonald and Ms Natalie Csengeri (instructed by **Public Interest Lawyers**) for the **Claimants**
Mr Edward Capewell (instructed by **University of Southampton**) for the **Defendant**

Hearing dates: 6 April 2016

Judgment
As Approved by the Court

Mrs Justice Whipple:

I. INTRODUCTION

1. Professor Oren Ben-Dor is a professor of philosophy and law. Professor Suleiman Sharkh is a professor of Engineering. They are the "Claimants". The Claimants bring two claims for judicial review against their employer institution, Southampton University (the "Defendant"). The Claimants had organised a conference to be held at the Defendant's campus, entitled "International Law and State of Israel: Legitimacy, Responsibility and Exceptionalism".

2. The conference was originally planned to take place between 17 and 19 April 2015. The first application for judicial review, which I shall refer to as JR 1, challenges the Defendant's decision dated 31 March 2015 (wrongly stated in the Claim Form as 30 March 2015) which was upheld by the Defendant on internal appeal on 1 April 2015, to withdraw permission to hold the conference on the Defendant's campus on the proposed dates, on grounds that there was an unacceptably high risk of disorder arising out of the conference, and there was insufficient time before the conference to put adequate measures in place to ensure that good order could be maintained. Permission to claim judicial review was granted by Arden LJ on 27 October 2015, and this judgment determines that judicial review substantively.

3. In light of the Defendant's withdrawal of permission, the conference did not take place as planned in April 2015, but the Claimants and the Defendant continued to investigate the possibility of holding the conference on another date. On 1 February 2016, the Defendant wrote to the Claimants with proposals for hosting the conference, now scheduled for April 2016, on the Defendant's campus. Those proposals included a requirement that the conference organisers should cover the costs of security within the venue for the duration of the conference from the conference budget. The security costs were estimated at around £24,000. The Claimants challenge that proposal by way of the second judicial review, which I shall refer to as JR 2. JR 2 comes before me for permission only.

4. The conference has not yet taken place. I am told that the Claimants are currently planning to host it in April 2017, depending to some extent on the outcome of these two applications for judicial review (and in particular JR 2 which relates to the validity of requiring the Claimants to meet part of the security costs from the conference income).

5. At the heart of both judicial reviews lies the Claimants' argument that the Defendant has, by these decisions, unlawfully interfered with the Claimants' rights of freedom of expression and assembly, protected by Articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"). By JR 1, the Claimants seek a declaration that the Defendant's decision to withdraw permission to hold the conference in April 2015 was unlawful. By JR 2 they sought an Order quashing the decision of 1 February 2016. The challenge put in that way is now redundant because the conference has been postponed to 2017. The Claimants now seek a declaration that the Defendant's decision to charge the security costs to them is unlawful, effectively amounting to an insurmountable obstacle to their ability to hold the conference and thus a disproportionate interference with their Convention

rights. The Claimants contend that these claims engage fundamental issues of principle and wider importance for the academic community.

6. The Claimants were represented by a legal team which acted *pro bono*, consisting of Ms Shivani Jegarajah who led on the law, and Mr Mark McDonald who led on the facts, supported by Ms Natalie Csengeri, and instructed by Public Interest Lawyers. I am very grateful to all of them for the time and expertise which they have volunteered. The Defendant was represented by Mr Edward Capewell, for whose submissions I am similarly grateful.

II. LITIGATION HISTORY

7. The JR 1 Claim Form was issued on 7 April 2015 and included an application for a protective costs order as well as expedition. Andrews J refused permission and all other applications by order dated 8 April 2015. The Claimants applied to renew its applications and the matter was listed for hearing on 14 April 2015. The Defendant filed an Acknowledgment of Service on 13 April 2015, which attached a skeleton argument drafted by Mr Capewell which was to stand as summary grounds of resistance; and filed three witness statements at the same time, from Professor Don Nutbeam, Vice-Chancellor of the University of Southampton dated 13 April 2015, Mr Stephen White, the Defendant's Chief Operating Officer dated 13 April 2015 and Mr Gary Jackson, the Defendant's head of security, dated 10 April 2015.

8. The hearing on 14 April 2015 proceeded before HHJ Alice Robinson sitting as a Deputy High Court judge. Giving reasons in an *ex tempore* judgment, she refused permission, and also refused the Claimants' ancillary applications.

9. The Claimants appealed to the Court of Appeal against the refusal of permission. By order dated 27 October 2015, Arden LJ granted permission to appeal, making the following observation:

> "…the applicants have shown that their claim is sufficiently arguable to justify the grant of permission. It is plainly arguable that the duty to protect freedom of speech means that it is not enough to act on a threat of violent protest unless it is significant and unavoidable and that therefore the court must scrutinise for itself whether the reaction to the threat was justified in light of all the circumstances. Accordingly, I grant permission and direct that the application is heard in the administrative court in order that any further evidence can be filed."

10. In light of that grant of permission, the Claimants renewed their application for a PCO which was granted by HHJ Cooke QC sitting as a Deputy High Court judge, by order dated 7 March 2016, capping the costs recoverable against the Claimants at £8,000 inclusive of VAT.

11. The substantive hearing was listed for one day. It came before me on 6 April 2016. The Defendant did not file detailed grounds of resistance, and relied instead on its original summary grounds in the form of a skeleton argument.

12. The Claim Form in JR 2 was issued on 17 March 2016 with an application for urgent consideration. (I think that the date on the Claim Form is probably incorrect, and JR 2 was in fact issued on or about 17 February 2016.) The Defendant submitted an Acknowledgement of Service on 5 March 2016 indicating an intention to resist the claim. The papers were put before Holman J on 21 March 2016 who ordered JR 2 to be listed for oral consideration of permission at the hearing of JR 1 fixed for 6 April 2016. Summary grounds of resistance together with supporting documents in relation to JR 2 (but no further witness evidence) were lodged on 4 April 2016.

13. No witness evidence has been filed by the Claimants in support of either claim for JR. The facts are outlined in the grounds drafted by lawyers, supported by correspondence attached to the claim forms.

III. BACKGROUND

Legal Framework

14. The Defendant is subject to obligations under Section 43 of the Education (No 2) Act 1986, which provides, so far as is relevant for present purposes, as follows:

> **"43.— Freedom of speech in universities, polytechnics and colleges.**
>
> (1) Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers.
>
> (2) The duty imposed by subsection (1) above includes (in particular) the duty to ensure, so far as is reasonably practicable, that the use of any premises of the establishment is not denied to any individual or body of persons on any ground connected with—
>
> (a) the beliefs or views of that individual or of any member of that body; or
>
> (b) the policy or objectives of that body.
>
> (3) The governing body of every such establishment shall, with a view to facilitating the discharge of the duty imposed by subsection (1) above in relation to that establishment, issue and keep up to date a code of practice setting out—
>
> (a) the procedures to be followed by members, students and employees of the establishment in connection with the organisation—

(i) of meetings which are to be held on premises of the establishment and which fall within any class of meeting specified in the code; and

(ii) of other activities which are to take place on those premises and which fall within any class of activity so specified; and

(b) the conduct required of such persons in connection with any such meeting or activity;

and dealing with such other matters as the governing body consider appropriate.

(4) Every individual and body of persons concerned in the government of any such establishment shall take such steps as are reasonably practicable (including where appropriate the initiation of disciplinary measures) to secure that the requirements of the code of practice for that establishment, issued under subsection (3) above, are complied with.

…"

15. (The Claimants also referred to Section 202 of the Education Reform Act 1988 which relates to obligations of University Commissioners. I am satisfied that Section 202 is not relevant to this case, which does not concern the Commissioners but the University itself, and I say no more about that section.)

16. By operation of Section 6(1) of the Human Rights Act 1998, the Defendant is also subject to obligations under the Convention. Articles 10 and 11 are relevant:

"**Freedom of expression**

Article 10

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.

Freedom of assembly and association

Article 11

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."

The Defendant's Code Of Practice

17. At all material times the Defendant has maintained a Code of Practice to Secure Freedom of Speech Within the Law, as it is required to do by s 43(3) of the 1986 Act. At the time of the decision leading to JR 1 (March and April 2015), the Defendant's Code of Practice provided, so far as relevant, as follows:

> "1 (a) *A designated activity* is defined as any meeting, event or other activity due to take place on University premises where there is a reasonable expectation on the part of the Principal Organiser … or the Responsible Officer … that freedom of speech within the law may be compromised unless appropriate remedial action is taken. Whilst it is not possible to be prescriptive about such activities they may include visits by public figures especially where their views have aroused controversy in the past or where the subject matter of the activity is likely to be regarded as controversial or objectionable by at least some of the participants. In cases of doubt the Responsible Officer should always be consulted.
>
> …
>
> 2.3 The Council of the University has authorised the Responsible Officer, at his/her sole discretion but taking account of such advice as he/she deems necessary, to declare any activity to be a 'designated activity' within the meaning of this Code.
>
> …
>
> The Responsible Officer shall have authority to withdraw permission for the holding of a designated activity if in his/her opinion such changes in circumstances have occurred since the

original granting of permission as to make it likely that good order cannot be maintained. Such action shall only be taken in exceptional circumstances and wherever possible after consultation with the Principal Organiser.

2.5 Where an activity is designated the Principal Organiser shall consider what measures, if any, might need to be taken in order to safeguard freedom of speech and advise the Responsible Officer as appropriate. The Responsible Officer may, at his/her sole discretion, vary the measures proposed by the Principal Organiser or require additional measures to be taken.

…

7.1 Appeals against any rulings or requirements of the Responsible Officer or his/her nominee may be made by the Principal Organiser or his/her nominee to the Vice-Chancellor whose decision shall be final. In the absence of the Vice-Chancellor and in cases of urgency appeals may be determined by the Provost or, in his/her absence, by a Pro Vice-Chancellor."

18. The Defendant amended its Code of Practice on 27 November 2015. This amended version of the code was operative at the time of the decision leading to JR 2 (1 February 2016). The costs provisions in the amended code were materially identical to those in the earlier code, providing as follows:

"12.1 Except in respect of Designated Activities this Code does not alter the normal policy whereby budgetary groups, the Staff Club, the Student's Union and hirers are responsible for payment where appropriate and necessary for services provided by another budgetary group or central funds.

12.2 Save for Type C events, where all costs shall be borne by the hirer, where additional costs arise as a direct result of the requirements of the Responsible Officer in relation to a Designated Activity these shall normally be borne by the University where they relate to:

(i) the provision of University portering and security staff *outside* the venue.

(ii) the provision of streaming and overspill facilities.

12.3 All other costs, including any additional external policing and security costs, shall be borne by the appropriate budgetary group or other financial entity except where it can be clearly shown that the right to freedom of speech is being inhibited by lack of funds. This shall not apply to Type C events, where all costs shall be borne by the hirer."

Facts

The Conference

19. The Claimants called for papers for the conference by a document entitled "Call for Papers" which was circulated widely by email in April 2014. That document described the conference in the following terms:

> "This conference seeks to analyse the challenge posed to international law by the Jewish State of Israel and the whole of historic Palestine – the area to the west side of River Jordan that includes what is now the State of Israel and the Palestinian territories occupied in 1967."

It was said that the conference would examine the legality of the State of Israel rather than its actions. The conference was described as *"the first of its kind"*. Its purpose was:

> "…to open up and serve as a platform for scholarly debates rather than positing an activist aim of adopting a firm normative position."

The intention was to publish the proceedings of the conference as an edited collection. The whole conference would be documented and filmed. Contributors were told that they would be fully funded or substantially assisted with their expenses. A conference fee of £50 (£30 for students) was to be charged.

20. The Defendant approved the conference as a legitimate academic exercise in or around July 2014, and accepted that the conference could take place on the Defendant's campus.

21. From around December 2014, the Defendant began to receive correspondence expressing opposition to the conference. This correspondence came from a wide range of individuals and organisations. The Defendant replied to each communication stating that it had no position on the substance or content of the conference.

22. In February 2015 and in light of the expressions of opposition, the Defendant designated the conference as a "designated activity" under the Code of Practice.

The Defendant's Risk Assessment

23. The Defendant commissioned a risk assessment to be prepared by Dr Andrew White, the Defendant's Head of Safety and Occupational Health. It was originally produced on 2 March 2015, and then updated on 17 and 26 March 2015 as further information came to light and further thought was given to the assessment of risk. The risk assessment was based on a risk estimation matrix which produces a combined risk rating based on two criteria, (i) likelihood of hazard and (ii) reasonably foreseeable worst case consequence.

24. The inherent risk of protest outside or near the conference venue, or elsewhere on site, was considered to be a high risk. I shall return later in this judgment to the evidence on which that risk was estimated. Importantly, as time went on, two notes were added

to this part of the risk assessment. The note added on 17 March 2015 recorded as follows:

> "Intelligence has been received of at least two opposing protests being planned for at least Sunday 19 April 2015. The size and scope of these protests is not clear, but could be substantial. There are also student societies in the University with a history of assertive protest on these issues. The adverse publicity and complaints re this conference are growing in scale and stridency."

The note added on 26 March 2015 recorded as follows:

> "Further intelligence received indicating 300-400 protestors expected, and also opposing protests, for at least Sunday 19 April, and possibly targeting other locations in addition to the venue. It appears that these protests may attract an element of agitators. Adverse publicity in both mainstream and social media is further intensifying. However, there is no evidence of direct explicit threat of violence. That said, the Police threat assessment has escalated such that 63-84 officers will be on site for 300-400 protestors, and possibly more, with other in-venue requirements added."

The controls or measures to reduce these risks included this:

> "Added 17 March 2015:
>
> …
>
> More intensive policing reduces likelihood of hazard event to Possible, but reasonably foreseeable worst case consequence is now Major because of anticipated size of protest and increasing indications of agitation. Possible x Major. Residual risk remains High."

The residual risk of protest, with controls, was rated "High".

Hampshire Constabulary's Event Assessment

25. On 30 March 2015, Mr White received a document from the Hampshire Constabulary entitled "Event Assessment". There are a number of points which emerge from the Event Assessment, which is an important document. The first is that although the Hampshire Constabulary was willing to assist in policing the event, the primary responsibility for maintaining good order at the event rested with the Defendant. This division of responsibility was explained by the Hampshire Constabulary in the Event Assessment in the following ways:

> "The event is a private event held within Southampton University and it will be the responsibility of the university to consider how they will manage potential protesters gaining entry to the conference by ticket and how they will deal with

this issue. They will always need to consider how they mitigate against the potential for terrorist attack." (Introduction)

"This is a private event which is on private property (Southampton University) which has a security department of its own. … It could be that the event is disrupted by persons inside who have paid to attend. It would be expected that the security team would have a plan for dealing with such matters. A warning method for conduct and an ejection policy will be developed. Police would only be expected to deal with matters of aggravated trespass, prevent a breach of the peace or investigate / prevent criminal matters. … It is not expected that police will have any uniformed presence within any buildings. … Security of the site is the responsibility of the university, plan for protests and who to deal with persons on their premises." (Public Order Public Safety Assessment)

"One of the biggest threats will be the University's capacity and experience to deal with protests or activity within the conference. It is a University event for which they must take responsibility for planning and delivering safe outcomes. The university only has a small security team and it would be expected that additional skilled resources are available to manage the event. … The provision of protest areas and clear stewarding will be the responsibility of the university as event organiser. … Hampshire Constabulary will offer all support and guidance required to assist with the delivery of a safe event. There is already a close liaison between parties and clear exchange of information and as appropriate intelligence. Discussions on requesting Special Policing Services have not commenced. … Within Universities generally there has been a call for "Cops off Campus". Events have taken place with protests against Police presence on university property. … This should also be considered a potential challenge for the event organisers." (Summary)

(I am told that the reference to Special Policing Services in the last cited paragraph is to services provided by the police which are charged to the event organisers, and which therefore carry a cost.)

26. The second point to emerge was the significant threat of disorder at the event. The Event Assessment recorded that the Defendant had received a large amount of correspondence objecting to the conference from community leaders, politicians and academics, as well as others expressing strong anti-Israeli views. A variety of groups were posting articles or discussing the conference on social media. The Event Assessment categorised these groups under the following headings: Pro-Israel, Right Wing, Left Wing, Pro-Palestine and Political Commentators. Only one official protest had been notified by the Sussex Friends of Israel ("SFOI") but the Event Assessment recorded that a known tactic of other groups was to stage surprise protests intended to cause wider disruption and provoke a response. Under the heading "Public Order Public Safety Assessment", the Hampshire Constabulary noted that

only the SFOI had indicated an intention to protest, and that the threat of disorder from that group was low towards the university and the staff; the SFOI was a peaceful group who at their national protest had 200 attendees, and were open to engagement. The Event Assessment continued:

> "The assessment is that between 400-1000 attendees could attend and should be planned for, with necessary arrangements to accommodate them for their protest in the event vicinity. They are likely to cooperate on where they can go. This will have to be managed by the university if on private land.
>
> It is likely that their protest will have a counter demonstration by pro Palestinian. The management of the two groups on University property will be managed by the University".

27. The Event Assessment then dealt with Right Wing groups. It was noted that although there was an active Right Wing group in Hampshire, previous attendances at Southampton University had involved low numbers (about six people) for protests called at short notice on weekdays. There had been confrontation between this group and Pro-Palestinian protest groups in Southampton in the previous year. The Hampshire Constabulary concluded that:

> "The threat from this group of disorder is low if there is no counter demonstration or numbers are few. If extreme Left Wing groups attend then it would be necessary for either security to provide a presence or if there is an increase in hostility from the groups for police to attend therefore threat of disorder is medium. At this stage there has been no notification of extreme Left Wing groups attending this event, though again their attendance is considered probable.
>
> There is the possibility of splinter groups from the right wing also attending. …They will seek confrontation with left wing groups."

28. The Event Assessment then dealt with Left Wing groups, and noted that if the Right Wing announced a demonstration, the Left Wing would "*actively look to organise a counter demonstration*". Around 100 attendees from this group was anticipated, based on previous local experience.

29. The Event Assessment also dealt with more extreme Left Wing groups and noted that police resources were sometimes required to keep activists from these groups apart from other protesters:

> "Should the profile of this event rise and an announcement of the Right Wing demonstrating at the site then the attendance of more extreme Left Wing could be considerably higher."

30. Consideration was given to local Pro-Palestinian groups (normally peaceful and not wishing to engage with opposing groups), student groups (usually willing to engage with police and organisers), national Pro-Palestinian groups (previously involved in

peaceful marches but might provoke counter demonstration) and local Muslim groups (could become provoked by inflammatory comments made by Right Wing activists: "*local leaders have expressed concern, should Right Wing attend future events, that confrontation between parties could escalate if provoked*".)

31. The Summary to the Event Assessment noted that:

> "The conference has received significant national and international media coverage and it is expected to continue up to and during the event. This will focus attention on the debate and raise the likelihood of groups attending to express their political views. Coverage during the event is considered to be high and so press attention on protest group considered likely.
>
> …
>
> The event organisers and University should consider the JTAC threat to the UK from terrorist activity. This event has a profile that would for some seem as a potential legitimate target and considerable thought needs to be made as to how this threat is mitigated against."

(JTAC stands for the Joint Terrorism Analysis Centre).

32. The Event Assessment concluded with this statement:

> "Given the above assessment, it is likely that this event will lead to the attendance of groups with opposing views and in turn the potential for disorder. Hampshire Constabulary remains confident it can provide the necessary support to Southampton University, if requested, to assist with the mitigation of risk from any protest. This may result from the event itself or as a consequence of cancellation."

IV THE DECISIONS UNDER CHALLENGE

The Decision – JR 1

33. On receipt of the Event Assessment on 30 March 2015, Mr White, the Defendant's Chief Operating Officer, invited the Claimants to a meeting to discuss the conference in light of the Event Assessment. The following day, 31 March 2015, Mr White wrote to the Claimants. The letter is five pages long, and detailed in its reasoning. Mr White recorded that he had taken advice from the Defendant's Director of Estates and Facilities, the Head of Security, the Head of Safety and Occupational Health, and various external third parties including the Southampton University Students' Union and the Hampshire Constabulary. He stated:

> "Having had full discussions with you yesterday and having reflected on all of the issues overnight, I have decided, under Section 2.3 of the University's Code of Practice to Secure Freedom of Speech within the law, to withdraw the University's permission to hold the conference….".

34. He then gave his reasons for the decision under a number of headings. Under the heading "Speakers and Conference Programme" he noted that the speakers who had indicated attendance at the conference had a distinct leaning towards one point of view (which had not been the original intention of the conference), and a number of them were regarded as controversial. Under the heading "Risk Assessment", Mr White noted that the risk of disorder had progressively worsened over the past few weeks and now showed "*an unacceptable high level of risk*" which remained even after considering such reasonable measures as could be put in place in the period running up to the scheduled conference; the risks had to be considered in light of the increased threat of terrorist activity given recent terrorist attacks in Paris and Brussels. Under the heading "Public Order, Public Safety Assessment" Mr White referred to the Event Assessment which estimated that 400-1000 protesters would attend. He recorded that he had invited the Claimants to suggest any practical measures to ameliorate the risks, to which the Claimants had responded by email, and he quoted from that email which had said as follows:

> "…it is very clear from the Police's report that they are more than capable of policing the conference and ensuring the safety of university staff, speakers, delegates, students and property. This should be accepted at face value".

In his letter, Mr White disagreed with that response from the Claimants, emphasising that the Defendant had a responsibility to maintain public order and safety. Mr White said that he considered the circumstances facing the Defendant as a result of the proposed conference to be "*exceptional*".

35. In conclusion, Mr White confirmed that the Defendant took its duty to secure freedom of speech very seriously and that he had reached his decision with considerable regret:

> "With this in mind, I mentioned to you yesterday that the University is prepared to commission an independent report to establish how a conference of this nature could be held in future; exploring and identifying how the balance between upholding freedom of speech and securing the safety and security of staff and students can be achieved, and the measures needed to achieve this. In our meeting you rejected this offer, but I make it again as a confirmation of the University's continuing commitment to uphold freedom of speech within the law."

36. Mr White confirmed that the Claimants could appeal.

37. The Claimants did appeal by letter dated 31 March 2015, submitted to Professor Nutbeam, the Vice-Chancellor, by email on 1 April 2015. The letter of appeal stated that the "*general thrust of the appeal is that the University is using security arguments disproportionately and inappropriately*" and advanced grounds for appeal under nine numbered paragraphs. The Claimants argued, amongst other things that:

> "We believe that case law shows that but for extreme cases of imminent terrorist attacks the University is under a positive obligation to provide security in order to allow freedom of

> speech to take place. This means that an argument based on security cannot be used to cancel an event as the University intends to do in this case."

38. The Claimants further argued that the Defendant's risk assessment was "*highly inconsistent*" and asserted that many of the risks addressed by the assessment were inflated. Specifically, the Claimants noted that the police had said that they were confident of being able to police the event and provide support to the Defendant. The Claimants suggested that the manner in which the Defendant had actively sought advice from the police in order to secure the event had been "*totally unacceptable*", but that police involvement should have been sought in a more "*active and demanding manner*". The Claimants suggested that there were alternative measures which could be put in place, for example holding the event in an offsite building, but said that it was not for them to suggest to the Defendant what those alternative measures should be. The Claimants argued that the reference to JTAC was irrelevant and none of the opposition to the conference came from groups with a track record of terrorist activities. Finally, the Claimants argued that the conference speakers would demonstrate a "*fantastic range of views*", fully in keeping with the intention of the conference organisers from the outset.

39. The Claimants met with Professor Nutbeam on the morning of 1 April 2015. Professor Nutbeam dismissed the Claimants' appeal by letter dated 1 April 2015, written later that afternoon. In that letter, Professor Nutbeam stated:

> "I reassured you that throughout this process, the only issues under consideration were how to balance the University's duty to uphold freedom of speech within the law with its duty to ensure the safety of staff and students of the University on University premises and they are the only considerations that have weighed in the decision making process."

40. He acknowledged the specific grounds of appeal submitted by the Claimants, and said:

> "In short, however, my decision, based on the advice that I have received, is that it is not possible to put in place measures or take remedial action to ensure that good order can be maintained on campus that will safeguard staff and students while the conference is taking place. For that reason, and that reason alone, I uphold the decision of [Mr White] to withdraw permission to hold the conference at the University from 17th to 19th April, 2015.
>
> The University remains committed to taking such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for staff and students. I was impressed by the commitment you gave this morning to holding a conference reflecting a broad spectrum of views and I would like to confirm the offer that I made when we met that the University would be prepared to work with you to find a venue suitable for a conference of this nature at a later date. I remain committed

> to the possibility of the event taking place in the future if adequate safeguards can be put in place to minimise the risk of the safety of university staff and students. Given the short period of time between now and 17th April, the amount of publicity that the conference has attracted and the consequent risk of protest and counter-protest, I do not believe that such measures could be put in place for the present conference.
>
> …
>
> I realise that this will be a disappointment to you both and of no consolation to you that this is the most difficult decision that I have had to make in my whole time as Vice-Chancellor of the University of Southampton."

41. The conference scheduled for 17 to 19 April 2015 was cancelled.

42. The decision under challenge in JR 1 is Mr White's decision dated 31 March 2015. I understand the challenge to encompass also the appeal decision dated 1 April 2015 which confirms Mr White's decision.

The Decision – JR 2

43. On 1 February 2016, Mr Ian Dunn, the Chief Operating Officer of the Defendant (who had by that date replaced Mr White) wrote to the Claimants with an update on the position of the Defendant in relation to the conference. Mr Dunn confirmed the Defendant's commitment to meeting its obligations to ensure academic freedom and freedom of speech, and that the Defendant was seeking to discharge those responsibilities by following its Code of Practice. He put forward a number of proposals to secure safety and good public order at the conference. Specifically, he proposed that the conference be held over two days (9 and 10 April 2016) in building 46; he withdrew permission to hold the mid-conference dinner in building 38; he enclosed a final risk assessment to which he sought the Claimants' agreement, noting that the risk assessment still required formal sign-off. He confirmed that the Defendant would cover the costs of security outside the venue, in line with the Code of Practice, and in line with the "*normal practice*", he proposed that the Claimants should cover the costs of security within the venue for the two days of the conference by reference to attachment 2 to his letter, which showed conference organiser costs of £20,045 plus VAT (a total of £23,873). Attachment 2 included costs for portaloos and cloakroom staffing, but also included contract security costs and costs of erecting barriers. Mr Dunn said that these costs should be reflected in a revised conference budget. He went on to say that:

> "By requiring security costs to be covered at this level we assess that much of the health and safety risk can be mitigated to allow the conference to proceed in most circumstances".

44. However, he went on to say that if additional costs were incurred in securing the event, those costs would initially be borne by the Defendant (up to providing the necessary resources to handle a maximum protest size of 600 people on campus and only to the extent that external policing was not required), but in that event the

Defendant would look to be reimbursed out of conference income "*should a financial surplus be produced*". By reference to the Claimants' conference budget, Mr Dunn noted that there was no budget allocated for security at all and that the security costs were required to be met first, before discretionary costs were met. He suggested that it was not possible to undertake to fund the speakers' travel and accommodation costs until the security costs were covered; alternatively, the conference organisers could consider increasing the conference attendance fees to increase income from the conference. He noted that:

> "It is your present allocation of projected income that makes the conference appear to be financially untenable in terms of meeting the University requirement to be self-funding. …
>
> By offering to underwrite the possible security costs of threat escalation beyond the current security plan attached, I trust this reassured you of the [Defendant's] commitment to protect freedom of speech on our campus. …"

He invited the Claimants to submit a revised programme for a 2 day conference and a revised budget.

45. The conference budget which Mr Dunn referred to (which had been produced by the Claimants) shows an estimate of 372 attendees (250 of whom would be paying the full rate), with fees charged of £95 per head (£30 for students). It was proposed that donations from two bodies (one anonymous) should be added to the income, giving a total forecast income of £55,250. This income was projected to be spent on accommodation, travel and other costs for the speakers, together with some modest publicity and other overheads, leaving a small deficit after costs. There was no allowance in this budget for security costs.

V. ANALYSIS - JR 1

Claimants' Arguments

46. Paragraph 2 of the Claimants' skeleton summarises the arguments thus: the decisions under challenge in JR 1 breach the mandatory duty in Section 43 of the 1986 Act, they are contrary to the Defendant's own Code of Practice, they breach Articles 10 and 11 of the Convention, and were based on risk assessments that were based on speculation as opposed to any real risk, and were based on irrelevant considerations to the exclusion of relevant considerations.

47. Ms Jegarajah dealt with the law. She reminded me that the decision as to whether there has been an unlawful interference with the Claimants' fundamental rights is a question for the Court, having due regard to the judgment of the primary decision maker, relying on *R* (*Lewis Malcolm Calver) v Adjudication Panel for Wales and Anor* [2012] EWHC 1172 (Admin) at [73]. However, she stressed, the approach requires close scrutiny by the Court (see *Calver* at [45]); the Court is not involved in a balancing exercise (see *Calver* at [47]), but rather looking to see whether the interference can be justified by clear and satisfactory reasons (*Calver* [50]).

48. She relies heavily on Application Nos 4916/08, 25924/08 and 14599/09 *Alekseyev v Russia* where the Court held that Russia had violated the Convention by its refusal to allow Gay Pride marches to take place in Moscow. From this case Ms Jegarajah draws the following propositions, which I do not understand to be disputed (and anyway, with which I wholeheartedly agree): freedom of expression is a fundamental value of a democratic society; this freedom extends to minority or controversial views; and the state has a positive obligation to secure the effective enjoyment of those freedoms.

49. More specifically, Ms Jegarajah relies on the following passages from the judgment to argue that the mere threat of violence is insufficient (again, a proposition which was not disputed by the Defendant, and with which I agree):

> "[75] … As a general rule, where a serious threat of a violent counter-demonstration exists, the Court has allowed the domestic authorities a wide discretion in the choice of means to enable assemblies to take place without disturbance (see *Plattform "Ärzte für das Leben*", loc. cit.). However, the mere existence of a risk is insufficient for banning the event: in making their assessment the authorities must produce concrete estimates of the potential scale of disturbance in order to evaluate the resources necessary for neutralising the threat of violent clashes (see *Barankevich*, cited above, § 33).
>
> [77] … if every probability of tension and heated exchange between opposing groups during a demonstration were to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion (see *Stankov and the United Macedonian Organisation Ilinden*, cited above, § 107)."

50. The Court rejected Russia's case and found Russia to be in breach:

> "[77] … In the present case, the Court cannot accept the Government's assertion that the threat was so great as to require such a drastic measure as banning the event altogether, let alone doing so repeatedly over a period of three years. Furthermore, it appears from the public statements made by the mayor of Moscow, as well as from the Government's observations, that if security risks played any role in the authorities' decision to impose the ban, they were in any event secondary to considerations of public morals.
>
> …
>
> [85] The Court is therefore unable to accept the Government's claim to a wide margin of appreciation in the present case. It reiterates that any decision restricting the exercise of freedom of assembly must be based on an acceptable assessment of the relevant facts (see, among other authorities, *Christian*

> *Democratic People's Party*, cited above, § 70). The only factor taken into account by the Moscow authorities was the public opposition to the event, and the officials' own views on morals."

51. So, argues Ms Jegarajah, in this case by analogy the Defendant has similarly capitulated to a risk of disorder which is insufficient to ban the event. The Defendant has failed to obtain a concrete estimate of the disorder, and because of that has failed to neutralise such risks as may have existed by taking appropriate measures. As with Russia, that puts the Defendant in breach of the Convention. The Defendant's conduct has, in effect, prohibited freedom of expression on an important and controversial subject of public importance.

52. She argues that s 43 is to be read with the benefit of Articles 10 and 11 so as to impose an *"enhanced duty"* on the Defendant to protect freedom of expression and freedom of assembly. In light of that enhanced duty (as she termed it), the Defendant has a positive obligation to facilitate the conference by taking all possible measures, accepting that there may come a point where the conference cannot go ahead, but that would only be in very exceptional circumstances, where safety could not be assured even with the benefit of full input from the police and public services. This ties in with the Defendant's own Code of Practice, paragraph 2.3 of which maintains that permission can only be withdrawn in exceptional circumstances. Those exceptional circumstances did not exist here, and for that reason the Defendant's decision was unlawful in domestic law (s 43), in breach of the Convention (Articles 10 and 11), in breach of the Defendant's own Code of Practice (paragraph 2.3) and based on an incorrect and inadequate risk assessment.

53. Ms Jegarajah argued that the Defendant was in error in taking into account external factors in arriving at its risk assessment. In advancing this submission, she relied on *R v University of Liverpool ex parte Caesar-Gordon* [1991] 1 QB 124. In that case, the Court considered the withdrawal by the University of Liverpool of permission to hold a meeting at which a South African diplomat had been invited to speak. The Court held (per Watkins LJ at p132 D - H):

> "…Thus, we conclude, that on a true construction of section 43 the duty imposed on the university by subsection (1) is local to the members of the university and its premises. Its duty is to ensure, so far as is reasonably practicable, that those whom it may control, that is to say its members, students and employees, do not prevent the exercise of freedom of speech within the law by other members, students and employees and by visiting speakers, in places under its control. To require the university in the discharge of its duty under subsection (1) to take into consideration persons and places outside its control would be, in our view, to impose upon it an intolerable burden which Parliament cannot possibly have intended the university to bear.
>
> …

> Thus in discharging its duty under section 43(1) the university is not enjoined or entitled to take into account threats of "public disorder" outside the confines of the university by persons not within its control. Were it otherwise, the purpose of the section to ensure freedom of speech could be defeated since the university might feel obliged to cancel a meeting in Liverpool on the threat of public violence as far away as, for example, London which it could not possibly have any power to prevent.
>
> …
>
> Had they confined their reasons when refusing permission for the meetings to take place to the risk of disorder on university premises and among university members, it may be that no objection could have been taken to either of their decisions. Where, however, the threat was of public disorder without the university, then, unless the threat was posed by members of the university, the matter was, in our opinion, entirely for the police."

54. In reliance on *Caesar-Gordon*, Ms Jegarajah argues that the Defendant was wrong to take any account of such external factors as the recent terrorist attacks in Paris and the general state of alert in relation to terrorist activity (noting that this event was due to take place only weeks after 7 January 2015, when terrorists attacked the offices of Charlie Hebdo in Paris and a kosher supermarket at Porte de Vincennes). The only factors which the Defendant was entitled to consider, she argues, were "*internal factors*", namely risks arising on and present at the Defendant's own premises.

55. Mr McDonald's main point on the facts was that the Defendant's risk assessment was not properly evidenced: there was no intelligence, in fact, to suggest that there would be significant disorder if the conference went ahead. On the specifics, Mr McDonald noted that the Defendant's Head of Security, Mr Jackson, stated in his witness statement that Special Branch had suggested to him at a meeting on 16 February 2015 that an armed response team might need to be available at the conference, but this was not evidenced by any minutes or written documentation, it formed no part of the Hampshire Constabulary's Event Assessment and there was apparently no intelligence to justify it. He argued that Mr Jackson had misinterpreted or exaggerated the risks in the risk assessments, and that it was clear by 30 March 2015, when the Event Assessment was received from the Hampshire Constabulary, that the Defendant had been working on an incorrect basis in assessing the risk, because that Event Assessment did not mention an armed response team; in fact, it indicated that there was only one group which was intending to demonstrate (namely SFOI), and that group was known to be peaceful and compliant; it was pure speculation whether there would be any other protesters or indeed any trouble at all at the conference. Risk assessments cannot be built on speculation but must be based on "concrete evidence" (citing *Alekseyev*). In fact, the Pro-Palestinian group had written saying they did not intend to demonstrate, and anyway the Event Assessment acknowledged that the Pro-Palestinians were a peaceful group. It was clear from the Event Assessment that the Hampshire Police would work with the Defendant and could handle security at the conference.

56. In summary, the Defendant should have worked with the police to ensure that the conference went ahead, safely, rather than cancelling the conference. That cancellation was an unjustified interference with the right of free speech and freedom of assembly.

Defendant's arguments

57. Mr Capewell acknowledged the importance of Articles 10 and 11 and the rights they safeguard. But, he says, this is not a case about high principle at all, but rather about a modest interference with the Claimants' Article 10 and 11 rights, justified and necessitated by the Defendant's concern for public safety, for those attending the conference (as delegates or protesters) and for others using the Defendant's premises at the time of the conference (students and staff).

58. The Defendant's starting point on the law was *R (Lord Carlile of Berriew) v SSHD* [2014] UKSC 60, [2014] 3 WLR 1404. In that case, the Supreme Court upheld the Secretary of State's decision to exclude Mrs Rajavi, a prominent Iranian dissident, from the UK with the result that she was unable to accept an invitation to speak to a number of Parliamentarians about issues of human rights and democracy in Iran. Adopting Lord Sumption's analysis from that case, the Defendant argued that this case falls very much at the lower end of the spectrum in terms of interference, because this is not a case where the Defendant has banned the conference; the Defendant has withdrawn its consent for the conference to be held in April 2015 as originally anticipated; the reasons for that decision are driven by public safety and public order concerns, which are expressly contemplated by Articles 10 and 11 as legitimate bases for limiting those rights. The decisions under challenge involved judgment about future risks and conduct, which the Defendant is best placed to exercise in light of the advice it had received from the Hampshire Constabulary and others, and with which this Court should not interfere.

59. He argued that the Court cannot go behind or question the evidence which has been provided, in the form of witness statements and the Event Assessment by Hampshire Constabulary. The risks to public order and public safety are fairly and accurately reported in those documents. It is absurd for the Claimants to argue that the Defendant should not take account of external risks which could result in trouble on campus, or that the conference should simply have gone ahead in the face of such clear risks without the Defendant first putting in place sufficient measures to mitigate or control those risks. No responsible public authority could have closed its mind to the risks which were identified by the risk assessments and the Event Assessment.

60. In summary, the Defendant submitted that there has been no error of law in the Defendant's approach to its decisions, and the decisions themselves are lawful, amounting to a wholly proportionate interference with the Claimants' Convention rights.

Discussion

Approach

61. Like Mr Capewell, I start the analysis with *Carlile*. I accept Ms Jegarajah's submission that *Carlile* is not on all fours with this case on its facts, but she is wrong

to argue that *Carlile* is irrelevant to the analysis here merely because of those differences of fact; the relevance of *Carlile* lies in the Supreme Court's guidance on the approach to be adopted in cases of this kind, where it is alleged that a public authority has impermissibly interfered with an individual's rights under Article 10 (and, in this case, Article 11) of the Convention.

62. *Carlile* confirms, if any confirmation were needed, that the Convention rights at issue here are very important, freedom of expression being "*one of the essential foundations of a democratic society*" (para [13]). But it also confirms that rights under Articles 10 and 11 are qualified and not absolute (see [37]). The proportionality of interference with those rights is ultimately a matter for the Court (and in that respect *Carlile* is at one with *Calver*) but the Court cannot simply substitute its own decision for that of the primary decision-maker or frank the decision without itself considering it (see, for examples of that proposition, [20], [31], [34], [68]). As to the weight which is to be given to the particular decision in any case, Lord Neuberger said this:

> "[68] … The weight to be given to the decision must depend on the type of decision involved, and the reasons for it. There is a spectrum of types of decision, ranging from those based on factors on which judges have the evidence, the experience, the knowledge, and the institutional legitimacy to be able to form their own view with confidence, to those based on factors in respect of which judges cannot claim any such competence, and where only exceptional circumstances would justify judicial interference, in the absence of errors of fact, misunderstandings, failure to take into account relevant material, taking into account irrelevant material or irrationality."

63. In applying that guidance to the facts of this case, it is clear that the Defendant has the "*relative institutional competence*" (to adopt Liberty's phrase, recorded by Lord Sumption at [33] of *Carlile*) to evaluate the risks posed by the conference going ahead as planned, and to determine whether it had sufficient time and resources to mitigate those risks. The nature of the Defendant's decision was essentially predictive: by it, the Defendant looked to a number of risks which had been identified but were incapable of precise quantification, and in light of those risks, the Defendant looked to the type of measures which it would have to put in place to mitigate against them and ensure public safely in light of them; it made a judgment about whether that could be done in the time available. This case falls at the latter end of Lord Neuberger's spectrum.

The Issues

64. There are, I believe, two main issues for the Court to resolve: first, a factual question, namely why the Defendant withdrew permission to hold the conference; and secondly, if it was withdrawn because of risks which had been identified, whether the cancellation was a proportionate response.

(1) The factual question

65. I have outlined above the Defendant's risk assessments, the Event Assessment provided by the Hampshire Constabulary and the Defendant's decisions to withdraw consent for the conference. At the hearing, the Defendant further relied on evidence from its witnesses to explain the background to the risk assessments and decisions, and the Defendant's approach to evaluating the risks presented by the conference, as those risks escalated over time. The answer to the factual question must take account of that evidence, which I considered was relevant and helpful to this issue (and not some form of *ex post facto* supplement to the decision-maker's reasoning).

66. Mr White stated in his witness statement that the conference first came to his attention in early February 2015. He decided to designate the conference under the Code of Practice. He had a meeting with the Claimants on 30 March 2015. By that date, his understanding was as follows:

> "My conversations with the police left me with a clear understanding that there was a high risk of public disorder and the advice that I had received from the Director of Estates, and the Heads of Security and Safety and Occupational Health were that at this time, the University was not in a position to put in place the arrangements that would ensure that a safe outcome could be delivered."

After further meetings, and having considered the matter overnight, Mr White decided to withdraw permission for the conference. In his witness statement, he said:

> "As Responsible Officer, I was aware of the positive duty of the University to take such steps as are necessary to ensure that freedom of speech within the law is secured for members, students and employees of the University as well as for visiting speakers but I was also very conscious of the duty to take such steps as are reasonably practical to safeguard students and staff on campus."

67. Mr Jackson described the Defendant's security resources, which comprise a total of 54 people, of whom 10 are on duty during the day and 10 at night, to cover the whole of the Defendant's premises. He said that the Defendant uses a third party company to provide contracted in security staff for the halls and computer suites, providing between 5 and 17 staff on a daily basis except when the University is closed. However, none of the Defendant's own staff or contracted in staff had any public order training and the Defendant has no riot equipment available to it. The Defendant had only limited experience of dealing with protests, and he thought that the conference had to be considered (and this is a passage which was subject to much criticism by the Claimants):

> "against a background of UK terrorism threat level of severe and recent terrorist incidents elsewhere in Europe targeting Jewish people".

68. Professor Nutbeam recorded in his witness statement that he had received a large amount of correspondence complaining about the conference, including threats to the Defendant if it went ahead. He stated:

> "I can categorically state that the nature and scale of the correspondence and lobbying about whether the conference should proceed or not did not impact in any way on the decisions that I made."

Professor Nutbeam had a series of meetings, including a meeting with the Claimants, before reaching his decision on appeal to confirm Mr White's decision of the previous day. He concluded:

> "Having reviewed the position, I did not consider, given the short period of time between the appeal and 17th April, the amount of publicity that the Conference had attracted and the consequent risk of protest and counter-protest, that suitable measures could be put in place for the Conference to take place now."

69. Taken at face value, this is powerful evidence to explain and support the Defendant's decision to withdraw permission to hold the conference on the scheduled dates in April 2015. The Claimants argue that this evidence is inaccurate or incomplete, because in truth the Defendant was cowed into cancelling the conference by the various letters and threats of protest which were received and the fear of reputational damage if the conference went ahead. The Claimants have a problem in advancing this submission, which is in effect an invitation to the Court to disregard the Defendant's witness evidence, and indeed to make an adverse credibility finding against witnesses who deny these ulterior motives: there was no questioning of any of the Defendant's witnesses, no application to cross examine, and it was not put to any of them that they were not telling the truth. In the circumstances, I consider myself bound to accept the Defendant's evidence and to reject the Claimants' challenge to it. I should add that I see no reason at all to doubt the truth and integrity of these witnesses, or the facts to which they attest: their witness evidence is entirely consistent with the risk assessments, Event Assessment and the decision letters, and portrays an obviously credible sequence of events and process of thinking by the Defendant.

70. The Defendant's witnesses all provide evidence of the Defendant's reasons for withdrawing permission. The Defendant, by its employees, was concerned about the risk of public disorder which had been identified, and concluded that there was insufficient time before the conference to ensure that the risks could be mitigated sufficiently to ensure safety for all those on the Defendant's premises at the time of the conference: it was for that reason, and that reason alone, that its permission to hold the conference was withdrawn.

(2) Proportionality of Interference

71. The Claimants contend that the Defendant's decision amounts to a disproportionate interference with the Claimants' Convention rights. In addressing those challenges, I have firmly in mind the four stage approach to issues of proportionality of

interference with Convention rights, summarised by Lord Sumption in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 (and recited in *Carlile* at [19]) as follows:

> "[20] … the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

72. There can be little dispute about (i) and (ii). The Defendant's withdrawal of permission to hold the conference was driven by its concern for the safety of persons present on its premises, including its own students and staff, but also conference delegates and those who might come onto university premises to protest. Articles 10 and 11 are subject to qualification where necessary for reasons of public safety and the prevention of disorder or crime. The Claimants did not suggest that the issues in this case arose in connection with stages (i) or (ii) of the analysis: I agree that those stages are met without difficulty on the facts of this case.

73. It is convenient to consider whether a less intrusive measure could have been used ((iii) above) together with the final issue relating to the severity of the consequence and the overall balance of interests ((iv) above). There are a number of points to be made here. First, it is important to be clear about the extent of the proposed interference. The Defendant did not ban the conference from its premises. Indeed, both decision letters referred to measures which might be put in place to enable the conference to proceed safely at some time in the future, and Professor Nutbeam's letter dated 1 April 2015 specifically invited further discussion on that matter. The interference was modest: it precluded the conference taking place on the scheduled date; but it was not a decision to ban the conference from the Defendant's premises altogether for all time.

74. Here lies the answer to the Claimants' submissions based on *Alekseyev*. In that case, the ECtHR recognised that the Russian state had, in effect, imposed an outright ban on the activists' right to march (and, what is more, a ban which was not driven by fears of public disorder but rather by "*considerations of public morals*" (see [77] – [78]). The Court could find no justification on the evidence (ie, no "*concrete estimate*") to justify this grave interference with the Claimants' Convention rights. By contrast, this case involves no ban on the Claimants' rights, only a much more modest interference. I have not found *Alekseyev* of assistance in resolving these claims.

75. Secondly, the Claimants argue that the Defendant overstated the risks, alternatively that they took insufficient steps to mitigate those risks by working with the police in the time remaining prior to the conference. This is not a challenge to the credibility of the evidence so much as an argument that the Defendant wrongly evaluated the

material it had before it. Mr McDonald took me to a number of passages in the risk assessments and the Event Assessment, seeking to persuade me that the risks outlined in those documents were modest and manageable, and that the decisions had been an overreaction to them. There are two answers to this point. The first is that this Court's role is to review the decisions, recognising (see above) that the Defendant has the relative institutional competence to evaluate the information before it and take those decisions. I give considerable weight to those decisions. It is not appropriate for this Court to engage in a line by line analysis of the material which was provided to the Defendant and on which it based its decisions; that would engage this Court in a process which goes far beyond its proper remit. But in any event, I am unable to accept that there is any substance in the Claimants' suggestions that the risks were exaggerated or misunderstood by the Defendant. The risk assessments were based on information obtained from the police; the assessments themselves appear to be thorough and professional. The Event Assessment contained details of a number of very worrying risks. I disagree with the Claimants' suggestion that it contained a reassuring overall message that the police could handle the event, come what may. It was entirely reasonable for the Defendant, faced with this material, and cognisant of its duties to staff and students, and to others who were present on the Defendant's premises for whatever reason, to conclude that there were significant risks in hosting the conference. Further planning was required to mitigate that risk, and time was insufficient to ensure that the required measures were in place.

76. Thirdly, the Claimants argued that the Defendant should not have taken any account of terrorist activity and the heightened general state of alert in arriving at its assessment of risk, relying on *Caesar-Gordon*. I reject that argument. *Caesar-Gordon* is authority for the proposition that a university should not take account of threats of public disorder *outside* the confines of the university and *outside* its control (see the citation above). By taking account of recent events in Paris and the general state of national alert, the Defendant was taking into account a relevant factor which might lead to disorder or violence *within* the confines of the university. As Mr Capewell said, the suggestion that the Defendant should simply ignore the terrorist threat in these circumstances is absurd.

77. A fourth point raised was Ms Jegarajah's argument that the risk assessments were wrongly based on a "*worst case scenario*" when they should have been based on "*concrete evidence*" of a real risk. For reasons I have already explained above, I conclude that the risk assessments were based on concrete evidence, namely information provided by the Hampshire Constabulary, referred to in the Defendant's witness statements, and reflected in the Event Assessment. I accept that risk assessments should not be based on speculation, but they were not, in fact.

78. Fifth, I ask myself what else the Defendant could have done, faced with the risks identified only a few weeks before the conference was due to take place, other than to withdraw permission? The Claimants argue that the Defendant should:

> "simply have worked with the police if they had concerns as to public disorder because that is the job of the police not University security."

(see the Claimants' skeleton argument at [62]). This misses the important point that the Defendant had duties, personal to it and not delegable to the police, to ensure the

safety of its students and staff, and others who occupy its premises for whatever reason. It also had an obligation to protect its own premises from damage, and an interest in protecting its own reputation for safe conduct of public events. The Defendant could not "simply" expect the police to secure the event, without putting in place its own security arrangements. Significant work was required by the Defendant to work up its own security plan. This would take time. That was why the conference could not take place as planned.

79. Finally, I turn to the Claimants' proposition that withdrawal of permission could only be a proportionate response in exceptional circumstances. I accept that the Code of Practice refers to permission being withdrawn in *"exceptional circumstances"* at paragraph 2.3, but am satisfied that these really were exceptional circumstances, so far as the Defendant was concerned, falling within the parameters of its own Code of Practice. Mr White was justified in describing the circumstances facing the Defendant as "*exceptional*".

80. In summary, I fail to see any shortcoming in the Defendant's approach. Moreover, I do not believe that the Defendant had any real choice in practice but to withdraw its permission. The risks of holding the conference were very substantial. Any responsible organisation would have wished to develop a coherent plan to ensure a safe event, and would have refused permission to hold the event until that plan was to hand.

Conclusion

81. For all these reasons, I conclude that the decisions under challenge in JR 1 were a proportionate interference with the Claimants' rights, they were not unreasonable, and there was no procedural irregularity. I dismiss JR 1.

VI JR 2

82. I can deal with JR 2 more briefly. The essence of the Claimant's complaint here is that the Defendant has unlawfully interfered with the Claimants' Convention rights, alternatively acted unreasonably, by asking the Claimants to meet the security costs for the conference. The Claimants suggest that this is a point of fundamental principle, namely that to request any contribution towards security costs for a conference of this nature is an unlawful breach of the right of free speech.

83. The Defendant's decision dated 1 February 2016 was based on its revised Code of Practice, paragraph 12 of which requires the costs of any designated activity to be met by the "*appropriate budgetary group or other financial entity*" (which in this case is the conference itself, by the conference organisers). The Claimants attack that Code of Practice as itself constituting an unlawful interference with Articles 10 and 11 (and being in breach of s 43). The answer to this challenge is contained within the proviso to paragraph 12 of the Code of Practice: the costs are to be met by the conference "*except where it can be clearly shown that the right of freedom of speech is being inhibited by lack of funds*". Therefore, the Code of Practice itself safeguards the right of free speech, by removing the requirement to fund costs in circumstances where it can be clearly shown that there are insufficient funds available to do so.

84. I can see no reason why, where funds are available, the conference should not fund its own security costs. I can see no reason why this would amount to any form of interference with the right of free speech. I conclude that the principle for which the Claimants contend does not exist.

85. The question must be whether the conference does in fact have the funds available to meet the security costs. I have no evidence before me to suggest that the conference budget cannot be recast as Mr Dunn suggests. The budget on its face is plainly capable of covering these costs (assuming that £24,000 is a realistic figure and noting that there has been no discussion or agreement of that figure).

86. Further, I reject the proposition that Mr Dunn's quantification of the security costs is flawed because it is based on the original 2015 risk assessment. The 2015 risk assessment was updated by the Defendant on 8 January 2016 and 25 January 2016. It provides a reasonable basis on which to quantify security costs. The Claimants' allegations that the risk assessments contain material errors (see [40] – [45] of the Claimants' grounds in JR 2) are unarguable. Further and in any event, the answer is for the Claimants' to work with the Defendant to finalise the risk assessment and the conference budget, including an amount for security costs if funds can be found.

87. I refuse permission to bring JR 2. The challenge is premature, because no final decision has been made by the Defendant. And the substance of the challenge is unarguable. For both reasons, permission is refused.

88. Since drafting this judgment (but before circulating it to the parties), I received a "Clarificatory Note" from the Claimants' representatives dated 11th April 2016. Nothing in that Note has caused me to take a different view or wish to rephrase my conclusions. I do not believe the Note raises any point which I have not already dealt with above.

VII CONCLUSION

89. I agree with the Defendant that there is no large principle at stake here. From all that I have seen in this case, I believe that freedom of expression and freedom of assembly are alive and well at Southampton University. The decisions in each case were motivated by well-founded concerns for the safety of people and property, and exemplify good and responsible decision-making by the Defendant's officers.

90. I dismiss JR 1 and refuse permission for JR 2.

Court of Appeal

Ineos Upstream Ltd and others *v* Persons Unknown and others (Friends of the Earth intervening)

[2019] EWCA Civ 515

2019 March 5, 6; April 3 Longmore, David Richards, Leggatt LJJ

Practice — Parties — Persons unknown — Injunction — Claimants seeking injunctions on quia timet basis to prevent anticipated unlawful "fracking" protests against various classes of unknown defendants — Whether injunctions properly granted — Guidance as to granting of injunction as against persons unknown

The claimants were a group of companies and various individuals connected with the business of shale and gas exploration by the hydraulic fracturing of rock formations, a procedure colloquially known as "fracking". Concerned that anticipated protests against the fracking operations might cross the boundary between legitimate and illegitimate activity, the claimants sought, inter alia, injunctions on a quia timet basis to restrain potentially unlawful acts of protest before they occurred. The first to fifth defendants were described as groups of "persons unknown" with, in each case, further wording relating to identified locations and potential actions designed to provide a definition of the persons falling within the group. The judge granted injunctions against the first to third and the fifth defendants so identified. No order was made against the sixth and seventh defendants, identified individuals. Expressing concern as to the width of the orders granted against the unknown defendants, the sixth and seventh defendants appealed.

On the appeal—

Held, allowing the appeal in part, that, while there was no conceptual or legal prohibition on suing persons unknown who were not currently in existence but would come into existence when they committed the prohibited tort, the court should be inherently cautious about granting injunctions against unknown persons since the reach of such an injunction was necessarily difficult to assess in advance; that, although it was not easy to formulate the broad principles on which an injunction against unknown persons could properly be granted, the following requirements might be thought necessary before such an order could be made, namely (i) there had to have been shown a sufficiently real and imminent risk of a tort being committed to justify a quia timet injunction, (ii) it had to have been impossible to name the persons who were likely to commit the tort unless restrained, (iii) it had to be possible to give effective notice of the injunction and for the method of such notice to be set out in the order, (iv) the terms of the injunction had to correspond to the threatened tort and not be so wide that they prohibited lawful conduct, (v) the terms of the injunction had to be sufficiently clear and precise as to enable persons potentially affected to know what they had not to do, and (vi) the injunction ought to have clear geographical and temporal limits; that, on the facts, the first three requirements presented no difficulty, but the remaining requirements were more problematic where the injunctions made against the third and fifth defendants had been drafted too widely and lacked the necessary degree of certainty; and that, accordingly, those injunctions would be discharged, and the claims against the third and fifth defendants dismissed; but that the injunctions against the first and second defendants would be maintained pending remission to the judge to reconsider (i) whether interim relief ought to be granted in the light of section 12(3) of the Human Rights Act 1998, and (ii) if the injunctions were to be continued against the first and second defendants, what would be the appropriate temporal limit (post, paras 29–34, 35, 39–42, 43, 47–51, 52, 53).

Bloomsbury Publishing Group plc v News Group Newspapers Ltd [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633; *Hampshire Waste Services Ltd v Intending Trespassers upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9 and *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] UKSC 6; [2019] 1 WLR 1471, SC(E) considered.

Decision of Morgan J [2017] EWHC 2945 (Ch) reversed in part.

APPEAL from Morgan J

The claimants, Ineos Upstream Ltd, Ineos 120 Exploration Ltd, Ineos Properties Ltd, Ineos Industries Ltd, John Barrie Palfreyman, Alan John Skepper, Janette Mary Skepper, Steven John Skepper, John Ambrose Hollingworth and Linda Katharina Hollingworth, were a group of companies and individuals connected with the business of shale and gas exploration by the hydraulic fracturing of rock formations, a procedure colloquially known as "fracking". Concerned that anticipated protests against the fracking operations might cross the boundary between legitimate and illegitimate activity, the claimants sought, inter alia, injunctions to restrain potentially unlawful conduct against the first to fifth defendants, each described as a group of persons unknown engaging in various defined activities, the sixth defendant, Joseph Boyd, and the seventh defendant, Joseph Corré. By a decision dated 23 November 2017 Morgan J, sitting in the Chancery Division (Property, Trusts and Probate), granted injunctions against the first to third and the fifth defendants so identified [2017] EWHC 2945 (Ch). No order was made against the sixth and seventh defendants.

By an appellant's notice and with the permission of the Court of Appeal the sixth and seventh defendants appealed on the grounds: (1) whether the judge had been right to grant injunctions against persons unknown; (2) whether the judge had failed adequately or at all to apply section 12(3) of the Human Rights Act 1998, which required a judge making an interim order in a case, in which article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was engaged, to assess whether the claimants would be likely to obtain the relief sought at trial; and (3) whether the judge had been right to grant an injunction restraining conspiracy to harm the claimants by the commission of unlawful acts against contractors engaged by the claimants.

Friends of the Earth were given permission to intervene by written submissions only.

The facts are stated in the judgment of Longmore LJ, post, para 1–11.

Heather Williams QC, Blinne Ní Ghrálaigh and *Jennifer Robinson* (instructed by *Leigh Day*) for the sixth defendant.

Stephanie Harrison QC and *Stephen Simblet* (instructed by *Bhatt Murphy Solicitors*) for the seventh defendant.

Alan Maclean QC and *Jason Pobjoy* (instructed by *Fieldfisher llp*) for the claimants.

Henry Blaxland QC and *Stephen Clark* (instructed by *Bhatt Murphy*) for the intervener, by written submissions only.

The court took time for consideration.

3 April 2019. The following judgments were handed down.

LONGMORE LJ

Introduction

1 This is an appeal from Morgan J [2017] EWHC 2945 (Ch) who has granted injunctions to Ineos Upstream Ltd and various subsidiaries of the Ineos Group ("the Ineos companies") as well as certain individuals. The injunctions were granted against persons unknown who are thought to be likely to become protesters at sites selected by those companies for the purpose of exploration for shale gas by hydraulic fracturing of rock formations, a procedure more commonly known as "fracking".

2 Fracking, which is lawful in England but not in every country in the world, is a controversial process partly because it is said to give rise to (inter alia) seismic activity, water contamination and methane clouds, and to be liable to injure people and buildings, but also because shale gas, which is a fossil fuel considered by many to contribute to global warming and in due course unsustainable climate change. For these reasons (and no doubt others) people want to protest against any fracking activity both where it may be taking place and elsewhere. In the view of the Ineos companies these protests will often cross the boundary between legitimate and illegitimate activity as indeed they have in the past when other companies have sought to operate planning permissions which they have obtained for exploration for shale gas by fracking. The Ineos companies have therefore sought injunctions to restrain potentially unlawful acts of protest before they have occurred.

3 The judge's order extends to 8 relevant sites described in detail in paras 4–7 of his judgment [2017] EWHC 2945 (Ch); sites 1–4 and 7 consist of agricultural or other land where it is intended that fracking will take place; sites 5, 6 and 8 are office buildings from which the Ineos companies conduct their business.

The claimants

4 There are ten claimants. The first claimant is a subsidiary company of the Ineos corporate group, a privately owned global manufacturer of chemicals, speciality chemicals and oil products. The first claimant's commercial activities include shale gas exploration in the United Kingdom. It is the lessee of four of the sites which are the subject of the claimants' application (sites 1, 2, 3 and 7). The lessors in relation to these four sites include the fifth to tenth claimants. The second to fourth claimants are companies within the Ineos corporate group. They are the proprietors of sites 4, 5 and 6 respectively. The fourth claimant is the lessee of site 8 and it has applied to the Land Registry to be registered as the leasehold owner of that site. I will refer to the first to fourth claimants as "Ineos" without distinguishing between them. The fifth to tenth claimants are all individuals. The fifth claimant is the freeholder of site 1. The sixth to eighth claimants are the freeholders of site 2. The ninth to tenth claimants are the freeholders of site 7.

The defendants

5 The first five defendants are described as groups of "Persons unknown" with, in each case, further wording designed to provide a definition of the persons falling within the group. The first defendant is described as: "Persons unknown entering or remaining without the consent of the claimant(s) on land and buildings shown shaded red on the plans annexed to the amended claim form."

6 The second defendant is described as:

> "Persons unknown interfering with the first and second claimants' rights to pass and repass with or without vehicles, materials and equipment over private access roads on land shown shaded orange on the plans annexed to the amended claim form without the consent of the claimant(s)."

7 The third defendant is described as:

> "Persons unknown interfering with the right of way enjoyed by the claimant(s) each of its and their agents, servants, contractors, sub-contractors, group companies, licensees, employees, partners, consultants, family members and friends over land shown shaded purple on the plans annexed to the amended claim form."

8 The fourth defendant is described as: "Persons unknown pursuing conduct amounting to harassment". The judge declined to make any order against this group which, accordingly, falls out of the picture.

9 The fifth defendant is described as: "Persons unknown combining together to commit the unlawful acts as specified in para 10 of the [relevant] order with the intention set out in para 10 of the [relevant] order."

10 The sixth defendant is Mr Boyd. He appeared through counsel at a hearing before the judge on 12 September 2017 and was joined as a defendant. The seventh defendant is Mr Corré. He also appeared through counsel at the hearing on 12 September 2017 and was joined as a defendant. The judge had originally granted ex parte relief on 28 July 2017 against the first five defendants until a return date fixed for 12 September 2017. On that date a new return date with a three-day estimate was then fixed for 31 October 2017 to enable Mr Boyd and Mr Corré to file evidence and instruct counsel to make submissions on their behalf.

11 As is to some extent evident from the descriptions of the respective defendants, the potentially unlawful activities which Ineos wishes to restrain are: (1) trespass to land; (2) private nuisance; (3) public nuisance; and (4) conspiracy to injure by unlawful means. This last group is included because protesters have in the past targeted companies which form part of the supply chain to the operators who carry on shale gas exploration. The protesters' aim has been to cause those companies to withdraw from supplying the operators with equipment or other items for the supply of which the operators have entered into contracts with such companies.

The judgment

12 The judge (to whose command of the voluminous documentation before him I would pay tribute) absorbed a considerable body of evidence contained in 28 lever arch files including at least 16 witness statements and their accompanying exhibits. He said of this evidence, at para 18 [2017] EWHC 2945 (Ch), which related largely to the experiences of fracking companies other than Ineos, which is a newcomer to the field:

> "Much of the factual material in the evidence served by the claimants was not contradicted by the defendants, although the defendants did join issue with certain of the comments made or the conclusions drawn by the claimants and some of the detail of the factual material."

In the light of this comment and the limited grounds of appeal for which permission has been granted, we have been spared much of this voluminous documentation.

13 The judge then commented, at para 21:

> "The evidence shows clearly that the protestors object to the whole industry of shale gas exploration and they do not distinguish between some operators and other operators. This indicates to me that what has happened to other operators in the past will happen to Ineos at some point, in the absence of injunctions. Further, the evidence makes it clear that, before the commencement of these proceedings, the protestors were aware of Ineos as an active, or at least an intending, operator in the industry. There is absolutely no reason to think that the protestors will exempt Ineos from their protest activities. Before the commencement of these proceedings, the protestors were also aware of some or all of the sites which are the subject of these proceedings. In addition, the existence of these proceedings has drawn attention to the eight Sites described earlier."

14 The judge then proceeded to consider the evidence, expressed himself satisfied that there was a real and imminent threat of unlawful activity if he did not make an interim order pending trial and that a similar order would be made at that trial. He accordingly made the orders requested by the claimants apart from that relating to harassment. The orders were in summary that: (1) the first defendants were restrained from trespassing at any of the sites; (2) the second defendants were restrained from interfering with access to sites 3 and 4, which were accessed by identified private access roads; (3) the third defendants were restrained from interfering with access to public rights of way by road, path or bridleway to sites 1–4 and 7–8, such interference being defined as (a) blocking the highway; (b) slow walking; (c) climbing onto vehicles; (d) unreasonably preventing access to or egress from the Sites; and (e) unreasonably obstructing the highway; (4) the fifth defendants were restrained from combining together to (a) commit an offence under section 241(1) of the Trade Union and Labour Relations (Consultation) Act 1992; (b) commit an offence of criminal damage under section 1 of the Criminal Damage Act 1971 or of theft under section 1 of the Theft Act 1968; (c) obstruct free passage along a public highway, including "slow walking", blocking the highway, climbing onto vehicles and otherwise obstructing the highway with the intention of causing inconvenience and delay; and (d) cause anything to be done on a road or interfere with any motor vehicle or other traffic equipment "in such circumstances that it would or could be obvious to a reasonable person that to do so would or could be dangerous" all with the intention of damaging the claimants.

15 These separate orders related, therefore, to causes of action in trespass, private nuisance, public nuisance and causing loss by unlawful means.

16 It is a curiosity of the case that the judge made no order against either Mr Boyd or Mr Corré but they have each sought and obtained permission to appeal against the orders made in respect of the persons unknown and they have each instructed separate solicitors, junior counsel and leading counsel to challenge the orders. They profess to be concerned about the width of the orders and seek to be heard on behalf of the unknown persons who are the subject matters of the judge's order. Friends of the Earth are similarly concerned and have been permitted to intervene by way of written submissions. Any concern about the locus standi of Mr Boyd and Mr Corré to make submissions to the court has been dissipated by the assistance to the court which Ms Heather Williams QC and Ms Stephanie Harrison QC have been able to provide.

This appeal

17 Permission to appeal has been granted on three grounds:

(1) whether the judge was correct to grant injunctions against persons unknown;

(2) whether the judge failed adequately or at all to apply section 12(3) of the Human Rights Act 1998 ("HRA") which requires a judge making an interim order in a case, in which article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") is engaged, to assess whether the claimants would be likely to obtain the relief sought at trial; and

(3) whether the judge was right to grant an injunction restraining conspiracy to harm the claimants by the commission of unlawful acts against contractors engaged by the claimants.

Persons unknown: the law

18 Under the Rules of the Supreme Court ("RSC"), a writ had to name a defendant: see *Friern Barnet Urban District Council v Adams* [1927] 2 Ch 25. Accordingly, Stamp J held in *In re Wykeham Terrace, Brighton, Sussex, Ex p Territorial Auxiliary and Volunteer Reserve Association for the South East* [1971] Ch 204 that no proceedings could take place for recovery of possession of land occupied by squatters unless they were named as defendants. RSC Ord 113 was then introduced to ensure that such relief could be granted: see *McPhail v Persons, Names Unknown* [1973] Ch 447, 458 per Lord Denning MR. There are also statutory provisions enabling local authorities to take enforcement proceedings against persons such as squatters or travellers contained in section 187B of the Town and Country Planning Act 1990 ("the 1990 Act").

19 Since the advent of the Civil Procedure Rules, there has been no requirement to name a defendant in a claim form and orders have been made against "Persons Unknown" in appropriate cases. The first such case seems to have been *Bloomsbury Publishing Group plc v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633 in which unknown persons had illicitly obtained copies of the yet to be published book "Harry Potter and the Order of the Phoenix" and were trying to sell them (or parts of them) to various newspapers. Sir Andrew Morritt V-C made an order against the person or persons who had offered the publishers of the Sun, the Daily Mail and the Daily Mirror copies of the book or any part thereof and the person or persons who had physical possession of a copy of the book. The theft and touting of the copies had, of course, already happened and the injunction was therefore aimed at persons who had already obtained copies of the book illicitly.

20 Sir Andrew Morritt V-C followed his own decision in *Hampshire Waste Services Ltd v Intending Trespassers Upon Chineham Incinerator Site* [2003] EWHC 1738 (Ch); [2004] Env LR 9. In that case, similarly to this, there had been in the past a number of incidents of environmental protesters trespassing on waste incineration sites. There was to be a "Global Day of Action Against Incinerators" on 14 July 2003 and the claimants applied for an injunction restraining persons from entering or remaining at named waste incineration sites without the claimant's consent. Sir Andrew observed that it would be wrong for the defendants' description to include a legal conclusion such as was implicit in the use of a description with the word "trespass" and that it was likewise undesirable to use a description with the word "intending" since that depended on the subjective intention of the individual concerned which would not be known to the claimants and was susceptible of change. He therefore made an order against persons entering or remaining on the sites without the consent of the claimants in connection with the Global Day of Action.

21 Both these authorities were referred to without disapproval in *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11; [2009] 1 WLR 2780, para 2.

22 In the present case, the judge held, at para 121, that since *Bloomsbury* there had been many cases where injunctions had been granted against persons unknown and many of those injunctions had been granted against protesters. For understandable reasons, those cases (unidentified) do not appear to have been taken to an appellate court. Ms Harrison on behalf of Mr Corré submitted that the procedure sanctioned by Sir Andrew Morritt V-C without adverse argument was contrary to principle unless expressly permitted by statute, as by the 1990 Act (section 187B, as inserted by section 3 of the Planning and Compensation Act 1991 during the subsistence of the RSC which would otherwise have prohibited it) or by the Civil Procedure Rules (eg CPR r 19.6 dealing with representative actions or CPR r 55.3(4), the successor to the RSC Ord 113). The principles on which she relied for this purpose were that a court cannot bind a person who is not a party to the action in which such an order is made and that it was wrong that someone, who had to commit the tort (and thus be liable to proceedings for contempt) before he became a party to the action, should have no opportunity to submit the order should not have been made before he was in contempt of it.

23 She pointed out that when the statutory powers of the 1990 Act were invoked that was precisely the position and she submitted that that could only be explained by the existence of the statute. This was most clearly apparent from the South Cambridgeshire litigation in which the Court of Appeal in September 2004 granted an injunction against persons unknown restraining them from (inter alia) causing or permitting the deposit of hardcore or other materials at Smithy Fen, Cottenham or causing or permitting the entry of caravans or mobile accommodation on that land for residential or other non-agricultural purposes, see *South Cambridgeshire District Council v Persons Unknown* [2004] EWCA Civ 1280; [2004] 4 P LR 88. Brooke LJ cited both *Bloomsbury* and

Hampshire Waste as illustrations of the way in which the power to grant relief against persons unknown had been used under the CPR.

24 On 20 April 2005 Ms Gammell stationed her caravan on the site; the injunction was served on her and its effect was explained to her on 21 April 2005; she did not leave and the council applied to commit her for contempt. Judge Plumstead on 11 July 2005 joined her as a defendant to the action and held that she was in contempt, refusing to consider Ms Gammell's rights under article 8 of the ECHR at that stage and adjourned sentence pending an appeal. On 31 October 2005 the Court of Appeal dismissed her appeal and upheld the finding of contempt, holding that the authority of *South Buckinghamshire District Council v Porter* [2003] UKHL 26; [2003] 2 AC 558, which required the court to consider the personal circumstances of the defendant under article 8 before an injunction was granted, only applied when the defendants were in occupation of a site and were named as defendants in the original proceedings: see *South Cambridgeshire District Council v Gammell* [2005] EWCA Civ 1429; [2006] 1 WLR 658. Sir Anthony Clarke MR (with whom Rix and Moore-Bick LJJ agreed) held, at para 32, that Ms Gammell became a party to the proceedings when she did an act which brought her within the definition of the defendant in the particular case and, at para 33, that, by the time of the committal proceedings she was a defendant, was in breach of the injunction and, given her state of knowledge, was in contempt of court. He then summarised the legal position:

> "(1) The principles in the *South Buckinghamshire* case set out above apply when the court is considering whether to grant an injunction against named defendants. (2) They do not apply in full when a court is considering whether or not to grant an injunction against persons unknown because the relevant personal information would, ex hypothesi, not be available. However this fact makes it important for courts only to grant such injunctions in cases where it is not possible for the applicant to identify the persons concerned or likely to be concerned. (3) The correct course for a person who learns that he is enjoined and who wishes to take further action, which is or would be in breach of the injunction, and thus in contempt of court, is not to take such action but to apply to the court for an order varying or setting aside the order. On such an application the court should apply the principles in the *South Buckinghamshire* case. (4) The correct course for a person who appreciates that he is infringing the injunction when he learns of it is to apply to the court forthwith for an order varying or setting aside the injunction. On such an application the court should again apply the principles in the *South Buckinghamshire* case. (5) A person who takes action in breach of the injunction in the knowledge that he is in breach may apply to the court to vary the injunction for the future. He should acknowledge that he is in breach and explain why he took the action knowing of the injunction. The court will then take account of all the circumstances of the case, including the reasons for the injunction, the reasons for the breach and the applicant's personal circumstances, in deciding whether to vary the injunction for the future and in deciding what, if any, penalty the court should impose for a contempt committed when he took the action in breach of the injunction. In the first case the court will apply the principles in the *South Buckinghamshire* case and in the *Mid Bedfordshire District Council v Brown* [2004] EWCA Civ 1709; [2005] 1 WLR 1460. (6) In cases where the injunction was granted at a without notice hearing a defendant can apply to set aside the injunction as well as to vary it for the future. Where, however, a defendant has acted in breach of the injunction in knowledge of its existence before the setting aside, he remains in breach of the injunction for the past and in contempt of court even if the injunction is subsequently set aside or varied. (7) The principles in the *South Buckinghamshire* case are irrelevant to the question whether or not a person is in breach of an injunction and/or whether he is in contempt of court, because the sole question in such a case is whether he is in breach and/or whether he is in contempt of court."

25 Ms Harrison said that this was unacceptable unless sanctioned by statute or rules of court contained in the CPR, because the persons unknown had no opportunity, before the injunction was granted, to submit that no order should be made on the grounds of possible infringements of the right to freedom of expression and the right peaceably to assemble granted by articles 10 and 11 of the ECHR or, indeed, any other grounds.

26 Ms Harrison further relied on the recent case of *Cameron v Hussain* [2019] UKSC 6; [2019] 1 WLR 1471 in which the Supreme Court held that it was not permissible to sue an unknown driver of a car which had collided with the claimant's car for the purpose of then suing that

unknown driver's insurance company, pursuant to the provisions of the Road Traffic Act 1988 requiring the insurance company to satisfy a judgment against the driver once the driver's liability has been established in legal proceedings. Lord Sumption (with whom Lord Reed DPSC, Lord Carnwath, Lord Hodge and Lady Black JJSC agreed) began his judgment by saying that the question on the appeal was in what circumstances was it permissible to sue an unnamed defendant but added that it arose in a rather special context. He answered that question by concluding, at para 26, that a person, such as the driver of the Micra car in that case, "who is not just anonymous but cannot be identified with any particular person, cannot be sued under a pseudonym or description, unless the circumstances are such that the service of the claim form can be effected or properly dispensed with".

27 In the course of his judgment he said, at para 12, that the CPR neither expressly authorise nor expressly prohibit exceptions to the general rule that actions against unnamed parties are permissible only against trespassers; the critical question was what, as a matter of law, was the basis of the court's jurisdiction over parties and in what (if any) circumstances jurisdiction can be exercised on that basis against persons who cannot be named. He then said, at para 13, that it was necessary to distinguish two categories of cases to which different considerations applied: the first category being anonymous defendants who are identifiable but whose names are unknown; the second being anonymous defendants who cannot even be identified, such as most hit and run drivers.

> "The distinction is that in the first category the defendant is described in a way that makes it possible in principle to locate or communicate with him and to know without further inquiry whether he is the same as the person described in the claim form, whereas in the second category it is not."

Those in the second category could not therefore be sued because to do so would be contrary to the fundamental principle that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as would enable him to be heard: para 17.

28 Ms Harrison submitted that these categories were exclusive categories of unnamed or unknown defendants and that the defendants as described in the present case did not fall within the first category since they are not described in a way that makes it possible to locate or communicate with them, let alone to know whether they are the same as the persons described in the claim form, because until they committed the torts enjoined, they did not even exist. To the extent that they fell within the second category they cannot be sued as unknown or unnamed persons.

29 Despite the persuasive manner in which these arguments were advanced, I cannot accept them. In my judgment it is too absolutist to say that a claimant can never sue persons unknown unless they are identifiable at the time the claim form is issued. That was done in both the *Bloomsbury* and the *Hampshire Waste* cases and no one has hitherto suggested that they were wrongly decided. Ms Harrison shrank from submitting that *Bloomsbury* was wrongly decided since it so obviously met the justice of the case but she did submit that *Hampshire Waste* was wrongly decided. She submitted that there was a distinction between injunctions against persons who existed but could not be identified and injunctions against persons who did not exist and would only come into existence when they breached the injunction. But the supposedly absolute prohibition on suing unidentifiable persons is already being departed from. Lord Sumption's two categories apply to persons who do exist, some of whom are identifiable and some of whom are not. But he was not considering persons who do not exist at all and will only come into existence in the future. I do not consider that he was intending to say anything adverse about suing such persons. On the contrary, he referred (para 11) to one context of the invocation of the jurisdiction to sue unknown persons as being trespassers and other torts committed by protesters and demonstrators and observed that in some of those cases proceedings were allowed in support of an application for a quia timet injunction "where the defendant could be identified only as those persons who might in future commit the relevant acts". But he did not refer in terms to these cases again and they do not appear to fit into either of the categories he used for the purpose of deciding the *Cameron* case. He appeared rather to approve them provided that proper notice of the court order can be given and that the fundamental principle of justice on which he relied for the purpose of negating the ability to sue a "hit and run" driver (namely that a person cannot be made subject to the court's jurisdiction without having such notice as will enable him to be heard) was not infringed. That is because he said this, at para 15:

> "Where an interim injunction is granted and can be specifically enforced against some property or by notice to third parties who would necessarily be involved in any contempt, the process of enforcing it will sometimes be enough to bring the proceedings to the defendant's attention. In *Bloomsbury Publishing Group*, for example, the unnamed defendants would have had to identify themselves as the persons in physical possession of copies of the book if they had sought to do the prohibited act, namely disclose it to people (such as newspapers) who had been notified of the injunction. The Court of Appeal has held that where proceedings were brought against unnamed persons and interim relief was granted to restrain specified acts, a person became both a defendant and a person to whom the injunction was addressed by doing one of those acts: *South Cambridgeshire District Council v Gammell*, para 32. In the case of anonymous but identifiable defendants, these procedures for service are now well established, and there is no reason to doubt their juridical basis."

30 This amounts at least to an express approval of *Bloomsbury* and no express disapproval of *Hampshire Waste*. I would, therefore, hold that there is no conceptual or legal prohibition on suing persons unknown who are not currently in existence but will come into existence when they commit the prohibited tort.

31 That is by no means to say that the injunctions granted by Morgan J should be upheld without more ado. A court should be inherently cautious about granting injunctions against unknown persons since the reach of such an injunction is necessarily difficult to assess in advance.

32 It is not easy to formulate the broad principles on which an injunction against unknown persons can properly be granted. Ms Harrison's fall-back position was that they should only be granted when it was necessary to do so and that it was never necessary to do so if an individual could be found who could be sued. In the present case notice and service of the injunction was ordered to be given to the potentially interested parties listed in Schedule 21 of the order. This listed Key Organisations, Local Action Groups and Frack Free Organisations all of whom could have been, according to her, named as defendants, rendering it unnecessary to sue persons unknown. This strikes me as hopelessly unrealistic. The judge was satisfied that unknown persons were likely to commit the relevant torts and that there was a real and imminent risk of their doing so; it is most unlikely that there was a real and imminent risk of the Schedule 21 organisations doing so and I cannot believe that, if it is possible to sue one or more such entities, it is wrong to sue persons unknown.

33 Ms Williams for Mr Boyd, in addition to submitting that the judge had failed to apply properly or at all section 12(3) of the HRA, submitted that the injunction should not, in any event, have been granted against the fifth defendants (conspiring to cause damage to the claimants by unlawful means) because the term of the injunctions were neither framed to catch only those who were committing the tort nor clear and precise in their scope. There is, to my mind, considerable force in this submission and the principles behind that submission can usefully be built into the requirements necessary for the grant of the injunction against unknown persons, whether in the context of the common law or in the context of the ECHR.

34 I would tentatively frame those requirements in the following way: (1) there must be a sufficiently real and imminent risk of a tort being committed to justify quia timet relief; (2) it is impossible to name the persons who are likely to commit the tort unless restrained; (3) it is possible to give effective notice of the injunction and for the method of such notice to be set out in the order; (4) the terms of the injunction must correspond to the threatened tort and not be so wide that they prohibit lawful conduct; (5) the terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and (6) the injunction should have clear geographical and temporal limits.

Application of the law to this case

35 In the present case there is no difficulty about the first three requirements. The judge held that there was a real and imminent risk of the commission of the relevant torts and permission has not been granted to challenge that on appeal. He also found that there were persons likely to commit the torts who could not be named and was right to do so; there are clear provisions in the order about service of the injunctions and there is no reason to suppose that these provisions will not constitute effective notice of the injunction. The remaining requirements are more problematic.

Width and clarity of the injunctions granted by the judge

36 The right to freedom of peaceful assembly is guaranteed by both the common law and article 11 of the ECHR. It is against that background that the injunctions have to be assessed. But this right, important as it is, does not include any right to trespass on private property. Professor Dicey in his *Introduction to the Study of the Law of the Constitution*, 10th ed (1959) devoted an entire chapter of his seminal work to what he called the right of public meeting saying this at p 271:

> "No better instance can indeed be found of the way in which in England the constitution is built up upon individual rights than our rules as to public assemblies. The right of assembling is nothing more than a result of the view taken by the courts as to individual liberty of person and individual liberty of speech. There is no special law allowing A, B and C to meet together either in the open air or elsewhere for a lawful purpose, but the right of A to go where he pleases so that he does not commit a trespass, and to say what he likes to B so that his talk is not libellous or seditious, the right of B to do the like, and the existence of the same rights of C, D, E, and F, and so on ad infinitum, lead to the consequence that A, B, C, D, and a thousand or ten thousand other persons, may (as a general rule) meet together in any place where otherwise they each have a right to be for a lawful purpose and in a lawful manner."

37 This neatly states the common law as it was in 195: see Oxford Edition (2013), p 154, I do not think it has changed since. There is no difficulty about defining the tort of trespass and an injunction not to trespass can be framed in clear and precise terms, as indeed Morgan J has done. I would, therefore, uphold the injunction against trespass given against the first defendants subject to one possible drafting point and always subject to the point about section 12(3) of the HRA. I would likewise uphold the injunction against the second defendants described as interfering with private rights of way shaded orange on the plans of the relevant sites. It is of course the law that interference with a private right of way has to be substantial before it is actionable and the judge has built that qualification into his orders. He was not asked to include any definition of the word substantial and said, at para 149, that it was not appropriate to do so since the concept of substantial interference was simple enough and well established. I agree.

38 The one possible drafting point that arises is that it was said by Ms Harrison that, as drafted, the injunctions would catch an innocent dog-walker exercising a public right of way over the claimants' land whose dog escaped onto the land and had to be recovered by its owner trespassing on that land. It was accepted that this was not a particularly likely scenario in the context of a fracking protest but it was said that the injunction might well have a chilling effect so as to prevent dog-walkers exercising their rights in the first place. I regard this as fanciful. I can see that an ordinary dog-walker exercising a public right of way might be chilled by the existence of an anti-fracking protest and thus be deterred from exercising his normal rights but, if he is not deterred by that, he is not going to be deterred instead by thoughts of possible proceedings for contempt for an inadvertent trespass while he is recovering his wandering animal. If this were really considered an important point, it could, no doubt, be cured by adding some such words as "in connection with the activities of the claimants" to the order but like the judge (in para 146) I do not consider it necessary to deal with this minor problem. Overall, this case raises much more important points than wandering dogs.

39 Those important points about the width and the clarity of the injunctions are critical when it comes to considering the injunctions relating to public rights of way and the supply chain in connection with conspiracy to cause damage by unlawful means. They are perhaps most clearly seen in relation to the supply chain. The judge has made an immensely detailed order (in no doubt a highly laudable attempt to ensure that the terms of the injunction correspond to the threatened tort) but has produced an order that is, in my view, both too wide and insufficiently clear. In short, he has attempted to do the impossible. He has, for example, restrained the fifth defendants from combining together to commit the act or offence of obstructing free passage along a public highway (or to access to or from a public highway) by ((c)(ii)) slow walking in front of the vehicles with the object of slowing them down and with the intention of causing inconvenience and delay or ((c)(iv)) otherwise unreasonably and/or without lawful authority or excuse obstructing the highway with the intention of causing inconvenience and delay, all with the intention of damaging the claimants.

40 As Ms Williams pointed out in her submissions, supported in this respect by Friends of the Earth, there are several problems with a quia timet order in this form. First, it is of the essence of the tort that it must cause damage. While that cannot of itself be an objection to the grant of quia timet relief, the requirement that it cause damage can only be incorporated into the

order by reference to the defendants' intention which, as Sir Andrew Morritt said in *Hampshire Waste*, depends on the subjective intention of the individual which is not necessarily known to the outside world (and in particular to the claimants) and is susceptible of change and, for that reason, should not be incorporated into the order. Secondly, the concept of slow walking in front of vehicles or, more generally, obstructing the highway may not result in any damage to the claimants at all. Thirdly, slow walking is not itself defined and is too wide: how slow is slow? Any speed slower than a normal walking speed of two miles per hour? One does not know. Fourthly, the concept of "unreasonably" obstructing the highway is not susceptible of advance definition. It is, of course, the law that for an obstruction of the highway to be unlawful it must be an unreasonable obstruction (see *Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240), but that is a question of fact and degree that can only be assessed in an actual situation and not in advance. A person faced with such an injunction may well be chilled into not obstructing the highway at all. Fifthly, it is wrong to build the concept of "without lawful authority or excuse" into an injunction since an ordinary person exercising legitimate rights of protest is most unlikely to have any clear idea of what would constitute lawful authority or excuse. If he is not clear about what he can and cannot do, that may well have a chilling effect also.

41 Many of the same objections apply to the injunction granted in relation to the exclusion zones shaded purple on the plans annexed to the order, which comprise public access ways to sites 1–4, 7 and 8 and public footpaths or bridleways over sites 2 and 7. The defendants are restrained from: (a) blocking the highway when done with a view to slowing down or stopping traffic; (b) slow walking; and (c) unreasonably; and/or without lawful authority or excuse preventing the claimants from access to or egress from any of the sites. These orders are likewise too wide and too uncertain in ambit to be properly the subject of quia timet relief.

42 Mr Alan Maclean QC for the claimants submitted that the court should grant advance relief of this kind in appropriate cases in order to save time and much energy later devoted to legal proceedings after the events have happened. But it is only when events have happened which can in retrospect be seen to have been illegal that, in my view, wide ranging injunctions of the kind granted against the third and fifth defendants should be granted. The citizen's right of protest is not to be diminished by advance fear of committal except in the clearest of cases, of which trespass is perhaps the best example.

Geographical and temporal limits

43 The injunctions granted by the judge against the first and second defendants have acceptable geographical limits but there is no temporal limit. That is unsatisfactory.

Section 12(3) of the Human Rights Act

44 Section 12 of the HRA 1998 provides:

> "(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> "(2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied— (a) that the applicant has taken all practicable steps to notify the respondent; or (b) that there are compelling reasons why the respondent should not be notified.
>
> "(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

45 Ms Williams submitted that the judge had failed to apply section 12(3) because the claimants had failed to establish that they would be likely to establish at trial that publication should not be allowed. She relied in particular on the manner in which the judge had expressed himself [2017] EWHC 2945 (Ch), para 98:

> "I have considered above the test to be applied for the grant of an interim injunction ('more likely than not') and the test for a quia timet injunction at trial ('imminent and real risk of harm'). I will now address the question as to what a court would be likely to do if this were an application for a final injunction and the court accepted the evidence put forward by the claimants."

She submitted that it was not correct to ask what a trial judge would be likely to do "if the court accepted the evidence put forward by the claimants". The whole point of the subsection is that it was the duty of the court to test the claimants' evidence, not to assume that it would be accepted.

46 Ms Williams then suggested many things which the judge failed (according to her) to take into account and submitted that it was not enough for Mr Maclean to point to the earlier passage (para 18) in the judgment where the judge had said that the factual evidence of the claimants was not contradicted by the defendants because he had added: "although the defendants did join issue with certain of the comments made or the conclusions drawn by the claimants and some of the detail of the factual material." There was, she said, no assessment of Mr Boyd's or Mr Corré's challenges to the inferences which the claimants invited the judge to draw or to the conclusions drawn by them, let alone analysis of the (admittedly small) amount of factual contradiction.

47 This submission has to be assessed on the basis (if my Lords agree) that the injunctions relating to public nuisance and the supply chain will be discharged. The only injunctions left are those restraining trespass and interfering with the claimants' rights of way and it will be rather easier therefore for the claimants to establish that at trial publication of views by trespassers on the claimants' property should not be allowed.

48 Nevertheless, I consider that there is force in Ms Williams's submission. It is not just the trespass that has to be shown to be likely to be established; by way of example, it is also the nature of the threat. For the purposes of interim relief, the judge has held that the threat of trespass is imminent and real but he has given little or no consideration (at any rate expressly) to the question whether that is likely to be established at trial. This is particularly striking in relation to site 7 where it is said that planning permission for fracking has twice been refused and sites 3 and 4 where planning permission has not yet been sought.

49 A number of other matters are identified in para 8 of Ms Williams's skeleton argument. We did not permit Ms Williams to advance any argument on the facts which contravened the judge's findings on the matters relevant to the grant of interim relief, apart from section 12(3) HRA considerations, and those findings will stand. Nevertheless, some of those matters may in addition be relevant to the likelihood of the trial court granting final relief. It is accepted that this court is in no position to apply the section 12(3) HRA test and that, if Ms Williams's submissions of principle are accepted, the matter will have to be remitted to the judge for him to re-consider, in the light of our judgments, whether the court at trial is likely to establish that publication should not be allowed.

Disposal

50 I would therefore discharge the injunctions made against the third and fifth defendants and dismiss the claims against those defendants. I would maintain the injunctions against the first and second defendants pending remission to the judge to reconsider: (1) whether interim relief should be granted in the light of section 12(3) HRA; and (2) if the injunctions are to be continued against the first and second defendants what temporal limit is appropriate.

Conclusion

51 To the extent indicated above, I would allow this appeal.

DAVID RICHARDS LJ

52 I agree.

LEGGATT LJ

53 I also agree.

Appeal allowed in part.

MATTHEW BROTHERTON, Barrister

A

Employment Appeal Tribunal

Gray *v* Mulberry Co (Design) Ltd

UKEAT/40/17

2018 March 2;
B July 18

Choudhury J

Discrimination — Religion or belief — Philosophical belief — Employee holding belief as to copyright on own designs — Employee dismissed for refusing to sign copyright agreement — Whether "philosophical belief" — Complaint of indirect discrimination — Whether requirement to sign agreement putting others sharing belief at a disadvantage — Equality Act 2010 (c 15), ss 10, 19

C

The claimant, a freelance writer and film-maker, was employed in a non-creative role by the respondent fashion design company. She was required to sign a contract containing a confidentiality clause and an agreement disclosing all copyright on her designs during her service to the company. The claimant refused to sign the agreement believing that it could extend to the copyright on her own creative output which she was anxious to protect and, although the company amended the agreement to clarify that it had no intention of obtaining the copyright to the
D claimant's personal work, she still refused to sign it and was dismissed. She presented a complaint to an employment tribunal of direct and indirect discrimination on the grounds of her belief, which was stated to be "the statutory human or moral right to own the copyright and moral rights of her own creative works and output", which she claimed amounted to a philosophical belief protected under section 10 of the Equality Act 2010[1]. The tribunal found that, while the claimant might have held those views privately, at no stage during her employment had she made the company aware that
E she held them or that they were the reason for her refusal to sign the agreement. The tribunal accepted that the belief was genuinely held but, when applying the test for determining whether her views came within the category of a philosophical belief, namely whether they had sufficient cogency, seriousness, cohesion and importance to be worthy of respect in a democratic society, it concluded that the claimant did not hold her belief as any sort of philosophical touchstone to her life so as to qualify for protection under the Act. The tribunal dismissed the complaint of direct
F discrimination on the ground that her dismissal was as a result of her refusal to sign the agreement and not because of her philosophical belief. It found that the provision, criterion or practice applied by the company, namely the requirement to sign the agreement or be dismissed, had not been shown to have put other persons sharing her belief at a disadvantage and was not indirectly discriminatory under section 19(2) of the 2010 Act. It also upheld the company's defence of justification, holding that a requirement to sign the agreement was, in any event, a proportionate means of
G achieving the legitimate aim of protecting the company's intellectual property.

On an appeal by the claimant—

Held, dismissing the appeal, (1) that to qualify as a philosophical belief under section 10(2) of the Equality Act 2010 a belief had to attain the same threshold level of cogency, seriousness, cohesion and importance as a religious belief; that the proper approach to whether the required threshold level had been attained was to ensure that the bar was not set too high, since it was not for the court to judge the validity of
H such beliefs; that, similarly, in focusing on the manifestation of a philosophical belief, the same threshold requirements applied and whether or not doing, or not doing, a particular act, amounted to a direct expression of the belief concerned, and was

[1] Equality Act 2010, s 10: see post, para 16.
S 19: see post, para 49.

intimately linked to it, was a question to be determined on the facts of each case; and that, although the claimant's refusal to sign the agreement might have been dictated by her stated belief, she had not made that known to the company and, accordingly, the tribunal was right to conclude that that belief was not sufficiently cohesive to form any cogent philosophical belief so as to achieve protection under the Act (post, paras 25, 27, 28, 33, 41, 46, 48).

Grainger plc v Nicholson [2010] ICR 360, EAT considered.

(2) That since, on a claim of indirect discrimination under section 19 of the Equality Act 2010, a claimant had to prove evidence of group disadvantage, the sole adherent of a philosophical belief could not rely on that belief in a claim of indirect discrimination; that, therefore, having regard to the employment tribunal's finding that the provision, criterion or practice applied by the company in requiring employees to sign the agreement had not been shown to have caused any group disadvantage, the claim of indirect discrimination failed; and that, in any event, requiring the claimant to sign the agreement or be dismissed was a proportionate means of achieving the legitimate aim of protecting the company's intellectual property and, accordingly, its defence of justification under section 19(2)(d) would have succeeded (post, paras 62, 63, 71).

The following cases are referred to in the judgment:

Arrowsmith v United Kingdom CE:ECHR:1977:0516DEC000705075; 3 EHRR 218
Essop v Home Office (UK Border Agency) [2017] UKSC 27; [2017] ICR 640; [2017] 1 WLR 1343; [2017] 3 All ER 551, SC(E)
Eweida v British Airways plc [2009] ICR 303, EAT; [2010] EWCA Civ 80; [2010] ICR 890, CA
Eweida v United Kingdom CE:ECHR:2013:0115JUD004842010; 57 EHRR 8, GC
Grainger plc v Nicholson [2010] ICR 360; [2010] 2 All ER 253, EAT
Harron v Chief Constable of Dorset Police [2016] IRLR 481, EAT
Henderson v General Municipal and Boilermakers Union [2015] IRLR 451, EAT
Maistry v British Broadcasting Corpn [2014] EWCA Civ 1116, CA
Mba v Merton London Borough Council [2013] EWCA Civ 1562; [2014] ICR 357; [2014] 1 WLR 1501; [2014] 1 All ER 1235, CA
R (Williamson) v Secretary of State for Education and Employment [2005] UKHL 15; [2005] 2 AC 246; [2005] 2 WLR 590; [2005] 2 All ER 1, HL(E)

The following additional cases were cited in argument:

Chief Constable of West Yorkshire Police v Homer [2012] UKSC 15; [2012] ICR 704; [2012] 3 All ER 1287, SC(E)
Paterson v Comr of Police of the Metropolis [2007] ICR 1522, EAT
Pendleton v Derbyshire County Council [2016] IRLR 580, EAT

APPEAL from an employment tribunal sitting at Bristol

By a judgment sent to the parties on 26 October 2016 with reasons sent on 22 November, an employment tribunal dismissed complaints of discrimination on the grounds of philosophical belief by the claimant, Ms A Gray, against the company, Mulberry Co (Design) Ltd. The claimant appealed on the ground that the tribunal was wrong to find that the claimant's beliefs were not protected under section 10 of the Equality Act 2010; the tribunal erred in its assessment of the particular disadvantage test for indirect discrimination; and the tribunal was wrong to hold that requiring the claimant to sign the copyright agreement was a proportionate means of achieving the legitimate aim of protecting its intellectual property.

The facts are stated in the judgment, post, paras 1–15.

A *Christopher Milsom* (instructed directly) for the claimant.
Amanda Beattie, Croner Group Ltd, Hinckley, for the respondent.

The court took time for consideration.

18 July 2018. **CHOUDHURY J** handed down the following judgment.

B *Introduction*

1 The appellant, to whom I shall refer as the claimant, was dismissed by the respondent company for failing to sign a copyright agreement as a condition of continued employment. The effect of the agreement would be to confer certain rights on the company in respect of works created by the claimant. The claimant refused to sign the agreement because of her C professed belief in "the statutory human or moral right to own the copyright and moral rights of her own creative works and output". The issue in this appeal is whether that belief amounts to a belief within the meaning of section 10(2) of the Equality Act 2010 and whether the claimant was the subject of indirect discrimination on the grounds of that belief.

D *Factual background*

2 The respondent is the well-known design company which produces luxury leather handbags and other fashion items. The claimant is a writer and film-maker. She commenced employment with the company as a market support assistant on 28 January 2015. In that role, the claimant was part of a team which had access to some of the company's designs ahead of their launch to market. Understandably, the company seeks to protect its E intellectual property rights and requires all of its employees to sign a contract of employment and the agreement. The contract contained a confidentiality clause and (at clause 13) a clause relating to "Inventions, improvements and patents".

3 Clause 13 of the contract was in the following terms:

F "You shall disclose to the company any discovery or invention or improvement to an existing invention, design or process.

"All improvements, designs or inventions, whether capable of registration or not, made by you during the course of your employment with the company, shall be the property of the company and you will sign all documents and do all necessary acts required to transfer title in such improvements or inventions to the company without any additional G compensation or payment, save for any expenses or disbursements incurred for the purposes of transferring title to the company. Nothing in this clause shall affect any rights conferred by the Patents Act 1977, the Copyright, Designs and Patents Act 1988 or any statutory modification or re-enactment thereof."

4 The agreement provided as follows:

H "2.1. You undertake that you shall promptly disclose to Mulberry Co all copyright works or designs originated, conceived, written or made by you alone or with others during the period of your service with Mulberry Co and shall hold them in trust for Mulberry Co until such rights shall be fully and absolutely vested in Mulberry Co.

"2.2. You hereby assign to Mulberry Co by way of future assignment of copyright, the copyright and other proprietary rights, if any, for the full term thereof throughout the world in respect of all copyright works and designs originated, conceived, written or made by you during the period of your service with Mulberry Co.

"2.3. You hereby unconditionally and irrevocably waive in favour of Mulberry Co and all moral rights conferred on you by Chapter IV of Part 1 of the Copyright, Designs and Patent Act 1988 for any work in which copyright or designs is vested in Mulberry Co whether by operation of this clause or otherwise.

"2.4. You agree and undertake that you will execute such deeds or documents and do all such things and acts as may be necessary or desirable to substantiate the rights of Mulberry Co in respect of the matters referred to in this clause.

"Each of the above terms is independent and separable from the remaining terms and enforceable accordingly. If any term shall be unenforceable for any reason but would be enforceable if part of the wording thereof were deleted, it shall apply with such deletions as may be necessary to make it enforceable."

5 The claimant signed the contract on 30 January 2015. However, she refused to sign the agreement. She told the respondent's human resources department that she had difficulty signing it because it interfered with her own work as a writer and film-maker. She said that she had read the clause very carefully because "it is extremely important to me to own all rights, including copyright, to my own writing, film-making and all creative output". She believed that the agreement could extend to her artistic activities away from work.

6 The respondent made it clear that it had no interest in obtaining the copyright to any of the claimant's personal work; its interest only extending to that which related to its business. The respondent responded to the claimant's concerns by amending the agreement to make it clearer that only work which related to the respondent's business would be covered. Clauses 2.1 and 2.2 were amended as follows (amendments are shown in italics):

"2.1. You undertake that you shall promptly disclose to Mulberry Co all copyright works or designs originated, conceived, written or made by you alone or with others during the period of your service with Mulberry Co *which relate to any business of Mulberry Co or any matter arising from your employment with Mulberry* and shall hold them in trust for Mulberry Co until such rights shall be fully and absolutely vested in Mulberry Co.

"2.2. You hereby assign to Mulberry Co by way of future assignment of copyright, the copyright and other proprietary rights, if any, for the full term thereof throughout the world in respect of all copyright works and designs originated, conceived, written or made by you during the period of your service with Mulberry Co *which relate to any business of Mulberry Co or any matter arising from your employment with Mulberry*."

7 This amendment did not satisfy the claimant. She considered that the additional words were "general and open to interpretation".

A 8 The discussions about the agreement continued over subsequent months but no resolution was reached. Matters came to a head on 16 September 2015 when a series of meetings took place between human resources and the claimant. As the claimant had refused to sign the amended version of the agreement, the amendment was withdrawn and the claimant was asked again to sign the original version. She made it clear that she B would not sign. After some consideration, the claimant was dismissed with notice. The claimant's dismissal was confirmed in writing on 22 September 2015. That letter, so far as relevant, stated that:

> "Following our discussions, I have decided to dismiss you with effect from 16 September 2015. The reason for your dismissal is refusing to comply with conditions of your employment with Mulberry through your C refusal to sign the copyright agreement and that we believe that by refusing to sign it you intend to copy Mulberry products which puts the company at risk."

9 The claimant had at no stage during her employment suggested that she had a philosophical belief in the terms set out in para 1 above or that that was the reason for her refusal to sign.

D 10 The claimant lodged proceedings for unfair dismissal on the grounds of asserting a statutory right, namely the right to own her own copyright and intellectual property. It was quickly established that that statutory right fell outside the scope of section 104 of the Employment Rights Act 1996. However, the claimant was given permission to amend her claim to one of discrimination (direct and indirect) on the grounds of belief.

E 11 That amended claim was heard by the Bristol employment tribunal, Employment Judge Livesey presiding, on 17 and 18 October 2016. A precise description of the claimant's stated belief was drawn up at the outset of the hearing, with the claimant's input and agreement. The belief was stated to be as follows: "The statutory human or moral right to own the copyright and moral rights of her own creative works and output."

F 12 The claimant gave evidence in support of her belief. The tribunal referred to this as follows:

> "*Claimant's stated philosophical beliefs*
>
> "4.8. The claimant had undertaken a Masters degree at UCLA in America which had included some teaching on certain aspects of the legal [principles] associated with film-making and intellectual property law. In G para 22 of her statement she said this: 'I became passionate about my belief in the right of an individual, not only to own, but to profit from and receive credit for their own work if they wished. In order to explore these ideas further, I wrote a feature film screen play in 2010 which explored issues of ownership of intellectual property."
>
> "4.9. In a document that she produced to the tribunal within her supplementary bundle . . . she further provided the following information H in relation to her beliefs . . . 'I hope that the court will see that there is in this case an issue of deeply held belief, of spiritual practice, of identity, of human rights, and of the attempted colonisation of those private areas of person's life and mind by a commercial enterprise with no actual interest in that individual's work, or devotions, or poems or hymns or life.'

"4.10. Whilst the claimant may have held those views privately, there was nothing in what she did or said to the respondent which made them aware that she held them. The claimant asserted that her actions, by not signing the copyright agreement, would have given that indication. We did not accept that that was necessarily so and the respondent's witnesses had certainly not gleaned that she had possessed such beliefs as a result of her refusal to sign the agreement.

"4.11. The claimant failed to mention, discuss or elucidate her beliefs to the respondent, either generally during her time working for Mulberry or, for example, during the private and candid conversations that she had with Ms Pitcher [the claimant's line manager] whilst commuting. Further, she did not refer to them specifically during her discussions and negotiations over signing of the copyright agreement."

13 The tribunal approached the issue of belief by reference to the questions set out in *Grainger plc v Nicholson* [2010] ICR 360 and para 2.59 of the Equality and Human Rights Commission's Code of Practice on Employment. Its conclusions are set out at para 5.7:

"5.7.1. Was the belief genuinely held.

"We accepted that the belief was genuinely held in the sense that the claimant honestly believed it. The respondent had attempted to challenge her veracity in that respect, but we broadly accepted her evidence on that issue;

"5.7.2. Was it a belief, as discussed in *McClintock v Department of Constitutional Affairs* [2008] IRLR 29, or an opinion or viewpoint based on the present state of information available.

"As in *Grainger*, particularly para 16, the claimant's opinion was a viewpoint held by her as a belief. It was not just an opinion based upon logic which, if the foundations changed, was capable of causing her to have altered her view;

"5.7.3. Did the belief concern a weighty and substantial aspect of human life and behaviour.

"That issue was not disputed by the respondent. The fact that copyright law existed to reflect the claimant's belief perhaps indicated that it was sufficiently weighty and serious to warrant protection at law;

"5.7.4. Had the belief attained a certain level of cogency, seriousness, cohesion and importance.

"There was, in our view, a considerable range of levels of cogency and seriousness in which these beliefs might have been held. At one end, they might been [sic] an individual who gave up her time and resources to lobby and campaign for a heightened awareness of copyright theft and an increase to the legal protection against it. At the other, there might have been somebody who was simply asked if they agreed with the notion that copyright theft was a bad thing. It was our view that, whilst the first type of person could well have been said to have held a belief which had a sufficient level of cogency and seriousness to qualify under the Act, we did not consider that the second type of person necessarily qualified.

"We did not seek to deny or decry the philosophical theories that underpinned such a belief, as perhaps reflected in the quotations listed within the legal text books as part of the claimant's submissions to the tribunal, but we did not accept that a person who simply agreed with the

notion that copyright theft was a bad thing, would necessarily hold a belief which carried a sufficient level of cogency and cohesion to qualify under the Act. It could have been said that Ms Wilkinson herself held such a view, but we considered it unlikely that she would have professed to having held a philosophical belief which qualified for protection under the Act. Such a person would not hold the type of cohesive belief pattern discussed in para 26 of *Grainger*.

"Accordingly, whilst we accepted that the claimant strongly believed in the right of ownership to her own creative output, we did not accept that she held that belief as any sort of philosophical touchstone to her life. This was, as Mr Chaudhuri put it in closing submissions, a belief or theory that the agreement would have threatened the claimant's ownership to her novel and/or her screenplay. That belief, even when set against the background belief that copyright law properly protected the fruits of an individual's artistic endeavours, was not sufficiently cohesive to form any cogent philosophical belief system. The claimant's own expression of her belief . . . concentrated upon an individual's right to create, produce and write and the benefit that she had from those activities which was something entirely different;

"5.7.5. Whether the belief was worthy of respect in a democratic society.

"The respondent accepted that that element of the test was met."

14 Although the tribunal found that the claimant did not hold a philosophical belief that was capable of protection under the 2010 Act, it nevertheless went on to consider how her complaints would have been determined if they had been wrong in reaching that conclusion. The tribunal rejected the claim of direct discrimination on the basis that her dismissal was due to her failure to sign the agreement and not because of her philosophical beliefs, of which the respondent had no understanding and knowledge. The tribunal also found that the appropriate comparator to the claim of direct discrimination would have been treated in the same way.

15 As to the claim of indirect discrimination, the tribunal found the provision, criterion or practice ("PCP") in question, namely the requirement to sign the agreement or be dismissed, was not shown to have put other persons sharing her belief at a particular disadvantage. But, in any case, the defence of justification under section 19(2)(d) of the 2010 Act applied in that the requirement to sign the agreement (particularly in its amended form) was a proportionate means of achieving the legitimate aim of protecting the respondent's intellectual property.

Belief and the Grainger criteria

16 Section 4 of the 2010 Act provides that religion or belief is a protected characteristic for the purposes of that Act. Section 10 of the 2010 Act, so far as relevant, provides:

"(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

"(3) In relation to the protected characteristic of religion or belief— (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief; (b) a reference to

persons who share a protected characteristic is a reference to persons who are of the same religion or belief." A

17 Guidance on the application of these provisions is provided in the Code of Practice on Employment 2011 ("the code"). The relevant paragraphs of the code for present purposes include the following:

"2.52. The meaning of religion and belief in the Act is broad and is consistent with article 9 of the European Convention on Human Rights (which guarantees freedom of thought, conscience and religion)." B

"*Meaning of belief*

"2.57. A belief which is not a religious belief may be a philosophical belief. Examples of philosophical beliefs include humanism and atheism.

"2.58. A belief need not include faith or worship of a God or Gods, but must affect how a person lives their life or perceives the world. C

"2.59. For a philosophical belief to be protected under the Act:

- it must be genuinely held;
- it must be a belief and not an opinion or viewpoint based on the present state of information available;
- it must be a belief as to a weighty and substantial aspect of human life and behaviour; D
- it must attain a certain level of cogency, seriousness, cohesion and importance;
- it must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others."

18 The requirements set out in the five bullet points at para 2.59 of the code are derived from the judgment of Burton J in *Grainger plc v Nicholson* [2010] ICR 360, para 24. I shall refer to these requirements as the "*Grainger* criteria". E

19 The claimant, ably represented here by Mr Milsom, concedes that the *Grainger* criteria constitute important guidance. However, he submits that three caveats should be added to their application. F

20 Firstly, he says that the *Grainger* criteria are not to be treated as statute. That proposition cannot be disputed. However, it does not add anything to the issues in this case as there is nothing to suggest that the tribunal did anything other than apply the *Grainger* criteria as appropriate guidance as to the correct approach.

21 Secondly, Mr Milsom invites me to conclude that *Grainger* was wrongly decided, in so far as the employment appeal tribunal in that case went on to say as follows, at para 26: G

"[The] submission is that what is required is a philosophical belief based on a philosophy of life, not a scientific or political belief or opinion, or a lifestyle choice. Both sides refer to dictionary definitions of philosophy, as did the regional employment judge, but I do not find them particularly helpful to resolve the question, since, as one would expect, each dictionary referred to has a number of definitions of philosophy. It is, as I have said, common ground that there must be some limitation, and hence Malcolm Evans, cited by Mrs Vickers from a work 'Religious Liberty and Non-Discrimination', is plainly right to say that 'no system could countenance H

A the right of anyone to believe anything and to be able to act accordingly'. *I am satisfied that, notwithstanding the amendment to remove 'similar', it is necessary, in order for the belief to be protected, for it to have a similar status or cogency to a religious belief.* However, as is apparent from the decision in *Eweida v British Airways plc* [2009] ICR 303, which is a decision of the Employment Appeal Tribunal on these Regulations, and
B not part of the Convention jurisprudence, even a religious belief is not required to be one shared by others . . ."

22 It is the italicised words to which Mr Milsom takes objection. He submits that by stating that a philosophical belief needed to have "similar status or cogency to a religious belief", the appeal tribunal was thereby impermissibly reintroducing a requirement of similarity in the definition of
C belief which had been expressly removed by amendment. (The Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660) had provided that " 'belief' means any religious or *similar* philosophical belief". The word "similar" was removed with effect from 30 April 2007 by an amendment introduced by section 77(1) of the Equality Act 2006.) This is relevant, says Mr Milsom, because the tribunal in the present case expressly referred (at para 5.7.4) to para 26 of *Grainger* in analysing whether the claimant's belief
D attained the required level of cogency and cohesion.

23 I do not agree that *Grainger* was wrongly decided in this respect. As is apparent from the analysis in *Grainger* of passages in *Hansard* dealing with the amendment, the removal of the word "similar" from the original definition of belief was because that word was not thought to add anything to the definition and was therefore redundant. The amendment was not
E intended to lower the threshold requirements in respect of philosophical beliefs as compared to religious beliefs. Philosophical beliefs, just as with religious beliefs, were still required to attain a certain level of cogency, seriousness, cohesion and importance in order to qualify for protection.

24 Furthermore, in *Maistry v British Broadcasting Corpn* [2014] EWCA Civ 1116, Underhill LJ referred to *Grainger* and the need stated
F therein for a philosophical belief to have "*a similar status or cogency to a religious belief*" without demur or criticism: see *Maistry* at paras 3 and 13. The fact that no distinction is to be drawn between religious and philosophical beliefs in terms of the level of cogency, seriousness, cohesion and importance to be attained, was also confirmed in *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, where Baroness Hale of Richmond stated as follows, at para 76:

G

> "Convention jurisprudence suggests that beliefs must have certain qualities before they qualify for protection. I suspect that this only arises when the belief begins to have an impact upon other people, in article 9 terms, when it is manifested or put into practice. Otherwise people are free to believe what they like. The European court in *Campbell v United Kingdom* (1982) 4 EHRR 293, 303, para 36, equated the parental
> H convictions which were worthy of respect under the First Protocol with the beliefs protected under article 9: they must attain a certain level of cogency, seriousness, cohesion and importance; be worthy of respect in a democratic society; and not incompatible with human dignity. No distinction was drawn between religious and other beliefs. In practice, of

course, it may be easier to show that some religious beliefs have the required level of cogency, seriousness, cohesion and importance." A

25 However, the fact that it may be easier for some religious beliefs to attain the said level of cogency, seriousness, cohesion and importance, does not mean that philosophical beliefs should not also be required to attain that same threshold level. This is not a requirement that philosophical beliefs be the same as or similar to religious beliefs; merely that philosophical beliefs must meet the same threshold requirements. This also does not mean that philosophical beliefs, if they meet those threshold requirements, would be afforded any less protection than those holding religious beliefs. Once the threshold requirements are met, any qualifying belief would have the same protection as any other: see *Henderson v General Municipal and Boilermakers Union* [2015] IRLR 451, para 62 per Simler J (President). B C

26 Mr Milsom's third suggested caveat is that when considering whether a belief attains "a certain level of cogency, seriousness, cohesion and importance", the bar must not be set too high. Reliance is placed upon para 34 of the judgment of Langstaff J (President) in *Harron v Chief Constable of Dorset Police* [2016] IRLR 481, in which the belief in question was a profound "belief in the proper and efficient use of public money in the public sector": D

> "As to the question of threshold, however, and the question of sufficiency of reasons, I take a different view. It is an error of law not to adopt the proper approach. The proper approach to determining whether or not there was a qualifying belief is not simply to set out the wording in the Code of Practice or that in para 24 of Burton J's decision in *Grainger*, but to have regard also to the way in which the criteria there set out are to be applied, as, for instance, indicated by the speech of Lord Nicholls, whose words I have quoted above. He made it clear that the belief must relate to matters more than merely trivial. That is a hint towards the approach that regards as substantial that which is more than merely trivial. The fact that he meant it in that sense is indicated by the use of the word 'again' in the expression, 'But, again, too much should not be demanded in this regard', when talking about the meaning of 'coherence'. 'Coherence' is to be understood in the sense of being intelligible and capable of being understood. Clearly, the belief that the claimant had would meet that test if that test had been applied in isolation. The paragraph ends with a plea not to set the threshold requirements at too high a level. The tribunal did not indicate in its decision that it had had particular regard to those matters that related to approach. When that is coupled with the absence of any description as to what it found to lack weight, or not to be in respect of a substantial aspect of human life and behaviour, it has not said sufficient to persuade me that an error of law may not have been committed." E F G

27 I agree with Mr Milsom that the bar is not to be set too high. The reference in the *Grainger* criteria to the attainment of a "certain level of cogency, seriousness, cohesion and importance", has to be read having regard to the jurisprudence which gave rise to those criteria, and, in particular, to the judgment of the House of Lords in *Williamson* [2005] 2 AC H

246, which is referred to in the passage from *Harron* above, and in which Lord Nicholls of Birkenhead said as follows, at para 23:

> "Everyone . . . is entitled to hold whatever beliefs he wishes. But when questions of 'manifestation' arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in article 9 of the European Convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard . . . Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention: see Arden LJ [in *Williamson*] [2003] QB 1300, 1371, para 258."

28 It follows from these passages in *Williamson* and *Harron* that, in considering whether a "certain level" of cogency, seriousness, cohesion and importance has been attained, the tribunal must guard against applying too stringent a standard. Mr Milsom suggested that for all of the *Grainger* criteria, the level should be set no higher than "more than merely trivial". However, whilst that level might be apt in assessing seriousness and importance, it seems to me to be less apt in assessing cogency and coherence. The mere fact that a genuinely held belief relates to subject matter which is more than merely trivial does not necessarily mean that that belief was either cogent or coherent. One can readily envisage a scenario whereby a claimant professes a profound belief as to an important aspect of her life but seeks to apply that belief in a haphazard, arbitrary or random fashion such that it cannot be said that her belief has attained any measure of cogency or coherence. The attributes of cogency and coherence are not susceptible to measurement against a standard of "more than merely trivial". In my judgment, the proper approach to the application of the *Grainger* criteria (and in particular to the fourth *Grainger* criterion) is simply to ensure that the bar is not set too high, and that too much is not demanded, in terms of threshold requirements, of those professing to have philosophical beliefs.

29 The justification for not setting the bar too high is that it is not for the court to judge the validity of a philosophical belief. It was said by Lord Nicholls in *Williamson* that, "Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising": para 22. The same may be said in respect of philosophical beliefs. However, it is important to remember that in an application of the *Grainger* criteria, and the fourth *Grainger* criterion in

particular, the focus should be on the manifestation of the belief. As Lord Nicholls stated in *Williamson*, at para 23:

> "Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of 'manifestation' arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements."

30 Lord Walker of Gestingthorpe, at para 64 of *Williamson*, agreed with Lord Nicholls that a focus on manifestation was necessary "in order to prevent article 9 becoming unmanageably diffuse and unpredictable in its operation" (see para 62):

> "I am therefore in respectful agreement with Lord Nicholls that, at any rate by the time that the court has reached the stage of considering the *manifestation* of a belief, it must have regard to the implicit (and not over-demanding) threshold requirements of seriousness, coherence and consistency with human dignity which Lord Nicholls mentions." (Emphasis in original.)

31 Those "objective minimum" or threshold requirements are reflected in the *Grainger* criteria. Those criteria are therefore to be applied to the manifestation of the belief. An act which is motivated by a belief is not necessarily a manifestation of it. Whether or not it is in a particular case will depend on the facts. In *Arrowsmith v United Kingdom* (1978) 3 EHRR 218, the European Court of Human Rights had to consider whether the article 9 rights of Ms Arrowsmith had been violated following her conviction and sentence under the Incitement to Disaffection Act 1934 for distributing leaflets seeking to dissuade soldiers from serving in Northern Ireland. Ms Arrowsmith was a pacifist, and she argued that her conviction and sentence amounted to an interference with her right to manifest that belief. The court held as follows:

> "69. The Commission is of the opinion that pacifism as a philosophy and, in particular, as defined above, falls within the ambit of the right to freedom of thought and conscience. The attitude of pacifism may therefore be seen as a belief ('conviction') protected by article 9.1. It remains to be determined whether or not the distribution by the applicant of the leaflets here in question was also protected by article 9.1 as being the manifestation of her pacifist belief.
>
> "70. Article 9.1 enumerates possible forms of the manifestation of a religion or a belief, namely, worship, teaching, practice and observance ('par le culte, l'enseignement, les pratiques et l'accomplissement des rites'), and the applicant submits that by distributing the leaflets she 'practised' her belief.
>
> "71. The Commission considers that the term 'practice' as employed in article 9.1 does not cover each act which is motivated or influenced by a religion or a belief. It is true that public declarations proclaiming generally the idea of pacifism and urging the acceptance of a commitment to non-violence may be considered as a normal and recognised manifestation of pacifist belief. *However, when the actions of individuals do not actually express the belief concerned they cannot be considered to*

A *be as such protected by article 9.1, even when they are motivated or influenced by it.*"

"75. *The Commission finds that the leaflets did not express pacifist views. The Commission considers, therefore, that the applicant, by distributing the leaflets, did not manifest her belief in the sense of article 9.1. It follows that her conviction and sentence for the distribution*
B *of these leaflets did not in any way interfere with the exercise of her rights under this provision.*

"Conclusion

"76. The Commission is therefore unanimously of the opinion that article 9.1 of the Convention has not been violated." (Emphasis added.)

32 In *Eweida v United Kingdom* (2013) 57 EHRR 8, it was said that in
C order to count as a manifestation within the meaning of article 9, the act in question must be intimately linked to the religion or belief. However, it was also said, at para 82, that acts or omissions which do not directly express the belief concerned may fall outside the protection:

"Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way
D inspired, motivated or influenced by it constitutes a 'manifestation' of the belief. Thus, for example, *acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of article 9.1* (see *Skugar v Russia* CE:ECHR:2009:1203DEC004001004 and, eg, *Arrowsmith v United Kingdom* (1978) 3 EHRR 218; *C v United Kingdom* (1983) 37 DR 142; *Zaoui v Switzerland* CE:ECHR:2001:0118DEC004161598). *In order to*
E *count as a 'manifestation' within the meaning of article 9, the act in question must be intimately linked to the religion or belief.* An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying
F belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question . . ." (Emphasis added.)

33 The question therefore is whether doing an act, or, as in this case, not doing a particular act (i e not signing the agreement), amounts to a direct
G expression of the belief concerned and whether it is "intimately linked" to it. If the act or omission does not satisfy those requirements then it does not fall to be protected.

34 These considerations may well be particularly relevant to an analysis of cogency and coherence under the fourth *Grainger* criterion (which can in some senses be regarded as an overarching criterion). Cohesion is to be understood in the sense of being intelligible and capable of being
H understood: see *Harron* [2016] IRLR 481, para 34. If, for example, a belief is expressed in relation to one act or omission, but inexplicably not expressed in relation to another which is very similar, then it would be open to a tribunal to conclude that the belief was unintelligible and lacking a certain level of cogency or coherence. The same conclusion might be

available to a tribunal where there is no expression of the belief at all. There is no good reason why a person whose belief is not manifested at all should necessarily be in a better position than one who manifests it inconsistently. Whether or not, in a particular case, the belief has attained a sufficient level of cogency and cohesion (bearing in mind that not too much is to be demanded in this respect) will depend on the facts.

The grounds of appeal

35 The claimant was given permission to proceed with three grounds of appeal. These are as follows:

(a) Ground 1: The tribunal erred in concluding that the claimant's belief was not a philosophical belief within the meaning of section 10 of the 2010 Act.

(b) Ground 2: The tribunal erred in its assessment of the particular disadvantage aspect of the test for indirect discrimination.

(c) Ground 3: Having failed to accept the importance of the claimant's belief to her life and to identify correctly the disadvantage to which she was subject, its conclusions on justification cannot stand.

36 I shall deal with each ground in turn.

Ground 1: Error in concluding that the claimant did not hold a philosophical belief

Submissions

37 The claimant submits that the tribunal's reasoning in support of its conclusion that her belief did not attain a certain level of cogency or cohesion was wrong in four central respects:

(a) First it is said the tribunal confused "cogency" with "importance". It is, submits Mr Milsom, axiomatic that a belief as to something as worthy of respect in a democratic society as the right to copyright—a right recognised by article 27 of the Universal Declaration of Human Rights and by domestic law—is cogent and coherent.

(b) Secondly, the tribunal's attempt to assess cogency and seriousness by reference to a "range of levels of cogency and seriousness in which these beliefs might have been held" led them into error. That was because the tribunal did not assess the belief as defined in para 3.2 but the belief that "copyright theft was a bad thing"; and the range or spectrum of belief appears to require that there be a public display of one's belief through proselytising and/or campaigning.

(c) Thirdly, Mr Milsom submits that the tribunal appears to have wrongly analysed the claimant's belief as being no more than "a belief or theory that the copyright agreement would have threatened the claimant's ownership to her novel and/or her screenplay".

(d) Finally, it is submitted that there is a discontinuity in the tribunal's reasoning in that, having accepted that the claimant's belief was not simply a viewpoint based on the present state of information, it is entirely unclear why her belief had not also attained the level of cogency, seriousness, cohesion or importance set by *Williamson* [2005] 2 AC 246 and *Harron* [2016] IRLR 481. Fundamentally, the tribunal has set the bar far too high and appears to have ruled out the claimant's belief on the basis that it concerned a "single issue" and did not affect all aspects of her life.

A **38** Ms Beattie submitted that the tribunal was not considering a different belief to that stated, that the range or spectrum identified by the tribunal was merely an example of the kinds of acts which might or might not satisfy the fourth *Grainger* criterion, and that on the facts of this case, the tribunal was fully entitled to conclude that the claimant's belief did not satisfy that criterion.

B *Discussion*

39 As to Mr Milsom's first point under this ground, I am not persuaded that the tribunal did confuse cogency with importance as suggested. The fact that the claimant's belief concerned an important aspect of human life and behaviour was addressed under the third *Grainger* criterion considered at para 5.7.3 of the reasons. The tribunal noted that the existence of C copyright law was an indication of the importance of creative ownership to an aspect of human life and behaviour. However, the mere fact that the claimant's belief in the importance of owning one's creative output was reflected in existing laws relating to copyright did not mean that her belief had necessarily attained a certain level of cogency or cohesion. Having a belief relating to an important aspect of human life or behaviour is not D enough in itself for it to have a similar status or cogency to a religious belief.

40 At first blush, Mr Milsom's second point, namely that the tribunal may not have had the agreed formulation of the claimant's belief in mind when conducting its analysis based on the range of levels of cogency and seriousness, would appear to have some merit. At para 5.7.4 the tribunal refers on more than one occasion to the notion that "copyright theft was a bad thing". That may be contrasted with the way in which the claimant put E her belief, which was that it was a belief in "The statutory human or moral right to own the copyright and moral rights of her own creative works and output." That may be said to be somewhat broader than simply an objection to copyright theft. The claimant's evidence also refers to the importance of writing in her life, which, she claimed, amounted to a "spiritual practice". In those circumstances, the commercial disadvantage of copyright theft might F be said to be only one of several disadvantages experienced by the claimant in losing control of her work.

41 However, as stated above, the focus must be on manifestation by reference to the act or omission in question. In the present case, the act or omission in question was the refusal to sign the agreement. Whilst that refusal might have been dictated by the claimant's belief, it did not amount to a manifestation of it in the sense described above. As the tribunal found, G she had not at any stage made her belief known to the respondent. Furthermore, her only stated reason for her refusal to sign was her concern that the respondent would obtain rights over her private creative output and a commercial concern that signing the agreement might make it more difficult for her to sell her work to others. That refusal to sign would not, and did not in this case, give rise to any suggestion that the refusal was H motivated by a philosophical belief; the tribunal having expressly rejected (at para 4.10) the claimant's contention that the mere fact of her refusal to sign would have indicated to the respondent that she was manifesting her belief. In that context, the tribunal was not incorrect, in my judgment, to draw the belief in the way that it did when considering whether it had a certain level of cogency and cohesion. The claimant's actions had done little

more than indicate that she was concerned about losing control of the copyright to her private creative output, or, as the tribunal put it (perhaps somewhat bluntly), her stated concern was about "copyright theft".

42 Mr Milsom's next criticism was as to the tribunal's range or spectrum of cogency, seriousness, cohesion and importance, which, at one end, had a person who was very publicly active in lobbying and campaigning for heightened awareness of copyright theft, and, at the other, had a person who simply agreed that copyright theft was a bad thing. Mr Milsom contends that by apparently ascribing higher levels of cogency and seriousness to those who seek to proselytise or publicly promote their beliefs, the tribunal fell into error, because it is quite possible for a person to have a sufficiently cogent and serious belief without actively seeking to promote those beliefs in any way. Article 9 of the Convention provides:

> "1. Everyone has a right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either *alone* or in community with others and in public or *private* to manifest his religion or belief, in worship, teaching, practice and observance.
>
> "2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." (Emphasis added.)

43 It is quite right, of course, to say that a belief that is manifested only in private may be just as cogent, serious and coherent as a belief that manifests itself more publicly, although outward manifestation may be evidence of cogency and coherence. It seems to me that in considering the spectrum referred to in para 5.10, the tribunal was merely seeking to give an example, by reference to the degree of outward manifestation, of the kinds of acts which might amount to a manifestation of a belief having a certain level of cogency, seriousness, cohesion and importance. The fact that the tribunal did not expressly place the claimant anywhere on the spectrum, and the fact that it did not consider that the person who merely agreed that copyright theft was a bad thing "necessary qualified", supports the view that this was no more than an example, and that the tribunal was not in fact suggesting that the claimant herself had to be a campaigner or proselytiser in order to qualify for protection.

44 It is in the next para of 5.7.4 that the tribunal's analysis turns specifically to the claimant. There, the tribunal states that it accepted that the claimant strongly believed in the right of ownership to her own creative output—notably, the tribunal was not here describing her belief as merely an objection to copyright theft—but that it did not accept that she held that belief as any sort of "philosophical touchstone to her life". If, by that, the tribunal considered that the belief had to be one that affected all or many aspects of the claimant's life in order to qualify then that would have been an error, as it would have amounted to setting the bar too high. It is quite clear that a belief in a single issue, which affects perhaps only a single but important aspect of a person's life, could qualify for protection: see *Grainger* [2010] ICR 360, para 27; *Harron* [2016] IRLR 481, (belief in the proper and efficient use of public money in the public sector), at para 34; and *Maistry*

A [2014] EWCA Civ 1116 (belief in BBC values), at para 3. However, it is clear from reading the rest of the paragraph, that that is not what the tribunal meant. First, it identifies that her belief was that the agreement would have threatened the claimant's ownership to her novel and/or screenplay. That was not inconsistent with the statement of her belief at para 3.10. However, the question is whether there was manifestation of the belief through an act or omission, as opposed to such act or omission merely being motivated by the belief. In the present case, given the terms of the stated belief and the fact that the claimant was being required to sign the agreement, the manifestation of that belief would axiomatically be in raising it as a reason for refusing to sign. She did not do so. In fact, the impression she clearly gave to her employer was that her objection was because of the difficulty it might create for her in seeking to sell her private work.

C **45** The respondent referred me to evidence which supported that finding. In particular, there is an e-mail from the claimant to Ms Wilkinson dated 22 June 2015, in which she set out her reasons for not signing the amended agreement. She said:

> "The issue for me is that any work I sell is subject to scrutiny by the lawyers of the buyer. The first thing they check is if I own copyright to the
D work I have created, whether I have signed any contracts that might be in conflict with their outright or partial purchase of my work."
>
> "Because I sell work to companies who further develop that work, it is very important to limit my copyright agreement with Mulberry to work created at the behest of Mulberry, during my working hours at Mulberry and for the furtherance of the business of Mulberry."

E **46** Not only does the claimant not articulate or even express her belief here, she in fact puts forward an objection to signing which could be described as purely commercial and designed to protect her private interests. That does not, on any view, amount to an actual expression of her belief so as to amount to a manifestation of it. Given these facts, the tribunal's view that that belief, so expressed, was not held as any sort of philosophical touchstone to her life, and was "not sufficiently cohesive to form any cogent
F philosophical belief system", was one that it was plainly entitled to reach.

47 The final reason given by the tribunal for concluding that there was no philosophical belief was that the claimant's expression of her belief concentrated upon her right to create, produce and write, and the benefit that *she* derived from those activities. That was said to be "something entirely different" from that which might give rise to any "cogent
G philosophical belief system". In my judgment, this was just another way of stating that the evidence as to the benefits she derived from the practice of her belief says little or nothing about the manifestation of her belief in a manner which involves an actual expression of it, and/or that it does not establish any intimate link between her belief and the act or omission in question, namely the refusal to sign the agreement. The refusal to sign could, objectively viewed, have been for any number of reasons, none of
H which had anything to do with a philosophical belief. In the absence of any meaningful expression of her belief, the necessary intimate link, in the circumstances of this case, simply does not exist.

48 I therefore reject Mr Milsom's submission that the tribunal has erred in its approach to the fourth *Grainger* criterion. Far from setting the bar too

high, the tribunal properly considered that criterion with regard to its manifestation, and, based on the facts in this case, found the claimed belief to be lacking. Accordingly, ground 1 of the appeal fails.

Ground 2: Indirect discrimination and disadvantage

49 For the claim of indirect discrimination, the tribunal was required to consider, pursuant to section 19(2) of the 2010 Act, whether the PCP was discriminatory in relation to the claimant's belief in that: (a) the respondent applied the PCP to persons who did not share the claimant's belief; (b) the PCP puts or would put persons with whom the claimant shares her belief at a particular disadvantage when compared with persons who do not share that belief, i e had she established that there would be group disadvantage; (c) the PCP puts or would put the claimant at that disadvantage; and (d) the respondent cannot show it to be a proportionate means of achieving a legitimate aim.

50 The tribunal's conclusion as to the second of these questions, namely whether there is group disadvantage, is at para 5.14:

> "The next question was whether the PCP put those with whom the claimant shared her protected characteristic at a particular disadvantage. That issue required us to consider whether other holders of the claimed philosophical belief would also have suffered the same disadvantage; would they have refused to sign the agreement and been dismissed? That question could not safely have been answered in the claimant's favour since there was no evidence that the clause would have been reprehensible to all of those who shared the claimant's belief. Other people may not have viewed the restrictions imposed by the agreement in the same way that she had. The clause was not obviously unreasonable nor did it obviously go beyond what was reasonably necessary to protect the respondent's legitimate interests."

Submissions

51 The claimant submits that the tribunal erred in that it asked itself whether *all* persons sharing the claimant's belief would have been disadvantaged by the PCP. Reliance is placed upon the judgment of Maurice Kay LJ in *Mba v Merton London Borough Council* [2014] ICR 357 which concerned a claimant who was disciplined for refusing to work on Sundays due to her strong Christian beliefs. In that case, the tribunal found that the claimant's belief that Sunday should be a day of rest was "not a core component of the Christian faith" and concluded that the imposition of the PCP—to work on Sundays—was proportionate. Finding that the tribunal erred in its approach to disadvantage, Maurice Kay LJ said as follows, at para 17:

> "I do not agree that there was no error of law in the employment tribunal's reasoning. Regulation 3(1)(b)(i) [of the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660)] envisages a PCP which applies or would apply equally 'to persons not of the same religion or belief' as the claimant and which puts or would put 'persons of the same religion or belief' as the claimant at a particular disadvantage when compared with other persons. The fact that those at the requisite

A particular disadvantage are described in the plural—'persons'—is the reason why the test is sometimes described as one of 'group disadvantage'. However, the use of the disjunctive—'religion or belief'—demonstrates that it is not necessary to pitch the comparison at a macro level. Thus it is not necessary to establish that all or most Christians, or all or most non-conformist Christians, are or would be put at a particular disadvantage. It is permissible to define a claimant's religion or belief more narrowly than that. In my judgment, this is where the employment tribunal went wrong. It described [the claimant's] Sabbatarian belief as 'not a core component of the Christian faith'. By so doing it opened the door to a quantitative test on far too wide a basis."

52 It is further submitted that in the context of philosophical belief there is no room for the requirement that there be group disadvantage. A belief may well be held by only one person in which case it would not be possible to adduce evidence of others sharing that belief; but to hold that that person did not for that reason satisfy the requirements of section 19(2)(b) of the 2010 Act would be contrary to article 9 which does not require there to be any group disadvantage. It is said that *Mba* provides support for the proposition that the requirements as to group disadvantage should be read down in order to give effect to article 9 of the Convention. Further, it is said that the tribunal should have found that others holding the claimant's belief would have faced an additional disadvantage if required to sign the agreement. In this case, there was a sufficiently close and direct nexus between the act of refusing to sign and the underlying belief, and the disadvantage in being required to sign was obvious. Finally, it was submitted that the tribunal wrongly took account of matters, such as whether the agreement was reasonably necessary to protect the respondent's legitimate interests, which were relevant to justification and not to whether or not there was a disadvantage.

53 The respondent accepted that not all individuals need to be shown to have suffered disadvantage but contended that, when read fairly and in context, para 5.14 showed that that was not the test being applied by the tribunal. In any event, says the respondent, given that the respondent had made perfectly clear that it had no interest in the claimant's private creative output, there was no nexus between the act of refusing to sign and the claimant's belief.

Discussion

54 On the face of it, the reference to there being no evidence that the clause would have been reprehensible to *all* those who shared the claimant's belief might suggest that the tribunal was indeed applying a test of universal disadvantage. If that had been the case then there would have been an error of law as "there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage": see *Essop v Home Office (UK Border Agency)* [2017] ICR 640, para 27, per Baroness Hale of Richmond DPSC. However, it is clear from a fair reading of the whole of para 5.14 that the tribunal did have in mind the correct test, which is whether *others* sharing the belief were put to a disadvantage. The tribunal identifies the issue as requiring it "to consider whether other holders of the claimed philosophical belief would also have

suffered the same disadvantage; would they have refused to sign the agreement and been dismissed?" Furthermore, the tribunal says later in the same paragraph that, "Other people may not have viewed the restrictions imposed by the agreement in the same way that she had". In my judgment, and having regard to these parts of the judgment, it cannot be said that the single reference to the word "*all*" means that the tribunal had the wrong test in mind. It must be remembered that in this case there was no evidence of *any* other person sharing the claimant's belief, let alone of any person suffering the same disadvantage as her. Had there been evidence of *some* others sharing her belief and suffering a disadvantage, then a conclusion that the requirements of section 19 had not been met because not *all* those sharing that belief had suffered might demonstrate an error of law. But that is not this case. It seems to me that if there had been evidence of some group disadvantage then the tribunal would not have concluded as it did.

55 That takes me to the claimant's second point which is that there should be no requirement for any group disadvantage to be shown at all in an indirect discrimination complaint based on religion or philosophical belief. I do not accept Mr Milsom's submission that the majority of the Court of Appeal in *Mba* [2014] ICR 357 found that the requirements as to group disadvantage should be read down in order to give effect to article 9 of the Convention. In fact, Elias LJ said as follows in *Mba*:

> "33. . . . I find it difficult to imagine that once a prima facie group disadvantage has been established—as it was in this case and must be in order for justification to be required—a court will give much weight to the fact that the size of the pool adversely affected is in principle potentially large if that is not in fact the case in relation to the particular employer . . ."
>
> "35. Article 9 cannot be enforced directly in employment tribunals because claims for breaches of Convention rights do not fall within their statutory jurisdiction (although the Strasbourg court in *Eweida* does not seem to have appreciated that fact): see *X v Y* [2003] ICR 1138. The *Eweida* decision in Strasbourg has not, and could not, affect the reach of the statutory jurisdiction, and therefore the claimant's article 9 right is incapable of direct enforcement in the employment tribunal. However, domestic law must be read so as to be consistent with Convention rights where possible, in accordance with section 3 of the Human Rights Act 1998. *In my judgment, it is simply not possible to read down the concept of indirect discrimination to ignore the need to establish group disadvantage. But I see no reason why the concept of justification should not be read compatibly with article 9 where that provision is in play.* In that context it does not matter whether the claimant is disadvantaged along with others or not, and it cannot in any way weaken her case with respect to justification that her beliefs are not more widely shared or do not constitute a core belief of any particular religion. It is for this reason that in my view the employment tribunal was wrong to make reference to this factor as one assisting the employer.
>
> "36. This is not to say that the number of employees sharing a particular belief will necessarily be irrelevant to a justification challenge where article 9 is engaged. Assuming that the employer's criterion is designed to achieve a legitimate end, the greater the number of employees

affected, the more difficult it is likely to be for an employer to accommodate those beliefs in a way which is compatible with his business objectives. So, paradoxically, if a belief is not widely shared, which is more likely to be the case where it is not a core belief of a particular religion, that is a factor which under article 9 is likely to work in favour of the employee rather than against." (Emphasis added.)

56 It is clear from the italicised passage in that analysis that, at least in the present context, the group disadvantage requirement cannot be read down, although the concept of justification can be read compatibly with article 9. In *Mba*, there was evidence that others would be disadvantaged; it was not a sole adherent case. The Court of Appeal was not tasked with considering the sole adherent scenario and the consequences of that in relation to the requirement to show group disadvantage. In my judgment, *Mba* provides no warrant for treating the group disadvantage requirement as redundant in claims of indirect discrimination involving belief.

57 Religion or belief discrimination does not fall into a separate category under section 19 of the 2010 Act. It is implicit in Baroness Hale DPSC's recent analysis in *Essop* [2017] ICR 640 of the salient features of indirect discrimination that the need to show group disadvantage remains:

"27. A fourth salient feature is that there is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. The later definitions cannot have restricted the original definitions, which referred to the proportion who could, or could not, meet the requirement. Obviously, some women are taller or stronger than some men and can meet a height or strength requirement that many women could not. Some women can work full time without difficulty whereas others cannot. Yet these are paradigm examples of a PCP which may be indirectly discriminatory. The fact that some BME or older candidates could pass the test is neither here nor there. The group was at a disadvantage because the proportion of those who could pass it was smaller than the proportion of white or younger candidates. If they had all failed, it would be closer to a case of direct discrimination (because the test requirement would be a proxy for race or age)."

"29. A final salient feature is that it is always open to the respondent to show that his PCP is justified—in other words, that there is a good reason for the particular height requirement, or the particular chess grade, or the particular [Core Skills Assessment] test. Some reluctance to reach this point can be detected in the cases, yet there should not be. There is no finding of unlawful discrimination until all four elements of the definition are met. The requirement to justify a PCP should not be seen as placing an unreasonable burden upon respondents. Nor should it be seen as casting some sort of shadow or stigma upon them. There is no shame in it. There may well be very good reasons for the PCP in question—fitness levels in fire-fighters or policemen spring to mind. But, as Langstaff J pointed out in the employment appeal tribunal in *Essop,* a wise employer will monitor how his policies and practices impact upon various groups and, if he finds that they do have a disparate impact, will try and see what can be modified to remove that impact while achieving the desired result."

58 I note in passing that the "wise employer", referred to in para 29 of Baroness Hale DPSC's judgment, would be wholly unable to monitor how his policies and practices impact upon the sole adherent of a belief of which he has no knowledge. In my judgment, the correct approach to be taken in a claim of indirect discrimination is that set out by Sedley LJ in *Eweida v British Airways plc* [2010] ICR 890, where he endorsed part of the judgment of Elias J in the appeal tribunal, at para 24:

> "The Employment Appeal Tribunal's considered judgment on this part of the case can be found at [2009] ICR 303, paras 26–64. While my reasoning on it follows a slightly different course, and at one point differs from it, my conclusion is the same as theirs. In particular I would respectfully endorse what they held at para 60: 'In our judgment, in order for indirect discrimination to be established, it must be possible to make some general statements which would be true about a religious group such that an employer ought reasonably to be able to appreciate that any particular provision may have a disparate adverse impact on the group.' "

59 It is also instructive, in the context of sole adherents, to consider what Elias J said in the paragraph that followed the one to which Sedley LJ referred, at [2009] ICR 303, para 61:

> "It is conceivable that a particular specialist religion, perhaps a subset of a major religion, may operate in a particular region or locality and employers in that area may have to cater for that belief even though employers elsewhere do not. But there must be evidence of group disadvantage, and the onus is on the claimant to prove this. We recognise that this means that if someone holds subjective personal religious views, he or she is protected only by direct and not indirect discrimination. There is hardly any injustice in that if the purpose of indirect discrimination is to counter group disadvantage and there is none."

60 In my judgment, the appeal tribunal's recognition that a person holding subjective religious views is not protected by indirect discrimination, applies equally to the sole adherent of a philosophical belief. Equally, there is no injustice in a sole adherent only having the protection of direct discrimination since the purpose of indirect discrimination is to eliminate unjustified group discrimination.

61 That analysis is not undermined by the fact that in *Eweida v United Kingdom* 57 EHRR 8, the European court held that the United Kingdom had failed sufficiently to protect Ms Eweida's article 9 rights. The European court expressly refers to the passage from *Eweida* in the appeal tribunal endorsed by the Court of Appeal: see para 16 of *Eweida v United Kingdom*. Furthermore, it noted Ms Eweida's submission that the requirement in the United Kingdom that there be group disadvantage for a claim of indirect discrimination was "legally uncertain and inherently vulnerable to returning arbitrary results": see para 66 in *Eweida v United Kingdom*. However, the European court's assessment focuses on justification and not on whether the requirement of group disadvantage had the effect of curtailing Ms Eweida's article 9 rights. In fact, the European court held as follows, at para 92:

> "None the less, while the examination of Ms Eweida's case by the domestic tribunals and court focused primarily on the complaint about

A discriminatory treatment, it is clear that the legitimacy of the uniform code and the proportionality of the measures taken by British Airways in respect of Ms Eweida were examined in detail. The court does not, therefore, consider that the lack of specific protection under domestic law in itself meant that the applicant's right to manifest her religion by wearing a religious symbol at work was insufficiently protected."

B **62** For these reasons I consider that the sole adherent of a philosophical belief, who is unable to establish any group disadvantage, cannot succeed in a claim of indirect discrimination. That seems to me to be not only consistent with the purpose of indirect discrimination, which is to prohibit unjustified group disadvantage, but also accords with common sense. If group disadvantage was not a requirement then the sole adherent of a C philosophical belief could claim that a particular PCP put her at a disadvantage. The employer would then be required to justify a PCP which it could not possibly have predicted or anticipated as having a disparate impact.

63 The tribunal considered whether other holders of the claimant's belief would have suffered the same disadvantage as her. It concluded that, "That question could not safely have been answered in the claimant's favour D since there was no evidence that the clause would have been considered reprehensible to all of those who shared the claimant's belief." Although there was no evidence that there were any others sharing her belief, the tribunal appears to have considered whether the PCP "would put" the hypothetical adherent at a disadvantage. In doing so it may have been overly generous to the claimant: see *Eweida* [2010] ICR 890 (Court of Appeal), at E paras 16–19. None the less, in my judgment, the tribunal's conclusion that the "question could not safely have been answered in the claimant's favour since there was no evidence . . ." amounts, in effect, to a finding that, due to a lack of evidence, group disadvantage had not been and could not be shown. Having so concluded, the claim of indirect discrimination failed and there was no need for the tribunal to go further. The respondent in this case could not possibly have anticipated that the PCP of requiring employees to F sign the agreement (which the tribunal found to be not obviously unreasonable) could have adversely affected a group of which it had no knowledge.

64 The tribunal's finding that there was no group disadvantage could have been treated as dispositive of the claim of indirect discrimination. The fact that the tribunal did not state its conclusions in those terms—perhaps G because the argument below was not put in the same sophisticated terms that were developed before me—does not undermine its judgment. The tribunal's conclusion that there was no indirect discrimination was unarguably correct. For those reasons, ground 2 of the appeal also fails.

65 The tribunal went on, nevertheless, to consider the potential defence of justification. That takes me to the third ground of appeal.

H *Ground 3: Justification*

66 The claimant's failure to succeed under grounds 1 and 2 renders any challenge to the tribunal's assessment of justification academic. However, as Mr Milsom made detailed submissions on this issue as well, I shall deal with it. The discussion below presumes that, contrary to my conclusions above,

the requisite disadvantage *is* established and the respondent is required to justify the PCP as being a proportionate means of achieving a legitimate aim.

Submissions

67 Mr Milsom submits that any analysis of justification would necessarily be flawed if the tribunal had erred in its approach to group disadvantage. He relies on the general principle that "the greater the impact, the harder it is to justify the provision": see *Mba* [2014] ICR 357, para 31; and submits that an error as to group disadvantage, which goes to impact, would tend to undermine the analysis on justification. However, this was not a case where there was any evidence of more than one person being adversely affected by the PCP. The only person affected was the claimant; the level of impact remains unaffected and the justification analysis is not undermined.

68 Mr Milsom also submits that the tribunal erred in its approach to impact in a different respect: that is that the tribunal considered justification by reference only to the requirement to sign the agreement, and omitted to consider that the consequence of not signing was dismissal. I do not accept that submission. The tribunal found that the respondent *required* its employees to sign the agreement (see para 4.6), and it refers to dismissal being a consequence of not signing in paras 5.12 and 5.14. The latter reference, in particular, relates to the consequence of the PCP. The tribunal asks itself whether others sharing the claimant's belief "would . . . have refused to sign the agreement and been dismissed?" Although there is no express reference to dismissal in the section dealing with justification, it cannot fairly be said that the tribunal would not have had that in mind. The refusal to sign was inexorably bound up with the consequence of dismissal, as is clear from a fair reading of the whole of the tribunal's judgment, and it may reasonably be inferred that that was the consequence that the tribunal had in mind when it turned to the question of justification.

69 The tribunal found that there was a legitimate aim in that the respondent desired to protect its own intellectual property. Mr Milsom accepts that that is a legitimate aim. However, he submits that the tribunal erred in that that justification was assessed by reference to the failure to sign the amended agreement,[1*] whereas by the time of dismissal the amendment had been withdrawn. In my judgment, that does not undermine the tribunal's analysis. That is for the simple reason that the claimant had unequivocally refused to sign even the amended agreement. Although the claimant had suggested that she had been advised that her proposed draft and the amended version were "very close", there was nothing to indicate that by 16 September, when the matter came to a head, the claimant had moved any closer to signing the amended version. Nor had it been suggested by the respondent at any time that the consequences of failing to sign even the amended agreement would be any less serious than not signing the original.

70 In those circumstances, the question for the tribunal was whether requiring the claimant to sign the amended agreement or be dismissed was a proportionate means of achieving the legitimate aim of protecting its

* *Reporter's note*. The superior figure in the text refers to a note found at the end of the judgment on p 200.

A intellectual property. That, in my judgment, is precisely the question which the tribunal considered. The tribunal answered it as follows, at para 5.18:

> "We could not see that anything more than the respondent's own intellectual property would have been covered by the clause, particularly by the amended wording. If the claimant had written a play, a book, a poem or a screenplay about anything other than the respondent or
B matters arising from her employment with the respondent or matters which did not relate to any business of the respondent, we could not see how such work would have been caught."

71 In my judgment, the tribunal was correct to conclude as it did. The clause in its amended form leaves little or no scope for any argument that work produced by the claimant in her own time and for her own private
C purposes unconnected with the respondent's business, would be subject to the requirement to disclose it to, or hold it in trust for, the respondent. The claimant's notice of appeal, however, suggests that even the amended version might prevent her from writing about other subjects and that it was "too general and therefore open to interpretation". She further suggests that,

D
> "Had she signed the agreement, and had she wished to publish, upload to the internet, or submit to a contest, any piece of work she was working on during that period, she would have had to challenge and to seek to overturn the agreement as it related to each individual piece of work."

These suggestions, which were not pursued orally, seem spurious. The claimant's approach (as is apparent from the evidence before the tribunal
E appeared to be that nothing less than a self-drafted document imposed on the respondent would do.

72 If, as the tribunal effectively found, the agreement (in its amended form) went no further than was necessary to protect the respondent's legitimate intellectual property interests, then it would be proportionate to make the signing of that agreement a condition of continued employment.

F 73 The claimant's further argument in respect of justification is that the tribunal ought to have found that clause 13 of the contract, which the claimant had signed, was sufficient to protect the respondent's interests. As to this argument, the tribunal said as follows, at para 5.19:

> "As to the claimant's second argument, that the clause was no more than had already been achieved by clause 13, we considered that she was wrong in that respect. It might have been said that clause 13 did nothing
G more than re-state the position in law since it vested any intellectual property rights in the respondent if the creation was made for or on its behalf. Clause 2 did two different things, as Ms Wilkinson explained; first, it created a positive duty to disclose creations that were made on the respondent's behalf and, secondly, it made employees aware of the position that they were in [in] terms of copyright law and legislation."

H 74 Mr Milsom submits that the first of these matters takes the position no further forward in that such duties of disclosure are already owed under common law or copyright law. However, the agreement imposes an obligation to disclose "promptly" and also refers expressly to all copyright works, whereas clause 13 focuses on "any discovery or invention or

improvement to an existing invention, design or process." It cannot be said in those circumstances that the agreement is otiose or goes further than is necessary to protect the interests in question.

75 As to the second matter relied upon by the respondent—namely, that it made employees aware of the position as regards copyright law and legislation—Mr Milsom submits that there can be no doubt that the claimant was already aware of her position in this regard. That does not seem to me to be a good answer to the point. The respondent is entitled, in seeking to protect its intellectual property, to make it clear to employees what their obligations are. The fact that one or more of those employees might already have some awareness of those obligations does not undermine the need to issue a document to all employees dealing with the subject. The respondent has 1,500 employees. It would hardly be reasonable to expect it to ascertain, in respect of each one of them, what his or her level of knowledge of copyright law was and issue a draft document accordingly.

76 In conclusion, therefore, it is my judgment that the tribunal did not err when it came to justification. The agreement, as amended, was found to go no further than is necessary to protect the respondent's interests. Whilst the impact on the claimant refusing to sign was severe, the respondent's interests as a design company, in seeking to protect its intellectual property and in ensuring that employees were aware of their obligations in this regard, were correspondingly greater.

77 Thus, even if the tribunal had found that there was a philosophical belief giving rise to group disadvantage, it was correct to find that the respondent's imposition of the PCP was likely to have been proportionate.

Conclusion

78 For all of those reasons, this appeal fails and is dismissed.

Note

1. The tribunal had referred to the agreement being amended twice. It was agreed that that was incorrect. However, given that the amended version is correctly set out in the judgment, that error as to the perceived number of amendments makes no difference.

Appeal dismissed.

JENNIFER WINCH, Barrister

ALEKHINA v RUSSIA

BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

Application No.38004/12

The President, Judge Jäderblom; Judges Keller, Dedov, Poláčková, Serghides, Schukking, Elósegui: 17 July 2018

(2019) 68 E.H.R.R. 14

Cathedrals; Freedom of expression; Inhuman or degrading treatment or punishment; Public order offences; Public performance; Remand; Right to fair trial; Right to liberty and security; Russia; Songs

H1 The applicants, three members of the feminist punk band Pussy Riot, were arrested after they, and two other members of the band, had attempted to perform one of their songs protesting various aspects of the state's political scene in a cathedral in Moscow. There were no religious services taking place at the relevant time. The applicants were unable to complete their performance as they were removed from the cathedral by security personnel and others present. The applicants were subsequently charged with the aggravated offence of hooliganism motivated by religious hatred and were detained for over five months pending their trial. During the trial, the applicants were kept in a glass dock, and were under constant surveillance by police, court ushers and a police dog. They complained of difficulties of communicating confidentially with their lawyers. The three applicants were convicted of hooliganism for reasons of religious hatred and enmity and for reasons of hatred towards a particular social group and sentenced to two years' imprisonment. Appeals against the convictions and sentences were largely unsuccessful though the Moscow City Court amended the trial judgment in respect of the third applicant and suspended her sentence after almost 14 months' imprisonment. The first and second applicants were subsequently released under a general amnesty after serving 16 months of their sentences.

H2 After the three applicants had been released from prison, supervisory proceedings took place in the Moscow City Court. The court, having reviewed the case, upheld the findings that the applicants' actions had amounted to incitement to religious hatred or enmity and dismissed the complaints regarding compliance with criminal procedure at the trial. The court did, however, remove reference to "hatred towards a particular group" from the judgment, finding that it had not been established which social group had been concerned. The court also reduced each applicant's sentence to one year and 11 months' imprisonment.

H3 While the first and second applicant were still in prison, but after the third applicant had been released, proceedings took place seeking a declaration that certain internet pages onto which footage of the applicants' performance had been

uploaded were extremist. The prosecutor had also sought to restrict access to the material in question. The third applicant applied to join the proceedings as an interested party on the basis that her rights as a member of the band would be affected by any court decision in the case. Her application was dismissed on the basis that any decision would not affect her rights. The third applicant appealed that decision and, while awaiting the hearing of that appeal, the trial court ruled that the video content was extremist and ordered that access to the material be limited. The third applicant also appealed that finding. While her appeal against the refusal to allow her to join the proceedings was dismissed, the Moscow City Court left her appeal against the classification and banning of the videos unexamined on the basis that she had no right to appeal the decision.

H4 **Held:**

(a) unanimously, that the complaints under art.3 about the condition of the applicants' transportation and detention in the courthouse, and their treatment during the court hearings, under arts 5(3), 6 and 10 about the applicants' criminal prosecution and the proceedings declaring video recordings of their performances as "extremist" in respect of the first and second applicant were admissible, and the rest of the application was inadmissible;

(b) by six votes to one, that there had been a violation of art.3;

(c) unanimously, that there had been a violation of art.5(3);

(d) unanimously, that there had been a violation of art.6(1) and (3)(c);

(e) unanimously, that there was no need to examine the complaint under art.6(1) and (3)(d);

(f) by six votes to one, that there had been a violation of art.10 on account of the applicants' criminal prosecution;

(g) unanimously, that there had been a violation of art.10 in respect of the first and second applicants on account of the declaration that the video material available on the internet was extremist and the banning of it;

(h) unanimously, that the state was to pay each of the applicants a sum in respect of non-pecuniary damage, costs and expenses;

(i) unanimously, that the remainder of the applicants' claim for just satisfaction should be dismissed.

1. Inhuman treatment during transfer and in court (art.3)

H5 The applicants were transported to and from the court in vehicles which had individual compartments ranging from 0.37 to 0.49m², with the common compartments in those vans providing less than 1m² per person. The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment had found that individual compartments measuring 0.4, 0.5 or even 0.8m² to be unsuitable for transporting a person, no matter how short the journey. The applicants were required to endure the cramped conditions twice a day, for over one month, with the time in transit varying between 35 minutes to four hours and 20 minutes. The conditions of the applicants' transport to and from the trial hearings exceeded the minimum level of severity and amounted to inhuman and degrading treatment in breach of art.3. [135]–[139]

H6 While the placement of defendants behind glass partitions or in glass cabins does not in and of itself involve an element of humiliation sufficient to reach the

minimum level of severity, that level could be attained if the circumstances of the applicants' confinement, taken as a whole, would cause them distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. During the trial, the applicants were kept in a glass dock, surrounded by police, a police dog and court ushers who were facing the applicants. While there was insufficient evidence to verify the applicants' claim that they were denied adequate personal space while in the glass dock, the applicants must have felt intimidation and anxiety at being so closely observed throughout the hearings by armed police officers and court ushers. Further, those individuals separated the applicants from their lawyers' desk. In those circumstances, and given the failure of the state to provide an explanation for the need for such security measures, the conditions in the courtroom during the applicants' trial attained the minimum level of severity and amounted to degrading treatment in breach of art.3. [143]–[150]

2. Pre-trial detention (art.5(3))

H7 The applicants were each detained for over five months prior to their trial. The domestic courts failed to address the specific facts of the applicants' case and they did not consider any alternative preventative measures. The reasons given by the domestic courts for authorising and extending the applicants' detention, while relevant, were not sufficient to justify the applicants' being remanded in custody for over five months and there had thus been a violation of art.5(3). [158]–[159]

3. Right to defend oneself (art.6)

H8 An accused's right to communicate with their lawyer without the risk of being overheard by a third party was one of the basic requirements of a fair trial in a democratic society. Without that protection, legal assistance would lose much of its usefulness. The dock in which the applicants were kept during the trial was surrounded by police officers and court ushers who kept the applicants under close observation. On one side they also separated the dock from the applicants' lawyers' desk. The applicants could speak with their lawyers only through a small window which was 1m off the ground and was in close proximity to the police officers and court ushers. The use of this security installation was not warranted by any specific security risks. The trial court did not recognise the impact of the courtroom arrangements on the applicants' defence rights and did not take any measures to compensate for those limitations. These arrangements must have adversely affected the fairness of the proceedings as a whole. In those circumstances, the applicants' rights to participate effectively in the trial court proceedings and to receive practical and effective legal assistance were restricted and those restrictions were neither necessary nor proportionate. The criminal proceedings were, thus, conducted in violation of art.6(1) and (3)(c). That finding rendered it unnecessary to address the other aspects of the applicants' complaint under art.6. [167]–[173]

4. Freedom of expression—the criminal proceedings (art.10)

H9 The applicants' performance in Christ the Saviour Cathedral constituted a mix of conduct and verbal expression and amounted to a form of artistic and political expression covered by art.10. The criminal proceedings against the applicants, which resulted in prison sentences, amounted to an interference with that right.

The interference pursued the legitimate aim of protecting the rights of others. While there may have been a question as to whether that interference was "prescribed by law", the applicants' grievances fell to be examined from the point of view of the proportionality of the interference and the question of whether the interference was "prescribed by law" was left open. [202]–[210]

H10 For the interference to be proportionate, the reasons adduced by the national authorities had to be relevant and sufficient. Given that the applicants had been sentenced to terms of imprisonment for non-violent conduct, the authorities' reasons had to be examined with particular scrutiny. The applicants had sought to draw the attention of the public and the state's Orthodox Church to their disapproval of the political situation in the state. Those were topics of public interest. The applicants' actions did not disrupt any religious services, nor did they cause any injuries to people inside the cathedral or any damage to property. In convicting the applicants of hooliganism motivated by religious hatred and enmity, the domestic courts did not consider the lyrics of the song performed by the applicants. Rather, the applicants' convictions were based primarily on their conduct, namely their being dressed in bright clothes, wearing balaclavas, making "brusque movements" and using obscene language, all of which did not respect the canons of the Orthodox Church. It was not possible to discern any element in the domestic courts' analysis which would allow a description of the applicants' conduct as incitement of religious hatred. The applicants' actions neither contained elements of violence, nor stirred up or justified violence, hatred or intolerance of believers. While certain reactions to the applicants' actions might have been warranted by the demands of protecting the rights of others on account of the breach of the rules of conduct in a religious institution, the domestic courts failed to adduce relevant and sufficient reasons to justify the criminal convictions and prison sentences imposed on the applicants and the sanctions were thus not proportionate to the legitimate aim pursued. There had accordingly been a violation of art.10. [212]–[230]

5. Freedom of expression—classification and banning of videos (art.10)

H11 The first and second applicant were still in prison when the proceedings concerning the classification and banning of the websites showing footage of the applicants' performances were heard by the domestic authorities. Domestic law did not make provision for notification to the authors, publishers or owners of the material of such proceedings. While, as a general rule, the six-month time limit with respect to exhaustion of domestic remedies runs from the date of the final decision by the domestic authorities, where no effective remedy is available, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on the applicant. The domestic courts had refused to consider the third applicant's appeal against the classification and banning order and there was no evidence that a different outcome would be reached if the first and second applicant lodged similar appeals. The first and second applicant were accordingly not required to lodge appeals akin to the third applicant's with the domestic courts before complaining to the Court. Having lodged their complaint with the Court within six months of the decision of the state's appellate court which had finally settled the matter, the first and second applicants had complied with the requirements of art.35(1). [241]–[249]

H12 There was no dispute that declaring the video recordings of the applicants' performances as "extremist" and banning access to them amounted to an interference with the first and second applicants' right to freedom of expression under art.10. While there was dispute as to whether the interference was "prescribed by law" within the meaning of art.10(2), the applicants' grievances fell to be examined from the point of view of the proportionality of the interference and the question of whether the interference was "prescribed by law" was left open. The interference could be considered as having pursued the legitimate aims of protecting the morals and rights of others. [251]–[259]

H13 There is little scope under art.10(2) for restrictions on political speech or debate on questions of public interest. Where the views expressed do not comprise incitements to violence, the state must not restrict the right of the general public to be informed of them, even on the basis of the aims set out in art.10(2). The domestic court's decision with respect to the nature of the applicants' performance was deficient for several reasons. First, it was not the court that made the crucial legal findings as to the extremist nature of the video material but linguistic experts. The domestic courts failed to assess the expert report and merely endorsed its conclusions. That situation was unacceptable since all legal matters must be resolved exclusively by the courts. Secondly, the domestic court made no attempt to conduct its own analysis of the video material. It did not specify which aspects of the videos were problematic so as to bring them within the scope of the relevant domestic legislation. The virtual absence of reasoning by the domestic court made it impossible to grasp the rationale behind the interference and there was no evidence that the domestic court had applied standards which were in conformity with the principles embodied in art.10(2) or had based itself on an acceptable assessment of the relevant facts. The domestic court accordingly failed to provide relevant and sufficient reasons for the interference with the first and second applicants' rights under art.10. [260]–[264]

H14 Furthermore, the first and second applicant were unable to participate in the proceedings concerning the classification and banning of the online content as domestic law did not provide for concerned parties to participate in such proceedings. They were not informed of the proceedings and the third applicant's application to join the proceedings was dismissed. They were, thus, unable to contest the findings of the expert report relied upon by the domestic court. A domestic court can never be in a position to provide relevant and sufficient reasons for an interference with the rights guaranteed by art.10 without some form of judicial review based on a weighing up of the arguments put forward by the public authority and those of the interested party. [265]–[267]

H15 Given the lack of sufficient reasons by the domestic courts and the failure to ensure the participation of the first and second applicants, declaring that the applicants' videos were extremist and banning access to them did not meet a pressing social need and was disproportionate to the legitimate aim invoked. The inference was not necessary in a democratic society and there had been a violation of art.10. [268]–[269]

H16 **The following cases are referred to in the Court's judgment:**
Achour v France (2007) 45 E.H.R.R. 2
Ananyev v Russia (2012) 55 E.H.R.R. 18
Appleby v United Kingdom (2003) 37 E.H.R.R. 38

Castells v Spain (1992) 14 E.H.R.R. 445
Ceylan v Turkey (2000) 30 E.H.R.R. 73
Chauvy v France (2005) 41 E.H.R.R. 29
Cumpănă v Romania (2005) 41 E.H.R.R. 14
Delfi AS v Estonia (2016) 62 E.H.R.R. 6
DH v Czech Republic (2008) 47 E.H.R.R. 3
Ekin Association v France (2002) 35 E.H.R.R. 35
El-Masri v Macedonia (2013) 57 E.H.R.R. 25
Feldek v Slovakia (2000) 30 E.H.R.R. CD291
Fressoz v France (2001) 31 E.H.R.R. 2
Gawęda v Poland (2004) 39 E.H.R.R. 4
Glasenapp v Germany (1987) 9 E.H.R.R. 25
Gündüz v Turkey (2005) 41 E.H.R.R. 5
Handyside v United Kingdom (1979-80) 1 E.H.R.R. 737
Harutyunyan v Armenia (2012) 55 E.H.R.R. 12
Hizb ut-Tahrir v Germany (2012) 55 E.H.R.R. SE12
İA v Turkey (2007) 45 E.H.R.R. 30
İlhan v Turkey (2002) 34 E.H.R.R. 36
Incal v Turkey (2000) 29 E.H.R.R. 449
Jalloh v Germany (2007) 44 E.H.R.R. 32
Jersild v Denmark (1995) 19 E.H.R.R. 1
Kalashnikov v Russia (2003) 36 E.H.R.R. 34
Khudoyorov v Russia (2007) 45 E.H.R.R. 5
Kopp v Switzerland (1999) 27 E.H.R.R. 91
Kosiek v Germany (1987) 9 E.H.R.R. 328
Kruslin v France (1990) 12 E.H.R.R. 547
Kudła v Poland (2002) 35 E.H.R.R. 11
Labita v Italy (2008) 46 E.H.R.R. 50
Lindon v France (2008) 46 E.H.R.R. 35
Maestri v Italy (2004) 39 E.H.R.R. 38
Mondragon v Spain (2015) 60 E.H.R.R. 7
Morice v France (2016) 62 E.H.R.R. 1
Müller v Switzerland (1991) 13 E.H.R.R. 212
Norwood v United Kingdom (2005) 40 E.H.R.R. SE11
Oberschlick v Austria (1995) 19 E.H.R.R. 389
Oliari v Italy (2017) 65 E.H.R.R. 26
Otto-Preminger Institut v Austria (1995) 19 E.H.R.R. 34
Özgür Gündem v Turkey (2001) 31 E.H.R.R. 49
Perinçek v Switzerland (2016) 63 E.H.R.R. 6
Perna v Italy (2004) 39 E.H.R.R. 28
Rai v United Kingdom (1995) 19 E.H.R.R. CD93
Skałka v Poland (2004) 38 E.H.R.R. 1
Steel v United Kingdom (2005) 41 E.H.R.R. 22
Steel v United Kingdom (1999) 28 E.H.R.R. 603
Stoll v Switzerland (2008) 47 E.H.R.R. 59
Tammer v Estonia (2003) 37 E.H.R.R. 43
Tatár v Hungary (2014) 59 E.H.R.R. 8
Tyrer v United Kingdom (1979-80) 2 E.H.R.R. 1
Van Mechelen v Netherlands (1998) 25 E.H.R.R. 647

Vejdeland v Sweden (2014) 58 E.H.R.R. 15
VgT Verein gegen Tierfabriken v Switzerland (2002) 34 E.H.R.R. 4
Wingrove v United Kingdom (1997) 24 E.H.R.R. 1
Yağız v Turkey (2014) 59 E.H.R.R. 4
Zana v Turkey (1999) 27 E.H.R.R. 667
Dmitriyevskiy v Russia (42168/06) 3 October 2017
Sinitsyn v Russia (39879/12 and 5956/13) 30 August 2017
Terentyev v Russia (25147/09) 26 January 2017
Bagdonavicius v Russia (19841/06) 11 October 2016
Yaroslav Belousov v Russia (2653/13 and 60980/14) 4 October 2016
Reichman v France (50147/11) 12 July 2016
Bilbija v Croatia (62870/13) 12 January 2016
M'Bala M'Bala v France (25239/13) 20 October 2015
Dilipak v Turkey (29680/05) 15 September 2015
Shvydka v Ukraine (17888/12) 30 October 2014
Murat Vural v Turkey (9540/07) 21 October 2014
Svinarenko v Russia (32541/08 and 43441/08) 17 July 2014
MS v Russia (8589/08) 10 July 2014
Taranenko v Russia (19554/05) 15 May 2014
Yedinoe Dukhovnoye Upravleniye Musulman Krasnoyarskogo Kraya v Russia (28621/11) 27 November 2013
Kummer v Czech Republic (32133/11) 25 July 2013
Vona v Hungary (35943/10) 9 July 2013
MS v Croatia (36337/10) 25 April 2013
Kasymakhunov and Saybatalov (26261/05 and 26377/06) 14 March 2013
Faber v Hungary (40721/08) 24 July 2012
Centro Europa 7 Srl v Italy (38433/09) 7 June 2012
Idalov v Russia (5826/03) 22 May 2012
Huhtamaki v Finland (54468/09) 6 March 2012
Samoylov v Russia (57541/09) 24 January 2012
Sakhnovskiy v Russia (21272/03) 2 November 2010
Logvinenko v Russia (44511/04) 17 June 2010
Le Pen v France (18788/09) 20 April 2010
Feret v Belgium (15615/07) 16 July 2009
Makarov v Russia (15217/07) 12 March 2009
Barraco v France (31684/05) 5 March 2009
Saygılı and Falakaoğlu v Turkey (38991/02) 17 February 2009
Women On Waves v Portugal (31276/05) 3 February 2009
Ramishvili v Georgia (1704/06) 27 January 2009
Balsyte- Lideikiene v Lithuania (72596/01) 4 November 2008
Starokadomskiy v Russia (42239/02) 31 July 2008
Soulas v France (15948/03) 10 July 2008
Belov v Russia (22053/02) 3 July 2008
Shukhardin v Russia (65734/01) 28 June 2007
Pshevecherskiy v Russia (28957/02) 24 May 2007
Ivanov v Russia (35222/04) 20 February 2007
Falakaoğlu and Saygılı v Turkey (22147/02 and 24972/03) 23 January 2007
Kommersant Moldovy v Moldova (41827/02) 9 January 2007
Erbakan v Turkey (59405/00) 6 July 2006

Mamedova v Russia (7064/05) 1 June 2006
Aydın Tatlav v Turkey (50692/99) 2 May 2006
Brasilier v France (71343/01) 11 April 2006
Sarban v Moldova (3456/05) 4 October 2005
Pakdemirli v Turkey (35839/97) 22 February 2005
WP v Poland (42264/98) 2 September 2004
Seurot v France (57383/00) 18 May 2004
Belchev v Bulgaria (39270/98) 8 April 2004
Seher Karataş v Turkey (33179/96) 9 July 2002
Colombani v France (51279/99) 25 June 2002
Coeme v Belgium (32492/96) 22 June 2000
Karataş v Turkey (23168/94) 8 July 1999
Surek v Turkey (26682/95) 8 July 1999
Cantoni v France (17862/91) 15 November 1996

H17 **The following cases are referred to in the Partly Dissenting Opinion of Judge Elósegui:**
Gündüz v Turkey (2005) 41 E.H.R.R. 5
Jersild v Denmark (1995) 19 E.H.R.R. 1
Von Hannover v Germany (2012) 55 E.H.R.R. 15
Stomakhin v Russia (52273/07) 9 May 2018
Krupko v Russia (26587/07) 26 June 2014
Paturel v France (54968/00) 22 December 2005

THE FACTS

I. The circumstances of the case

5 The first applicant, Ms Mariya Vladimirovna Alekhina, was born in 1988. The second applicant, Ms Nadezhda Andreyevna Tolokonnikova, was born in 1989. The third applicant, Ms Yekaterina Stanislavovna Samutsevich, was born in 1982. The applicants live in Moscow.

A. Background of the case

6 The three applicants are members of a Russian feminist punk band, Pussy Riot. The applicants founded Pussy Riot in late 2011. The group carried out a series of impromptu performances of their songs *Release the Cobblestones*, *Kropotkin Vodka*, *Death to Prison*, *Freedom to Protest* and *Putin Wet Himself* in various public areas in Moscow, such as a subway station, the roof of a tram, on top of a booth and in a shop window.

7 According to the applicants, their actions were a response to the ongoing political process in Russia and the highly critical opinion which representatives of the Russian Orthodox Church, including its leader Patriarch Kirill, had expressed about large-scale street protests in Moscow and many other Russian cities against the results of the parliamentary elections of December 2011. They were also protesting against the participation of Vladimir Putin in the presidential election that was due in early March 2012.

8 The applicants argued that their songs contained "clear and strongly worded political messages critical of the government and expressing support for feminism, the rights of minorities and the ongoing political protests". The group performed in disguise, with its members wearing brightly coloured balaclavas and dresses, in various public places selected to enhance their message.

9 Following a performance of *Release the Cobblestones* in October 2011, several Pussy Riot members, including the second and third applicants, were arrested and fined under art.20.2 of the Code of Administrative Offences for organising and holding an unauthorised assembly. On 14 December 2011 three members of the group performed on the roof of a building at temporary detention facility No.1 in Moscow. The performance was allegedly held in support of protesters who had been arrested and placed in that facility for taking part in street protests in Moscow on 5 December 2011. The band performed *Death to Prison*, *Freedom to Protest* and hung a banner saying "Freedom to Protest" on it from the roof of the building. No attempt to arrest the band was made. A video of the performance was published on the internet.

10 On 20 January 2012 eight members of the band held a performance entitled *Riot in Russia* at Moscow's Red Square. The group sang a song called *Putin Wet Himself*. All eight members of the band were arrested and fined under art.20.2 of the Code of Administrative Offences, the same as before.

11 In response to the public support and endorsement provided by Patriarch Kirill to Mr Putin, members of Pussy Riot wrote a protest song called *Punk Prayer—Virgin Mary, Drive Putin Away*. A translation of the lyrics is as follows:

> "Virgin Mary, Mother of God, drive Putin away
> Drive Putin away, drive Putin away
> Black robe, golden epaulettes
> Parishioners crawl to bow
> The phantom of liberty is in heaven
> Gay pride sent to Siberia in chains
> The head of the KGB, their chief saint,
> Leads protesters to prison under escort
> So as not to offend His Holiness
> Women must give birth and love
> Shit, shit, holy shit!
> Shit, shit, holy shit!
> Virgin Mary, Mother of God, become a feminist
> Become a feminist, become a feminist
> The Church's praise of rotten dictators
> The cross-bearer procession of black limousines
> A teacher-preacher will meet you at school
> Go to class—bring him cash!
> Patriarch Gundyaev believes in Putin
> Bitch, better believe in God instead
> The girdle of the Virgin can't replace rallies
> Mary, Mother of God, is with us in protest!
> Virgin Mary, Mother of God, drive Putin away
> Drive Putin away, drive Putin away."

12 On 18 February 2012 a performance of the song was carried out at the Epiphany Cathedral in the district of Yelokhovo in Moscow. The applicants and two other members of the band wearing brightly coloured balaclavas and dresses entered the cathedral, set up an amplifier, a microphone and a lamp for better lighting and performed the song while dancing. The performance was recorded on video. No complaint to the police was made in relation to that performance.

B. Performance in Moscow's Christ the Saviour Cathedral

13 On 21 February 2012 five members of the band, including the three applicants, attempted to perform *Punk Prayer—Virgin Mary, Drive Putin Away* from the altar of Moscow's Christ the Saviour Cathedral. No service was taking place, although a number of persons were inside the Cathedral. The band had invited journalists and media to the performance to gain publicity. The attempt was unsuccessful as cathedral guards quickly forced the band out, with the performance only lasting slightly over a minute.

14 The events unfolded as follows. The five members of the band, dressed in overcoats and carrying bags or backpacks, stepped over a low railing and ran up to the podium in front of the altar (the *soleas*). After reaching the steps, the band removed their coats, showing their characteristic brightly coloured dresses underneath. They also put on coloured balaclavas. They placed their bags on the floor and started taking things out of them. At that moment the video recorded someone calling out for security and a security guard then ran up the steps to the band. The band member dressed in white, the third applicant, pulled a guitar from her bag and tried to put the strap over her shoulder. Another guard ran up to the second applicant and started pulling her away. Moments later the band started singing the song without any musical accompaniment. The guard let go of the second applicant and grabbed the third applicant by the arm, including her guitar, at the same time calling on his radio for help. The radio fell out of his hand but he did not let go of the third applicant and pushed her down the steps. While the third applicant was being pushed away by the guard, three of the other band members continued singing and dancing without music. Words such as "holy shit", "congregation" and "in heaven" were audible on the video recording. At the same time the second applicant was trying to set up a microphone and a music player. She managed to turn the player on and music started playing. A uniformed security guard grabbed the player and took it away. At the same time four band members, including the first two applicants, continued singing and dancing on the podium, kicking their legs in the air and throwing their arms around. Two cathedral employees grabbed the first applicant and another band member dressed in pink. She ran away from the security guard, while the second applicant kneeled down and started making the sign of the cross and praying. The band continued singing, kneeled down and started crossing themselves and praying.

15 Cathedral staff members escorted the band away from the altar. The video-recording showed that the last band member left the altar one minute and 35 seconds after the beginning of the performance. The guards accompanied the band to the exit of the cathedral, making no attempt to stop them or the journalists from leaving.

16 A video containing footage of the band's performances of the song, both at the Epiphany Cathedral in Yelokhovo and at Christ the Saviour Cathedral, was uploaded to YouTube.

C. Criminal proceedings against the applicants

1. Institution of criminal proceedings

17 On 21 February 2012 a deputy director general of private security company Kolokol-A, Mr O, complained to the head of the Khamovniki district police in Moscow of "a violation of public order" by a group of unidentified people in Christ the Saviour Cathedral. Mr O stated that at 11.20 that day unidentified individuals had screamed and danced on "the premises of the cathedral", thus "insulting the feelings of members of the church". The individuals had not responded to reprimands by churchgoers, clergymen or guards.

18 A similar complaint was lodged three days later by the acting director of the Christ the Saviour Cathedral Fund, Mr P. He called the applicants' conduct disorderly, extremist and insulting to Orthodox churchgoers and the Russian Orthodox Church. Mr P also stated that the band's actions had been aimed at stirring up religious intolerance and hatred. Printouts of photographs of the band's performances and the full lyrics of *Punk Prayer—Virgin Mary, Drive Putin Away*, downloaded from the group's website, were attached to the complaint.

19 On 24 February 2012 the police instituted criminal proceedings. Cathedral staff members and guards were questioned. They stated that their religious feelings had been offended by the incident and that they could identify three of the band members as they had taken off their balaclavas during the performance.

2. Detention matters

20 On 3 March 2012 the second applicant was arrested. The first applicant was apprehended the following day. They were charged with the aggravated offence of hooliganism motivated by religious hatred.

The third applicant was also stopped by the police in the street and taken in for questioning on 3 March 2012. She had no identification documents and did not provide her real name, instead identifying herself as Ms Irina Vladimirovna Loktina. Her mobile telephone and a computer flash drive were seized and she was released after the interview.

21 On 5 March 2012 the Taganskiy District Court of Moscow issued separate detention orders to remand the first two applicants in custody until 24 April 2012. In terms of the circumstances precluding the application of a less stringent measure to the applicants, the court cited the gravity of the charges, the severity of the penalty they faced, the "cynicism and insolence of the crime" the applicants were charged with, their choice not to live at their places of permanent residence, their lack of permanent "legal" sources of income, the first applicant's failure to care for her child and the second applicant's right to move to and reside in Canada. It also cited the fact that certain members of Pussy Riot were still unidentified or on the run.

22 The detention orders became final on 14 March 2012, when the Moscow City Court upheld them on appeal, fully endorsing the district court's reasoning.

23 The third applicant was placed in custody on 16 March 2012 by the Taganskiy District Court after finally being identified by the police and charged with the same criminal offence as the first two applicants. The district court found that the risks of the third applicant absconding, reoffending and perverting the course of justice warranted her detention. Those risks were linked by the court to the following considerations: the gravity of the charges, the severity of the penalty she faced, her unwillingness to identify other members of the band, her lack of a permanent legal source of income, and her use of an assumed identity while communicating with the police on previous occasions. The decision was upheld on appeal by the Moscow City Court on 28 March 2012.

24 By three separate detention orders issued on 19 April 2012 the Taganskiy District Court further extended the applicants' detention until 24 June 2012. Citing the grounds it had used to substantiate the need for the applicants' placement in custody, the district court concluded that no new circumstances warranting their release had come to light. It also noted the first applicant's blanket refusal to confess to the offence with which she had been charged or to any other act prohibited by the Russian Criminal Code. It also stated that the applicants' arrests had only been possible due to searches conducted by the Russian police as it had not been possible to find them at their places of permanent residence.

25 On 20 June 2012 the Taganskiy District Court once again extended the applicants' detention, citing the same reasons as in the previous detention orders. On 9 July 2012 the Moscow City Court agreed that it was necessary to continue holding the applicants in custody.

26 In a pre-trial hearing on 20 July 2012 the Khamovnicheskiy District Court of Moscow allowed an application by a prosecutor for a further extension of the applicants' detention, finding that the circumstances which had initially called for their being held on remand had not changed. The applicants were to remain in custody until 12 January 2013. The district court dismissed the arguments the applicants put forward pertaining to their family situation (the first two applicants had young children), the fragile health of the second applicant, the fact that the three applicants had registered their places of residence in Moscow and that the criminal proceedings against them were already at a very advanced stage. The court also refused to accept personal written sureties given by 57 individuals, including famous Russian actors, writers, film producers, journalists, businessmen, singers and politicians.

27 On 22 August 2012 the Moscow City Court upheld the detention order of 20 July 2012, considering it lawful and well-founded.

3. Pre-trial investigation and trial

28 In the meantime, investigators ordered expert opinions to determine whether the video-recording including the performance of *Punk Prayer—Virgin Mary, Drive Putin Away* downloaded from the internet was motivated by religious hatred, whether the performance of the song at the cathedral could therefore amount to incitement of religious hatred, and whether it had been an attack on the religious feelings of Orthodox believers. In the first two reports, commissioned by a state expert bureau and issued on 2 April and 14 May 2012 respectively, five experts answered in the negative to those questions. In particular, the experts concluded that the applicants' actions on 21 February 2012 at Christ the Saviour Cathedral

had not contained any signs of a call or an intention to incite religious hatred or enmity. The experts concluded that the applicants had not been violent or aggressive, had not called for violence in respect of any social or religious group and had not targeted or insulted any religious group.

29 A third expert opinion subsequently requested by the investigators from directly appointed individual experts produced an entirely different response. In a report issued on 23 May 2012 three experts—a professor from the Gorky Institute of World Literature, a professor at the Moscow City Psychological Pedagogical University, and the President of a regional NGO, the Institute of State Confessional Relations and Law—concluded that the performance and video had been motivated by religious hatred, in particular hatred and enmity towards Orthodox believers, and had insulted the religious feelings of such believers.

30 On 20 July 2012 the three applicants were committed to stand trial before the Khamovnicheskiy District Court. The trial was closely followed by national and international media.

31 The trial court dismissed numerous complaints by the applicants related to the negative impact of security measures in place at the courthouse on their right to communicate freely with counsel and to prepare their defence. In particular, in applications to the trial court of 23 July 2012 for time for a confidential meeting with their lawyers, they stated that confidential communication was impossible because of the presence of police officers and court ushers around the dock. The applicants raised the issue again in a similar application on 24 July 2012, which was repeated at a hearing on 30 July 2012.

32 The applicants provided the following description of the hearings. Throughout the trial they were held in an enclosed dock with glass walls and a tight-fitting door, which was commonly known as an "aquarium". There was insufficient ventilation inside the glass dock and it was hard to breathe, given the high summer temperatures. A desk for the applicants' lawyers was installed in front of the dock. There was always high security around the dock, which at times included seven armed police officers and a guard dog. Colour photographs of the courtroom submitted by the applicants show police officers and court ushers surrounding the dock, either behind or close to the defence lawyers' desk. Some photographs show female police officers positioned between the lawyers' desk and the glass dock containing the applicants. The applicants had to use a small window measuring 15×60 cm to communicate with their lawyers, which they had to bend down to use as it was only a metre off the ground. The applicants had to take turns to speak to their lawyers as the window was too small for all three to use it simultaneously. According to the applicants, confidential communication with their defence team was impossible as a police officer always stood nearby monitoring their conversations and any documents which were passed between them. Furthermore, a dog was present in the courtroom, which was at times particularly disturbing as it had barked during the hearings and behaved restlessly.

33 According to the applicants, it was virtually impossible to communicate with their lawyers outside the courtroom as they were taken back to the detention facility at night, when it was too late to be allowed visitors.

34 The lawyers applied several times to the district court for permission to hold confidential meetings with the applicants. The lawyers and applicants also sought an adjournment of the hearings to give the defence an opportunity to consult their

clients in private, either in the courthouse or in the detention facility, but those requests were fruitless.

35 Similarly, the court dismissed applications to call the experts who had issued the three expert reports or to call additional experts, including art historians and specialists in the fields of contemporary art and religious studies, who could have provided opinions on the nature of the performance on 21 February 2012. The defence's challenges to the third expert report issued on 23 May 2012 were also unsuccessful.

4. Conditions of transport to and from the trial hearings

(a) The applicants' account

36 According to the applicants, when there were hearings they were transported from the detention facility to court in a prison van: they were usually transported in a small vehicle when being taken to the courthouse in the morning and in a bigger one when being taken back to the detention facility in the evening. The bigger van consisted of two long sections so men and women could be transported separately. The vans had two or three compartments separated by metal partitions, each designed to accommodate one inmate. The common area of the vans was equipped with benches, while the roof was so low detainees could not stand up. The space in the common compartment of the smaller van was no more than 2m² and was designed for four people, while the space in the bigger van was approximately 5m².

37 According to the applicants, they were transported in single-person compartments to their custody hearings and in common compartments later on. Most of the time the vans were overcrowded, with detainees sitting directly against each other, with squashed up legs and shoulders. The bigger vans transported between 30 and 40 detainees, making a number of stops at various Moscow facilities to pick up detainees. The vans were sometimes so full that there was no place to sit. Smoking was not prohibited but many detainees did so. The second and third applicant had severe headaches as a result of the conditions of transport.

38 The temperature in Moscow at the time of the trial was as high as 30°C, while inside the vans it reached 40°C. The natural ventilation in the single-person compartments was insufficient and the system of forced ventilation was rarely switched on. When it was switched on, it was only for a very short time because of the noise it made and so it was hardly ever used. A fan was switched on during the summer but did not make the conditions of the cramped space any more bearable.

39 The journey to the courthouse usually took two to three hours, but could sometimes last as long as five hours. Detainees were not allowed to use the toilet unless the police van drove past the Moscow City Court, where inmates were allowed to relieve themselves.

40 On the days of court hearings the applicants were woken up at 05.00 or 06.00 to carry out the necessary procedures for leaving the facility and were only taken back to the detention facility late at night. The applicants missed mealtimes at the detention facility because of such early departures and late returns.

41 On leaving the detention facility in the morning they received a lunch box containing four packets of dry biscuits (for a total of eight each), two packets of

dry cereal, one packet of dry soup and two tea bags. However, it was impossible to use the soup and tea bags as hot water was only made available to them five minutes before they were taken out of their cells to the courtroom, which was not enough time to eat.

42 The applicants were forbidden to have drinking water with them during the hearings: requests for short breaks to drink some water and use the toilet were regularly refused, which caused them physical suffering.

43 On 1 August 2012 an ambulance was called twice to the court because the applicants became dizzy and had headaches owing to a lack of food, water, rest and sleep. They were both times found fit for trial.

(b) The Government's account

44 The Government provided the following information concerning the vehicles in which the applicants had been transported to and from the courthouse:

Vehicle	**Area and number of compartments**	**Number of places**
KAMAZ-4308-AZ	2 common compartments 2 single-occupancy compartments	32
GAZ-326041-AZ	1 common compartment 3 single compartments	7
GAZ-2705-ZA	2 common compartments (1.35 sq.m each) 1 single compartment (0.375 sq.m)	9
GAZ-3221-AZ	2 common compartments (1.44 sq.m each) 1 single compartment (0.49 sq.m)	9
GAZ-3309-AZ	2 common compartments 1 single compartment (total area 9.12 sq.m)	25
KAMAZ-OTC-577489-AZ	2 common compartments (4.2 sq.m each) 2 single compartments (0.4 sq.m each)	32
KAVZ-3976-AZ	1 common compartment (5 places) 6 single compartments (total area 6.3 sq.m)	11

45 It appears from the information provided by the Government that between 20 July and 17 August 2012 the applicants were transported between Moscow's SIZO-6 remand prison and the Khamovnicheskiy District Court twice a day for 15 days. The trips lasted between 35 minutes and one hour and 20 minutes. The trips back from the court lasted between 20 minutes and four hours and 20 minutes.

46 According to the Government, the daytime temperature in Moscow in July and August 2012 only reached 30ºC on 7 August 2012 and that, furthermore, the mornings and evenings, when the applicants were transported, were cooler than the temperature at midday. All the vehicles underwent a technical check and were cleaned before departure. They were also disinfected once a week. The passenger compartment had natural ventilation through windows and ventilation panes. The

vehicles were also equipped with a system of forced ventilation. The passenger compartment had artificial lighting in the roof. The Government provided photographs of the vehicles and extracts from the vehicle logs to corroborate their assertion that the number of passengers never exceeded the upper limit on places given in the table in [44] above. People transported in such vehicles could use toilets in courthouses that were on the vehicles' route.

47 The Government submitted that the area at the Khamovnicheskiy District Court where the applicants had been held before the hearings and during breaks consisted of six cells equipped with benches and forced ventilation. A kettle had also been available to them. The Government provided reports by the officers on duty at the Khamovnicheskiy District Court on the dates of the applicants' hearings to corroborate their statement that the applicants had always been provided with a lunch box and boiling water when being transported to court.

5. Conviction and appeal

48 On 17 August 2012 the Khamovnicheskiy District Court found the three applicants guilty under art.213(2) of the Russian Criminal Code of hooliganism for reasons of religious hatred and enmity and for reasons of hatred towards a particular social group. It found that they had committed the crime in a group, acting with premeditation and in concert, and sentenced each of them to two years' imprisonment. The trial court held that the applicants' choice of venue and their apparent disregard for the cathedral's rules of conduct had demonstrated their enmity towards the feelings of Orthodox believers, and that the religious feelings of those present in the cathedral had therefore been offended. While also taking into account the video-recording of the song *Punk Prayer—Virgin Mary, Drive Putin Away*, the district court rejected the applicants' arguments that their performance had been politically rather than religiously motivated. It stated that the applicants had not made any political statements during their performance on 21 February 2012.

49 The district court based its findings on the testimony of a number of witnesses, including the cathedral employees and churchgoers present during the performance on 21 February 2012 and others who, while not witnesses to the actual performance, had watched the video of *Punk Prayer—Virgin Mary, Drive Putin Away* on the internet or had been present at the applicants' performance at the Epiphany Cathedral in Yelokhovo.[1] The witnesses provided a description of the events on 21 February 2012 or of the video and attested to having been insulted by the applicants' actions. In addition, the district court referred to statements by representatives of various religions about the insulting nature of the applicants' performance.

50 The district court also relied on the expert report issued on 23 May 2012, rejecting the first two expert reports for the following reasons:

> "… [the expert reports issued on 2 April and 14 May 2012] cannot be used by the court as the basis for conviction as those reports were received in violation of the criminal procedural law as they relate to an examination of the circumstances of the case in light of the provisions of Article 282 of the

[1] See [12] above.

Russian Criminal Code—incitement to hatred, enmity or disparagement, as can be seen from the questions put [to the experts] and the answers given by them.

Moreover, the expert opinions do not fulfil the requirements of Articles 201 and 204 of the Russian Code of Criminal Procedure. The reports lack any reference to the methods used during the examinations. The experts also exceeded the limits of the questions put before them; they gave answers to questions which were not mentioned in the [investigators'] decisions ordering the expert examinations. The reports do not provide a linguistic and psychological analysis of the lyrics of the song performed in Christ the Saviour Cathedral, and the experts did not carry out a sentiment analysis and psychological assessment of the song's lyrics in relation to the place where the crime had been committed (an Orthodox church). [The experts] examined the lyrics of the song selectively. Given the lack of a linguistic and psychological analysis of the lyrics of the song performed in Christ the Saviour Cathedral, the experts made an unfounded and poorly reasoned conclusion, which runs counter to the testimony of the eyewitnesses, the victims of the crime, who expressed an extremely negative view of the events in Christ the Saviour Cathedral and of the video-recording."

51 On the other hand, the district court found the expert report of 23 May 2012 to be "detailed, well founded and scientifically reasoned". The experts' conclusions were seen by the court as substantiated and not open to dispute, given that the information received from the experts corresponded to the information received from other sources, such as the victims and the witness statements. The court also stressed that it would not call the experts or authorise an additional expert examination as it had no doubts about the conclusions made in the report in question.

52 The district court's main reasons for finding that the applicants had committed hooliganism motivated by religious hatred were as follows:

"The court cannot accept the defence's argument that the defendants' actions were not motivated by religious hatred and enmity or hatred against a social group.

The court finds that the defendants' actions were motivated by religious hatred for the following reasons.

The defendants present themselves as supporters of feminism, a movement for equality between women and men.

…

At the present time people belonging to the feminist movement fight for equality of the sexes in political, family and sexual relations. Belonging to the feminist movement is not unlawful and is not a criminal offence in the Russian Federation. A number of religions, such as the Orthodox Church, Catholicism and Islam, have a religious, dogmatic basis incompatible with the ideas of feminism. And while feminism is not a religious theory, its adherents interfere with various areas of social relations such as morality, rules of decency, family relations, sexual relations, including those of a non-traditional nature, which were historically constructed on the basis of religious views.

In the modern world, relations between nations and nationalities and between different religions must be built on the principles of mutual respect and

equality. The idea that one is superior and the others inferior, that a different ideology, social group or religion are unacceptable, gives grounds for mutual enmity, hatred and personal conflicts.

The defendants' hatred and enmity were demonstrated in the court hearings, as was seen from their reactions, emotions and responses in the course of the examination of the victims and witnesses.

…

It can be seen from the statements of the victims, witnesses, defendants and the material evidence that Pussy Riot's performances are carried out by way of a sudden appearance by the group [in public places] with the band dressed in brightly coloured clothes and wearing balaclavas to cover [their] faces. Members of the group make brusque movements with their heads, arms and legs, accompanying them with obscene language and other words of an insulting nature. That behaviour does not respect the canons of the Orthodox Church, irrespective of whether it takes place in a cathedral or outside its walls. Representatives of other religions and people who do not consider themselves believers also find such behaviour unacceptable. Pussy Riot's 'performances' outside religious buildings, although containing signs of clear disrespect for society motivated by religious hatred and enmity and hatred of a specific social group, are not associated with a specific object and therefore amount to a violation of moral standards or an offence. However, placing such a performance within an Orthodox cathedral changes the object of the crime. It represents in that case a mixture of relations between people, rules of conduct established by legal acts, morality, customs, traditions which guarantee a socially tranquil environment and the protection of individuals in various spheres of their lives, as well as the proper functioning of the State and public institutions. Violating the internal regulations of Christ the Saviour Cathedral was merely a way of showing disrespect for society, motivated by religious hatred and enmity and hatred towards a social group.

The court concludes that [the applicants'] actions … offend and insult the feelings of a large group of people in the present case in view of their connection with religion, [their actions] incite feelings of hatred and enmity and therefore violate the constitutional basis of the State.

[The applicants'] intention to incite religious hatred and enmity and hatred towards a specific social group in view of its connection with religion, in public, is confirmed by the following facts.

A so-called 'punk prayer' was carried out in a public place—Christ the Saviour Cathedral. [The applicants] knowingly envisaged a negative response to that performance on the part of society as they had prepared bright, open dresses and balaclavas in advance and on 21 February 2012 publicly and in an organised group carried out their actions, which were motivated by religious hatred and enmity and hatred towards a social group in view of its connection with religion.

…

Given the particular circumstances of the criminal offence, its nature, the division of the roles, the actions of the accomplices, the time, place and method of committing the offence of hooliganism, that is to say a gross violation of public order committed by a group of people acting in premeditated fashion and in concert, and which demonstrated an explicit lack of respect for society

motivated by religious hatred and enmity and hatred towards a social group, the court is convinced that [the applicants] were correctly charged with the [offence] and that their guilt in committing [it] has been proven during the trial.

[The applicants'] actions are an obvious and gross violation of generally accepted standards and rules of conduct, given the content of their actions and the place where they were carried out. The defendants violated the generally accepted rules and standards of conduct accepted as the basis of public order in Christ the Saviour Cathedral. The use of offensive language in public in the vicinity of Orthodox icons and objects of worship can only be characterised as a violation of public order, given the place where those actions were carried out. In fact, there was mockery and humiliation of the people present in the Cathedral, a violation of social tranquillity, unauthorised and wilful entry into the cathedral's ambon and soleas, accompanied by intentional, stubborn and a lengthy period of disobedience to the reprimands and orders of the guards and churchgoers.

…

The court dismisses [the applicants'] arguments that they had no intention to incite religious hatred or enmity or to offend the dignity of a group of people because of their religious beliefs, as those arguments were refuted by the evidence in the case. …

Although the members of Pussy Riot cite political motives for their actions, arguing that they have a positive attitude to the Orthodox religion and that their performance was directed against the uniting of Church and State, their words are refuted by their actions, lyrics and articles found [in the course of the investigation].

The defendants' arguments that their actions in the cathedral were not motivated by hatred or enmity towards Orthodox churchgoers and Christianity, but were governed by political considerations, are also unsubstantiated because, as can be seen from the victims' statements, no political claims were made and no names of political leaders were mentioned during the defendants' acts of disorder in the Cathedral."

53 Citing the results of psychological expert examinations commissioned by investigators, the district court noted that the three applicants suffered from mixed personality disorders, which did not affect their understanding of the criminal nature of the act they had carried out in the cathedral and did not call for psychiatric treatment. The psychiatric diagnosis was made on the basis of the applicants' active social position, their reliance on their personal experience when taking decisions, their determination to defend social values, the "peculiarity" of their interests, their stubbornness in defending their opinion, their confidence and their disregard for social rules and standards.

54 As regards the punishment to be imposed on the applicants, the district court ruled as follows:

"Taking into account the gravity and social danger of the offence, the circumstances in which it was committed, the object and reasons for committing the offence, and [the applicants'] attitude towards their acts, the court believes that the goals of punishment, such as the restoration of social

justice, the correction of people who have been convicted and the prevention of the commission of new offences, can only be achieved by sentencing them to prison and their serving the sentence …"

55 The two-year prison sentence was to be calculated from the date of arrest of each of the applicants, that is from 3, 4 and 15 March 2012 respectively.

56 On 28 August 2012 the applicants' lawyers lodged an appeal on behalf of the three applicants and on 30 August 2012 the first applicant submitted an additional statement to her appeal. She stated, in particular, that throughout the trial she and the other accused had not been able to have confidential consultations with their lawyers.

57 On 10 October 2012, the Moscow City Court decided on the appeals by upholding the judgment of 17 August 2012 as far as it concerned the first two applicants, but amended it in respect of the third applicant. Given the third applicant's "role in the criminal offence [and] her attitude towards the events [of 21 February 2012]", the City Court suspended her sentence, gave her two years' probation and released her in the courtroom. The Moscow City Court did not address the issue of confidential consultations between the applicants and their lawyers.

6. The applicants' amnesty

58 On 23 December 2013 the first and second applicants were released from serving their sentence under a general amnesty issued by the Duma on 18 December 2013, the Amnesty on the Twentieth Anniversary of the Adoption of the Constitution of the Russian Federation.

59 On 9 January 2014 the third applicant was also amnestied.

7. Supervisory review proceedings

60 On 8 February 2013 the Ombudsman, on behalf of the second applicant, applied to the Presidium of the Moscow City Court for supervisory review of the conviction. He argued, in particular, that the applicants' actions had not amounted to hooliganism as they could not be regarded as inciting hatred or enmity. Breaches of the normal functioning of places of worship, insults to religious feelings or the profanation of religious objects were administrative offences punishable under art.5.26 of the Code of Administrative Offences.

61 On 15 March 2013 Judge B of the Moscow City Court refused to institute supervisory review proceedings.

62 In a letter of 28 May 2013 the President of the Moscow City Court refused to review the decision of 15 March 2013.

63 On 8 November 2013 the Ombudsman submitted an application for supervisory review to the Supreme Court. As well as the arguments set out in the previous application, he added that public criticism of officials, including heads of state, the government and the heads of religious communities, was a way of exercising the constitutional right to freedom of speech.

64 On an unspecified date the first and second applicants' representatives also applied for supervisory review to the Supreme Court on their behalf. They argued, inter alia, that the applicants' actions had amounted to political criticism, not incitement to hatred or enmity on religious grounds or towards any social group.

Furthermore, they pointed to a number of alleged breaches of criminal procedure in the course of the trial.

65 On 10 December 2014 the Supreme Court instituted supervisory review proceedings upon the above applications.

66 On unspecified date the third applicant also applied for supervisory review of her conviction.

67 On 17 December 2014 the Supreme Court instituted supervisory review proceedings upon her application.

68 On an unspecified date the case was transferred to the Presidium of the Moscow City Court for supervisory review.

69 On 4 April 2014 the Presidium of the Moscow City Court reviewed the case. It upheld the findings that the applicants' actions had amounted to incitement to religious hatred or enmity and dismissed the arguments concerning breaches of criminal procedure at the trial. At the same time, it removed the reference to "hatred towards a particular social group" from the judgment as it had not been established which social group had been concerned. It reduced each applicant's sentence to one year and 11 months' imprisonment.

D. Proceedings concerning declaring video-recordings of the applicants' performances as "extremist"

70 The group uploaded a video of their performance of *Punk Prayer—Virgin Mary, Drive Putin Away* at the Epiphany Cathedral in Yelokhovo and at Christ the Saviour Cathedral to their website *http://pussy-riot.livejournal.com* [Accessed 18 February 2019]. It was also republished by many websites.

71 On 26 September 2012 a State Duma member, Mr S, asked the Prosecutor General of the Russian Federation to study the video of the group's performance, to stop its dissemination and to ban the websites which had published it.

72 As a result of that assessment, on 2 November 2012 the Zamoskvoretskiy Inter-District Prosecutor applied to the Zamoskvoretskiy District Court of Moscow for a declaration that the internet pages *http://www.pussy-riot.livejournal.com/8459.html*, *http://www.pussy-riot.livejournal.com/5164.html*, *http://www.pussy-riot.livejournal.com/5763.html* and *http://pussy-riot.livejournal.com/5497.html* were extremist. They contained text posted by Pussy Riot, photographs and videos of their performances, including videos for *Riot in Russia, Putin Wet Himself*; *Kropotkin Vodka*; *Death to Prison, Freedom to Protest*; *Release the Cobblestones*; and *Punk Prayer—Virgin Mary, Drive Putin Away*.[2] The prosecutor also sought to limit access to the material in question by installing a filter to block the IP addresses of websites where the recordings had been published.

73 After learning of the prosecutor's application through the media, the third applicant lodged an application with the district court on 12 November 2012, seeking to join the proceedings as an interested party. She argued that her rights as a member of Pussy Riot would be affected by any court decision in the case.

74 On 20 November 2012 the Zamoskvoretskiy District Court dismissed her application, finding as follows:

> "Having considered [the third applicant's] argument that a decision issued in response to the prosecutor's request could affect [her] rights and obligations,

[2] See [11] above and appendix for lyrics.

> the court finds this argument unsubstantiated because the judgment of 17 August 2012 issued by the Khamovnicheskiy District Court in respect of the third applicant became final on 10 October 2012; [she] was found guilty by that judgment under Article 213 § 2 of the Russian Criminal Code of hooliganism committed in a group acting in premeditated fashion and in concert. That judgment can be appealed against by way of supervisory review in entirely different proceedings.
>
> [The third applicant's] argument that charges related to a criminal offence under Article 282 § 2 (c) of the Russian Criminal Code were severed from [the first] criminal case cannot, in the court's opinion, show that [her] rights and obligations would be influenced by the court's decision issued in respect of the prosecutor's request because there is no evidence that [she] took any part in disseminating the materials published on the Internet sites identified by the prosecutor [.] [T]here is no evidence that [she] owns those websites either.
>
> Therefore the court concludes that an eventual decision on the prosecutor's request for the materials to be declared extremist will not affect [the third applicant's] rights and obligations; and therefore there are no grounds for her to join the proceedings as an interested party."

75 On 28 November 2012 the third applicant appealed against that decision.

76 On 29 November 2012 the Zamoskvoretskiy District Court ruled that video content on *http://pussy-riot.livejournal.com* was extremist, namely the video-recordings of their performances of *Riot in Russia, Putin Wet Himself*; *Kropotkin Vodka*; *Death to Prison, Freedom to Protest*; *Release the Cobblestones*; and *Punk Prayer—Virgin Mary, Drive Putin Away*. It also ordered that access to that material be limited by a filter on the website's IP address. Relying on sections 1, 12 and 13 of the Suppression of Extremism Act and s.10(1) and (6) of the Federal Law on Information, Information Technologies and the Protection of Information, the court gave the reasons for its decision and stated as follows:

> "According to section 1 of [the Suppression of Extremism Act], extremist activity is deemed to be constituted by, *inter alia*, the stirring up of social, racial, ethnic or religious discord; propaganda about the exceptional nature, superiority or deficiency of persons on the basis of their social, racial, ethnic, religious or linguistic affiliation or attitude to religion; violations of human and civil rights and freedoms and lawful interests in connection with a person's social, racial, ethnic, religious or linguistic affiliation or attitude to religion; public appeals to carry out the above-mentioned acts or the mass dissemination of knowingly extremist material, and likewise the production or storage thereof with the aim of mass dissemination.
>
> …
>
> Results from monitoring the Internet and of a psychological linguistic expert examination performed by experts from the Federal Scientific Research University's 'Russian Institute for Cultural Research' state that the Internet sites *http://www.pussy-riot.livejournal.com/8459.html*, *http://www.pussy-riot.livejournal.com/5164.html*, *http://www.pussy-riot.livejournal.com/5763.html* and *http://pussy-riot.livejournal.com/5497.html* contain video materials of an extremist nature.

> That conclusion is confirmed by report no. 55/13 of 26 March 2012 on the results of the psychological linguistic expert examination performed by experts from the Federal Scientific Research University's 'Russian Institute for Cultural Research'.
> The court concludes that free access to video materials of an extremist nature may contribute to the incitement of hatred and enmity on national and religious grounds, and violates the rights of a specific group of individuals—the consumers of information services in the Russian Federation.
> The court accepts the prosecutor's argument that the dissemination of material of an extremist nature disrupts social stability and creates a threat of damage to the life, health and dignity of individuals, to the personal security of an unidentified group of individuals and disrupts the basis of the constitutional order of the State. Accordingly, the aforementioned activities are against the public interests of the Russian Federation.
> …
> Taking the above-mentioned circumstances into account, the court finds that the prosecutor's application is substantiated and should be allowed in full."

77 The third applicant appealed against the decision of 29 November 2012.

78 On 14 December 2012 the Zamoskvoretskiy District Court rejected the third applicant's appeal against the decision of 20 November 2012 on the grounds that the Code of Civil Procedure did not provide for a possibility to appeal against a decision to deny an application to participate in proceedings.

79 On 30 January 2013 the Moscow City Court dismissed an appeal by the third applicant against the decision of 14 December 2012. It found that under the Code of Civil procedure no appeal lay against a court decision on an application to join proceedings as an interested party. It noted, furthermore, that the applicant would be able to restate her arguments in her appeal against the decision on the merits of the case.

80 On the same date the Moscow City Court left the third applicant's appeal against the decision of 29 November 2012 without examination. The appellate court stated, inter alia:

> "… the subject in question was the extremist nature of the information placed in the Internet sources indicated by the prosecutor and the necessity to limit access to them[.] [A]t the same time, the question of [the third applicant's] rights and obligations was not examined, the impugned decision did not limit her rights, and she was not a party to the proceedings begun upon the prosecutor's application.
> Taking into account the foregoing, [the third applicant's] allegations contained in her appeal statement concerning alleged breaches of procedural rules on account of the failure to allow her to participate in proceedings which violated her rights and legal interests are unfounded and are based on an incorrect interpretation of the rules of procedural law.
> Therefore … [the third applicant] has no right to appeal against the above decision."

II. Relevant domestic law and practice and international materials

A. Relevant domestic law and practice

1. Constitution

81 Article 2 provides as follows:

> "An individual, his rights and freedoms, shall be the supreme value. The recognition, observance and the protection of the rights and freedoms of an individual and citizen shall be an obligation of the State."

82 Article 14 states that The Russian Federation is a secular state and that no state or obligatory religion may be established (para.1). "Religious associations shall be separate from the State and shall be equal before the law" (para.2).

83 Article 17 states that human rights and freedoms are recognised and guaranteed according to the generally accepted principles and rules of international law and the Constitution (para.1). "The basic rights and freedoms are inalienable and belong to every person from birth" (para.2). However, the exercise of such rights and freedoms must not infringe upon the rights and freedoms of others (para.3).

84 Under art.19(2), the State guarantees equal human and civil rights and freedoms irrespective of gender, race, ethnicity, language, origin, property or employment status, place of residence, religion, convictions, membership of public associations, or any other circumstances. Any restrictions of rights on the grounds of social status, race, ethnicity, language or religion are prohibited.

85 Article 28 guarantees the right to freedom of conscience and religion to everyone.

86 Article 29 provides as follows:

> "1. Freedom of thought and speech is guaranteed to everyone.
> 2. Propaganda or agitation arousing social, racial, ethnic or religious hatred and enmity and propaganda about social, racial, ethnic, religious or linguistic supremacy is prohibited.
> 3. Nobody can be forced to express [his or her] thoughts and opinions or to renounce them.
> 4. Everyone has the right to freely seek, receive, transmit, produce and disseminate information by any lawful means. The list of items which constitute State secrets shall be established by a federal law.
> 5. Freedom of the mass media is guaranteed. Censorship is forbidden."

2. Criminal law

87 Article 213 of the Criminal Code, as in force at the material time, provided:

> "1. Hooliganism, that is, a gross violation of public order manifested in clear contempt of society and committed:
> a) with the use of weapons or articles used as weapons;
> b) for reasons of political, ideological, racial, national or religious hatred or enmity or for reasons of hatred or enmity towards a particular social group—
> shall be punishable by a fine of three hundred thousand to five hundred thousand roubles or an amount of wages

or other income of the convicted person for a period of two to three years, or by obligatory labour for a term of up to four hundred and eighty hours, or by correctional labour for a term of one to two years, or by compulsory labour for a term of up to five years, or by deprivation of liberty for the same term.

2. The same offence committed by a group of persons by previous agreement, or by an organised group, or in connection with resistance to a representative of authority or to any other person who fulfils the duty of protecting the public order or suppressing a violation of public order –

shall be punishable by a fine of five hundred thousand to one million roubles or an amount of wages or other income of the convicted person for a period of three to four years, or by compulsory labour for a term of up to five years, or by deprivation of liberty for a term of up to seven years."

88 In Ruling No.45 of 15 November 2007 On Judicial Practice in Criminal Cases Concerning Hooliganism and Other Offences, the Supreme Court stated in particular:

"A person manifests clear disrespect for society by a deliberate breach of the generally recognised norms and rules of conduct motivated by the culprit's wish to set himself in opposition to those around him, to demonstrate a disparaging attitude towards them."

3. Administrative law

89 Article 5.26 of the Code of Administrative Offences, as in force until 29 June 2013, provided:

"1. Hindering the exercise of the right to freedom of conscience and freedom of religion, including acceptance of religious and other convictions and the refusal thereof, joining a religious association or leaving it—

shall be punishable by the imposition of an administrative fine of one hundred to three hundred roubles [and by the imposition of an administrative fine] on officials of three hundred to eight hundred roubles.

2. Insulting religious feelings or the profanation of objects of worship, signs and emblems relating to beliefs—

shall be punishable by the imposition of an administrative fine of five hundred to one thousand roubles."

4. Extremist activity

(a) Suppression of Extremism Act

90 Section 1(1) of Federal Law No.114-FZ on Combatting Extremist Activity of 25 July 2002 (the Suppression of Extremism Act) defines "extremist activity/extremism" as follows:

> "— a forcible change of the foundations of the constitutional system and violations of the integrity of the Russian Federation;
> — the public justification of terrorism and other terrorist activity;
> — the stirring up of social, racial, ethnic or religious discord;
> — propaganda about the exceptional nature, superiority or deficiency of persons on the basis of their social, racial, ethnic, religious or linguistic affiliation or attitude to religion;
> — violations of human and civil rights and freedoms and lawful interests in connection with a person's social, racial, ethnic, religious or linguistic affiliation or attitude to religion;
> — obstructing the exercise of citizens' electoral rights and rights to participate in a referendum or a violation of voting in secret, combined with violence or the threat of the use thereof;
> — obstructing the lawful activities of state authorities, local authorities, electoral commissions, public and religious associations or other organisations, combined with violence or a threat of the use thereof;
> — committing crimes for the motives set out in Article 63 § 1 (e) of the Criminal Code [crimes involving motives of political, ideological, racial, ethnic or religious hatred or enmity or involving motives of hate or enmity towards a social group];
> — propaganda for and the public display of Nazi attributes or symbols or of attributes or symbols similar to Nazi attributes or symbols to the point of them becoming undistinguishable;
> — public appeals to carry out the above-mentioned acts or the mass dissemination of knowingly extremist materials, and likewise the production or storage thereof with the aim of mass dissemination;
> — making a public, knowingly false accusation against individuals holding a state office of the Russian Federation or a state office of a Russian Federation constituent entity of committing actions in the discharge of their official duties that are set down in the present Article and that constitute offences;
> — the organisation of and preparation for the aforementioned actions and inciting others to commit them;
> — funding the aforementioned actions or any assistance in organising, preparing or carrying them out, including the provision of training, printing and material/technical support, telephonic or other types of communication links or information services."

91 Section 1(3) of the Act defines "extremist materials" as follows:

> "… documents intended for publication or information in other media calling for extremist activity to be carried out or substantiating or justifying the necessity of carrying out such activity, including works by leaders of the

National Socialist Workers' Party of Germany, the Fascist Party of Italy, publications substantiating or justifying ethnic and/or racial superiority or justifying the practice of committing war crimes or other crimes aimed at the full or partial destruction of any ethnic, social, racial, national or religious group."

92 Section 3 of the Act outlines the main areas of combatting extremist activity as follows:

"— "the taking of precautionary measures aimed at the prevention of extremist activity, including the detection and subsequent elimination of the causes and conditions conducive to carrying out extremist activity;
— the detection, prevention and suppression of terrorist activity carried out by social and religious associations, other organisations and natural persons."

93 Section 12 forbids the use of public communication networks for carrying out extremist activity:

"The use of public communication networks to carry out extremist activity is prohibited. In the event of a public communication network being used to carry out extremist activity, measures provided for in the present Federal law shall be taken with due regard to the specific characteristics of the relations governed by Russian Federation legislation in the sphere of communications."

94 Section 13 of the Act, as in force at the material time, provided for the following responsibility for the distribution of extremist materials:

"The dissemination of extremist materials and the production and storage of such materials with the aim of their dissemination shall be prohibited on the territory of the Russian Federation …
Information materials shall be declared extremist by the federal court with jurisdiction over the location in which they were discovered or disseminated or in the location of the organisation producing such material on the basis of an application by a prosecutor or in proceedings in an administrative, civil or criminal case.
A decision concerning confiscation shall be taken at the same time as the court decision declaring the information materials extremist.
A copy of the court decision declaring the information materials extremist and which has entered into legal force shall be sent to the federal State registration authority.
A federal list of extremist materials shall be posted on the 'Internet' worldwide computer network on the site of the federal State registration authority. That list shall also be published in the media.
A decision to include information materials in the federal list of extremist material can be appealed against in court under the procedure established by Russian Federation legislation."

(b) Federal Law on Information, Information Technologies and the Protection of Information

95 Section 10(1) and (6) of Federal Law No.149-FZ on Information, Information Technologies and the Protection of Information of 27 July 2006, as in force at the material time, provided as follows:

> "1. The distribution of information shall be carried out freely in the Russian Federation, observing the requirements established by the legislation of the Russian Federation.
>
> …
>
> 6. The distribution of information directed towards propaganda for war, the stirring up of national, race or religious hatred and hostility and other information whose distribution is subject to criminal or administrative responsibility shall be banned."

(c) Constitutional Court

96 In Ruling No.1053-O of 2 July 2013 the Constitutional Court ruled on a complaint lodged by K, who contested the constitutionality of s.1(1) and (3) and s.13(3) of the Suppression of Extremism Act. K argued that the definitions of "extremist activity" and "extremist materials" were not precise enough and were therefore open to different interpretations and arbitrary application. K also contested the power of the courts to order the confiscation of material, irrespective of whether the owner had committed an offence.

97 The Constitutional Court noted, first, that the provisions of s.1(1) and (3) of the Suppression of Extremism Act were based on the Constitution and could not therefore as such be in breach of constitutional rights. As regards the wording of the provisions, it further stated that laws had to be formulated precisely enough to enable people to adjust their conduct accordingly, but that did not rule out the use of generally accepted notions whose meaning should be clear either from the content of the law itself or with the help, inter alia, of judicial interpretation. In that regard the Constitutional Court referred to the Court's case-law.[3]

98 The Constitutional Court stated that when applying s.1(1) and (3) of the Suppression of Extremism Act, courts had to determine, in view of the specific circumstances of each case, whether the activity or material in question ran counter to the constitutional prohibition on incitement to hatred or enmity or on propaganda relating to superiority on the grounds of social position, race, ethnic origin, religion or language. At the same time, a restriction on freedom of thought and religion and on freedom of expression should not be taken solely on the grounds that the activity or information in question did not comply with traditional views and opinions or contradict moral and/or religious preferences. In that regard the Constitutional Court referred to the Court's case-law.[4]

99 As regards s.13(3), the Constitutional Court found that confiscation of information materials recognised as extremist on the basis of a judicial order was not related to any type of responsibility and did not constitute a punishment, but

[3] In particular, *Cantoni v France* (17862/91) 15 November 1996; *Coëme v Belgium* (32492/96) 22 June 2000; *Achour v France* (2007) 45 E.H.R.R. 2; and *Huhtamäki v Finland* (54468/09) 6 March 2012.
[4] In particular, *Handyside v United Kingdom* (1979-80) 1 E.H.R.R. 737; *Otto-Preminger Institut v Austria* (1995) 19 E.H.R.R. 34; and *Wingrove v United Kingdom* (1997) 24 E.H.R.R. 1.

was a special measure employed by the state to combat extremism and was aimed at the prevention thereof.

100 The Constitutional Court thus held that the contested provisions could not be considered as unconstitutional and dismissed the complaint as inadmissible.

B. Relevant international materials

1. Council of Europe

(a) Venice Commission

101 The European Commission for Democracy through Law (the Venice Commission) in its Report on the Relationship between Freedom of Expression and Freedom of Religion: the Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred, adopted at its 76th Plenary Session held in Venice on 17–18 October 2008, CDL-AD(2008)026 (Report of the Venice Commission), stated that whereas incitement to religious hatred should be the object of criminal sanctions (para.89), they were inappropriate in respect of insult to religious feelings and, even more so, in respect of blasphemy (para.92).

102 Opinion No.660/2011 on the Federal Law on Combating Extremist Activity of the Russian Federation adopted by the Venice Commission at its 91st Plenary Session held in Venice on 15–16 June 2012, CDL-AD(2012)016-e (Opinion of the Venice Commission), contained, in particular, the following opinions and conclusions:

> "30. The Venice Commission notes that the definitions in Article 1 of the Law of the 'basic notions' of 'extremism' ('extremist activity/extremism', 'extremist organisation' and 'extremist materials') do not set down general characteristics of extremism as a concept. Instead, the Law lists a very diverse array of actions that are deemed to constitute 'extremist activity' or 'extremism'. This should mean that, according to the Law, only activities defined in Article 1.1 are to be considered extremist activities or fall within the scope of extremism and that only organisations defined in Article 1.2 and materials defined in Article 1.3 should be deemed extremist.
>
> 31. The Commission however has strong reservations about the inclusion of certain activities under the list of 'extremist' activities. Indeed, while some of the definitions in Article 1 refer to notions that are relatively well defined in other legislative acts of the Russian Federation, a number of other definitions listed in Article 1 are too broad, lack clarity and may open the way to different interpretations. In addition, while the definition of 'extremism' provided by the Shanghai Convention, as well as the definitions of 'terrorism' and 'separatism', all require violence as an essential element, certain of the activities defined as 'extremist' in the Extremism Law seem not to require an element of violence (see further comments below).
>
> …
>
> 35. Extremist activity under point 3 is defined in a less precise manner than in a previous version of the Law (2002). In the 2002 Law the conduct, in order to fall within the definition, had to be 'associated with violence or calls to violence'. However the current definition ('stirring up of social, racial, ethnic or religious discord') does not require violence as the reference to it has been

removed. According to non-governmental reports, this has led in practice to severe anti extremism measures under the Extremism Law and/or the Criminal Code. The Venice Commission recalls that, as stated in its Report devoted to the relation between freedom of expression and freedom of religion, hate speech and incitement may not benefit from the protection afforded by Article 10 ECHR and justify criminal sanctions. The Commission notes that such a conduct is criminalized under Article 282 of the Russian Criminal Code and that, under Article 282.2, the use of violence or the threat of its use in committing this crime is an aggravating circumstance.

36. The Venice Commission is of the opinion that in order to qualify 'stirring up of social, racial, ethnic or religious discord' as 'extremist activity', the definition should expressly require the element of violence. This would maintain a more consistent approach throughout the various definitions included in article 1.1, bring this definition in line with the Criminal Code, the Guidelines provided by the Plenum of the Supreme Court and more closely follow the general approach of the concept of 'extremism' in the Shanghai Convention.

…

41. Extremist activity under point 5 brings together a collection of criteria, the combination of which may or may not be required before establishing that the Law applies to them. Clarification is required of what is intended here. If violating rights and freedoms 'in connection with a personal's social, racial, ethnic, religious or linguistic affiliation or attitude to religion', in the absence of any violent element is an extremist activity, it is clearly a too broad category.

42. Similarly, under point 10 incitement to extremist activity is in itself an extremist activity. This provision is problematic to the extent that certain of the activities listed, as pointed out above, should not fall into the category of extremist activities at all.

…

47. [Article 1.3] defines extremist materials not only as documents which have been published but also as documents intended for publication or information, which call for extremist activity (to be understood, most probably, by reference to the definition of such an activity in Article 1.1) or which justify such activity …

…

49. Considering the broad and rather imprecise definition of 'extremist documents' (Article1.3), the Venice Commission is concerned about the absence of any criteria and any indication in the Law on how documents may be classified as extremist and believes that this has the potential to open the way to arbitrariness and abuse. The Commission is aware from official sources, that the court decision is systematically based on prior expert review of the material under consideration and may be appealed against in court. It nonetheless considers that, in the absence of clear criteria in the Law, too wide a margin of appreciation and subjectivity is left both in terms of the assessment of the material and in relation to the corresponding judicial procedure. According to non-governmental sources, the Federal List of Extremist Materials has in recent years led to the adoption, in the Russian

Federation, of disproportionate anti-extremist measures. Information on how this list is composed and amended would be necessary for the Commission to comment fully.

…

56. The Commission further notes that the Law does not provide for any procedure for the person to whom a warning is addressed to challenge the evidence of the Prosecutor-General upon which it is based at the point when the warning is given, though it is noted that article 6 of the Law provides that the warning may be appealed to a court. It also notes that, according to the law 'On the public prosecutor's service in the Russian Federation', a warning about the unacceptability of breaking the law may be appealed against not only in court but also to a superior public prosecutor.

…

61. … [I]n the Commission's view the Law should be made more specific as to the procedures available in order to guarantee the effective enjoyment of the right to appeal both the warning/the notice issued, and the liquidation or suspension decision before an independent and impartial tribunal, as enshrined in Article 6 ECHR.

…

63. … It is worrying at the same time that, as a result of the vagueness of the Law and of the wide margin of interpretation left to the enforcement authorities, undue pressure is exerted on civil society organisations, media outlets and individuals, which undoubtedly has a negative impact on the free and effective exercise of human rights and fundamental freedoms.

…

65. … It is therefore essential, in order for the warnings and notices or any other anti-extremism measures to fully comply with the requirements of Articles 10 and 11 of the ECHR, to ensure that any restrictions that they may introduce to fundamental rights stem from a pressing social need, are proportionate within the meaning of the ECHR and are clearly defined by law. The relevant provisions of the Extremism Law should thus be amended accordingly.

…

73. The Venice Commission is aware of the challenges faced by the Russian authorities in their legitimate efforts to counter extremism and related threats. It recalls that, in its recent recommendation devoted to the fight against extremism, the Parliamentary Assembly of the Council of Europe expressed its concern over the challenge of fighting extremism and its most recent forms and encouraged the member States of the Council of Europe to take resolute action in this field, 'while ensuring the strictest respect for human rights and the rule of law'.

74. However, the manner in which this aim is pursued in the Extremism Law is problematic. In the Commission's view, the Extremism Law, on account of its broad and imprecise wording, particularly insofar as the 'basic notions' defined by the Law—such as the definition of 'extremism', 'extremist actions', 'extremist organisations' or 'extremist materials'—are concerned, gives too wide discretion in its interpretation and application, thus leading to arbitrariness.

75. In the view of the Venice Commission, the activities defined by the Law as extremist and enabling the authorities to issue preventive and corrective measures do not all contain an element of violence and are not all defined with sufficient precision to allow an individual to regulate his or her conduct or the activities of an organisation so as to avoid the application of such measures. Where definitions are lacking the necessary precision, a law such as the Extremism Law dealing with very sensitive rights and carrying potential dangers to individuals and NGOs can be interpreted in harmful ways. The assurances of the authorities that the negative effects would be avoided thanks to the guidelines of the Supreme Court, the interpretation of the Russian Institute for Legislation and Comparative Law or good faith are not sufficient to satisfy the relevant international requirements.

76. The specific instruments that the Law provides for in order to counter extremism—the written warnings and notices—and the related punitive measures (liquidation and/or ban on the activities of public religious or other organisations, closure of media outlets) raise problems in the light of the freedom of association and the freedom of expression as protected by the [European Convention on Human Rights] and need to be adequately amended.

77. The Venice Commission recalls that it is of crucial importance that, in a law such as the Extremism Law, which has the capacity of imposing severe restrictions on fundamental freedoms, a consistent and proportionate approach that avoids all arbitrariness be taken. As such, the Extremism Law has the capacity of imposing disproportionate restrictions of fundamental rights and freedoms as enshrined in the European Convention on Human Rights (in particular Articles 6, 9, 10 and 11) and infringe the principles of legality, necessity and proportionality. In the light of the above comments, the Venice Commission recommends that this fundamental shortcoming be addressed in relation to each of the definitions and instruments provided by the Law in order to bring them in line with the European Convention on Human Rights."

(b) ECRI General Policy Recommendation No.15 on Combating Hate Speech

103 The relevant parts of General Policy Recommendation No.15 on Combating Hate Speech adopted by the European Commission against Racism and Intolerance (the ECRI) on 8 December 2015 read as follows:

"Considering that hate speech is to be understood for the purpose of the present General Policy Recommendation as the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of 'race', colour, descent, national or ethnic origin, age, disability, language, religion or belief, sex, gender, gender identity, sexual orientation and other personal characteristics or status;

Recognising that hate speech may take the form of the public denial, trivialisation, justification or condonation of crimes of genocide, crimes against humanity or war crimes which have been found by courts to have occurred, and of the glorification of persons convicted for having committed such crimes;

Recognising also that forms of expression that offend, shock or disturb will not on that account alone amount to hate speech and that action against the use of hate speech should serve to protect individuals and groups of persons rather than particular beliefs, ideologies or religions;

…

14. The Recommendation further recognises that, in some instances, a particular feature of the use of hate speech is that it may be intended to incite, or can reasonably be expected to have the effect of inciting, others to commit acts of violence, intimidation, hostility or discrimination against those targeted by it. As the definition above makes clear, the element of incitement entails there being either a clear intention to bring about the commission of acts of violence, intimidation, hostility or discrimination or an imminent risk of such acts occurring as a consequence of the particular hate speech used.

…

16. … [T]he assessment as to whether or not there is a risk of the relevant acts occurring requires account to be taken of the specific circumstances in which the hate speech is used. In particular, there will be a need to consider (a) the context in which the hate speech concerned is being used (notably whether or not there are already serious tensions within society to which this hate speech is linked); (b) the capacity of the person using the hate speech to exercise influence over others (such as by virtue of being a political, religious or community leaders); (c) the nature and strength of the language used (such as whether it is provocative and direct, involves the use of misinformation, negative stereotyping and stigmatisation or otherwise capable of inciting acts of violence, intimidation, hostility or discrimination); (d) the context of the specific remarks (whether or not they are an isolated occurrence or are reaffirmed several times and whether or not they can be regarded as being counter-balanced either through others made by the same speaker or by someone else, especially in the course of a debate); (e) the medium used (whether or not it is capable of immediately bringing about a response from the audience such as at a 'live' event); and (f) the nature of the audience (whether or not this had the means and inclination or susceptibility to engage in acts of violence, intimidation, hostility or discrimination)."

2. United Nations

(a) International Covenant on Civil and Political Rights

104 The relevant provisions of the 1966 International Covenant on Civil and Political Rights (ICCPR) provide:

"Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

(b) Human Rights Council

105 The relevant parts of the Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir, and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, further to Human Rights Council Decision 1/107 on incitement to racial and religious hatred and the promotion of tolerance, A/HRC/2/3, of 20 September 2006 (HRC 2006 Report) read as follows:

"47. The Special Rapporteur notes that article 20 of the Covenant was drafted against the historical background of the horrors committed by the Nazi regime during the Second World War. The threshold of the acts that are referred to in article 20 is relatively high because they have to constitute advocacy of national, racial or religious hatred. Accordingly, the Special Rapporteur is of the opinion that expressions should only be prohibited under article 20 if they constitute incitement to imminent acts of violence or discrimination against a specific individual or group …

50. Domestic and regional judicial bodies—where they exist—have often laboured to strike the delicate balance between competing rights, which is particularly demanding when beliefs and freedom of religion are involved. In situations where there are two competing rights, regional bodies have often extended a margin of appreciation to national authorities and in cases of religious sensitivities, they have generally left a slightly wider margin of appreciation, although any decision to limit a particular human right must comply with the criteria of proportionality. At the global level, there is not sufficient common ground to provide for a margin of appreciation. At the global level, any attempt to lower the threshold of article 20 of the Covenant would not only shrink the frontiers of free expression, but also limit freedom of religion or belief itself. Such an attempt could be counterproductive and may promote an atmosphere of religious intolerance."

106 The relevant parts of the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, submitted in accordance with Human Rights Council Resolution 16/4, A/67/357, of 7 September 2012 read as follows:

> "46. While some of the above concepts may overlap, the Special Rapporteur considers the following elements to be essential when determining whether an expression constitutes incitement to hatred: real and imminent danger of violence resulting from the expression; intent of the speaker to incite discrimination, hostility or violence; and careful consideration by the judiciary of the context in which hatred was expressed, given that international law prohibits some forms of speech for their consequences, and not for their content as such, because what is deeply offensive in one community may not be so in another. Accordingly, any contextual assessment must include consideration of various factors, including the existence of patterns of tension between religious or racial communities, discrimination against the targeted group, the tone and content of the speech, the person inciting hatred and the means of disseminating the expression of hate. For example, a statement released by an individual to a small and restricted group of Facebook users does not carry the same weight as a statement published on a mainstream website. Similarly, artistic expression should be considered with reference to its artistic value and context, given that art may be used to provoke strong feelings without the intention of inciting violence, discrimination or hostility. 47. Moreover, while States are required to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence under article 20 (2) of the Covenant, there is no requirement to criminalize such expression. The Special Rapporteur underscores that only serious and extreme instances of incitement to hatred, which would cross the seven-part threshold, should be criminalized."

(c) Human Rights Committee

107 The relevant parts of General Comment No.34, art.19: Freedoms of Opinion and Expression, of 12 September 2011 read as follows:

> "22. Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be 'provided by law'; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated …
>
> 46. States parties should ensure that counter-terrorism measures are compatible with paragraph 3. Such offences as 'encouragement of terrorism' and 'extremist activity' as well as offences of 'praising', 'glorifying', or 'justifying' terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate

interference with freedom of expression. Excessive restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities …

48. Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except in the specific circumstances envisaged in article 20, paragraph 2, of the Covenant. Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith …

50. Articles 19 and 20 are compatible with and complement each other. The acts that are addressed in article 20 are all subject to restriction pursuant to article 19, paragraph 3. As such, a limitation that is justified on the basis of article 20 must also comply with article 19, paragraph 3."

(d) Committee on the Elimination of Racial Discrimination

108 The relevant part of General Recommendation No.35, Combating Racist Hate Speech, of 12 September 2011 reads as follows:

> "20. The Committee observes with concern that broad or vague restrictions on freedom of speech have been used to the detriment of groups protected by the Convention [on the Elimination of All Forms of Racial Discrimination]. States parties should formulate restrictions on speech with sufficient precision, according to the standards in the Convention as elaborated in the present recommendation. The Committee stresses that measures to monitor and combat racist speech should not be used as a pretext to curtail expressions of protest at injustice, social discontent or opposition."

(e) Office of the High Commissioner for Human Rights

109 The joint submission by Heiner Bielefeldt, Special Rapporteur on freedom of religion or belief; Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and Githu Muigai, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance of the Office of the High Commissioner for Human Rights (OHCHR) for the expert workshop on the prohibition of incitement to national, racial or religious hatred (Expert workshop on Europe, 9–10 February 2011, Vienna) referred to "objective criteria to prevent arbitrary application of national legal standards pertaining to incitement to racial or religious hatred", one of such criteria being the following:

> "The public intent of inciting discrimination, hostility or violence must be present for hate speech to be penalized[.]"

110 The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, Conclusions and recommendations emanating from the four regional expert workshops organised by the OHCHR, in 2011 (the Rabat Plan) was adopted by experts in Rabat, Morocco, on 5 October 2012. The relevant parts of the Plan read as follows:

> "15. … [L]egislation that prohibits incitement to hatred uses variable terminology and is often inconsistent with article 20 of the ICCPR. The broader the definition of incitement to hatred is in domestic legislation, the more it opens the door for arbitrary application of these laws. The terminology relating to offences on incitement to national, racial or religious hatred varies in the different countries and is increasingly rather vague while new categories of restrictions or limitations to freedom of expression are being incorporated in national legislation. This contributes to the risk of a misinterpretation of article 20 of the ICCPR and an addition of limitations to freedom of expression not contained in article 19 of the ICCPR."

3. Other international materials

(a) The Shanghai Convention on Combating Terrorism, Separatism and Extremism of 15 June 2001 (the Shanghai Convention)

111 Article 1(3) of the Shanghai Convention, ratified by the Russian Federation in October 2010, provides the following definition of "Extremism":

> "'Extremism' is an act aimed at seizing or keeping power through the use of violence or at violent change of the constitutional order of the State, as well as a violent encroachment on public security, including the organization, for the above purposes, of illegal armed formations or participation in them and that are subject to criminal prosecution in conformity with the national laws of the Parties."

(b) Joint Declaration on Defamation of Religions, and Anti-Terrorism and Anti-Extremism Legislation

112 On 9 December 2008 the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information adopted a joint declaration which reads, in so far as relevant:

"Defamation of Religions

The concept of 'defamation of religions' does not accord with international standards regarding defamation, which refer to the protection of reputation of individuals, while religions, like all beliefs, cannot be said to have a reputation of their own.

Restrictions on freedom of expression should be limited in scope to the protection of overriding individual rights and social interests, and should never be used to protect particular institutions, or abstract notions, concepts or beliefs, including religious ones.

Restrictions on freedom of expression to prevent intolerance should be limited in scope to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

International organisations, including the United Nations General Assembly and Human Rights Council, should desist from the further adoption of statements supporting the idea of 'defamation of religions'.

Anti-Terrorism Legislation

The definition of terrorism, at least as it applies in the context of restrictions on freedom of expression, should be restricted to violent crimes that are designed to advance an ideological, religious, political or organised criminal cause and to influence public authorities by inflicting terror on the public.

The criminalisation of speech relating to terrorism should be restricted to instances of intentional incitement to terrorism, understood as a direct call to engage in terrorism which is directly responsible for increasing the likelihood of a terrorist act occurring, or to actual participation in terrorist acts (for example by directing them). Vague notions such as providing communications support to terrorism or extremism, the 'glorification' or 'promotion' of terrorism or extremism, and the mere repetition of statements by terrorists, which does not itself constitute incitement, should not be criminalised.

The role of the media as a key vehicle for realising freedom of expression and for informing the public should be respected in anti-terrorism and anti-extremism laws. The public has a right to know about the perpetration of acts of terrorism, or attempts thereat, and the media should not be penalized for providing such information.

Normal rules on the protection of confidentiality of journalists' sources of information—including that this should be overridden only by court order on the basis that access to the source is necessary to protect an overriding public interest or private right that cannot be protected by other means—should apply in the context of anti-terrorist actions as at other times."

(c) The Camden Principles

113 The non-governmental organisation ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19) prepared the Camden Principles on Freedom of Expression and Equality on the basis of discussions involving a group of high-level UN and other officials, civil society and academic experts in international human rights law on freedom of expression and equality issues at meetings held in London on 11 December 2008 and 23–24 February 2009 (the Camden Principles). They read as follows in so far as relevant:

"Principle 12: Incitement to hatred

12.1. All States should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (hate speech). National legal systems should make it clear, either explicitly or through authoritative interpretation, that:

i. The terms 'hatred' and 'hostility' refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group.
ii. The term 'advocacy' is to be understood as requiring an intention to promote hatred publicly towards the target group.
iii. The term 'incitement' refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.
iv. The promotion, by different communities, of a positive sense of group identity does not constitute hate speech.

…

12.3. States should not prohibit criticism directed at, or debate about, particular ideas, beliefs or ideologies, or religions or religious institutions, unless such expression constitutes hate speech as defined by Principle 12.1.

…

12.5. States should review their legal framework to ensure that any hate speech regulations conform to the above."

JUDGMENT

I. The government's preliminary objections

A. Date of application

114 The Government contested the date the present application was lodged. They argued that the introductory letter of 19 June 2012 sent by the applicants' representatives, Ms Volkova, Mr Polozov and Mr Feygin, should not be taken into account as they had failed to provide the Court with all the necessary documents. At the same time, the Government pointed out that the introductory letter to the Court sent by Ms Khrunova on 19 October 2012 had only been on behalf of the third applicant and alleged that it had been the Court that had invited her to act on behalf of all three applicants. In view of the foregoing, they argued that compliance with the six-month time-limit should be examined in respect of each applicant separately.

115 The applicants stated that their representatives had sent the introductory letter of 19 June 2012 on their behalf in accordance with their instructions. The fact that they had later decided to refuse the assistance of those representatives and use different lawyers could not affect the validity of the introductory letter.

116 The Court notes that on 19 June 2012 it received an introductory letter concerning alleged violations of the applicants' rights guaranteed by arts 3, 5, 6 and 10 of the Convention on account of the criminal prosecution for the performance of 21 February 2012. The introductory letter was sent on behalf of the three applicants by their representatives Ms Volkova, Mr Polozov and Mr Feygin. Authority forms were enclosed with the letter.

117 On 21 August 2012 the Court received an application form of 16 August 2012 sent on behalf of the applicants by their representatives Ms Volkova, Mr Polozov and Mr Feygin. The above complaints were further detailed in the application form.

118 On 29 October 2012 the Court received an introductory letter sent on behalf of the third applicant by Ms Khrunova. In a letter of 31 October 2012 to Ms Khrunova the Court informed her that it had already registered an application lodged on behalf of the three applicants and asked her to clarify whether she was going to represent them all or only the third applicant. In a letter of 12 December 2012 Ms Khrunova informed the Court that she was going to represent all three applicants. The applicants subsequently provided the Court with authority forms in respect of Ms Khrunova, Mr Y. Grozev and Mr D. Gaynutdinov, who made further submissions to the Court on their behalf. In particular, an additional application form of 6 February 2013 was submitted on behalf of the three applicants by Ms Khrunova and Mr Y. Grozev, which further detailed the complaints under arts 3, 5, 6 and 10 of the Convention.[5]

119 The Court observes that the fact that the applicants chose to change their representatives in the course of the proceedings has no bearing on the validity of the submissions made by the first set of representatives. Accordingly, the Court considers 19 June 2012 as the date of the lodging of the complaints under arts 3, 5, 6 and 10 concerning the criminal prosecution for the performance of 21 February 2012 in respect of the three applicants, in compliance with r.47(5) of the Rules of Court as it stood at the material time.

120 At the same time, the Court notes that the first and second applicants, in an additional application form of 29 July 2013 submitted by Mr D. Gaynutdinov on their behalf, made a new complaint under art.10 concerning banning the video-recordings of their performances available on the internet. Accordingly, the Court considers 29 July 2013 as the date that complaint was lodged by the first and second applicants.

B. Legal representation

121 Having regard to the fact that on 14 June 2014 the third applicant withdrew the authority form in respect of Ms Khrunova and Mr Y. Grozev and herself submitted observations in reply to those of the Government, the latter contested the validity of the observations, having regard to r.36(2) of the Rules of Court, which provides:

> "Following notification of the application to the respondent Contracting Party under Rule 54 § 2 (b), the applicant should be represented in accordance with paragraph 4 of this Rule, unless the President of the Chamber decides otherwise."

122 The Court notes that on 24 September 2014 the President of the Section to which the case had been allocated granted the third applicant leave to represent herself in the proceeding before the Court, of which the Court informed the Government by letter on 29 September 2014. The Government's objection is therefore dismissed.

[5] See [116] above.

II. Alleged violation of art.3 of the Convention

123 The applicants complained that the conditions of their transportation to and from their court hearings and the treatment to which they had been subjected on the days of the hearings had been inhuman and degrading. They also complained that they had been kept in a glass dock in the courtroom under heavy security and in full view of the public, which amounted to humiliating conditions which were in breach of art.3 of the Convention. That provision reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. The parties' submissions

1. The Government's submissions

124 The Government contested the applicants' argument. They stated that the conditions of their transportation had been in full accordance with art.33 of Federal Law No.103-FZ of 15 July 1995 On the Detention of Those Suspected and Accused of Having Committed a Crime. There had been many people in and around the court on the dates of the hearings and some of them had had an aggressive attitude, either towards the applicants or the police, and specially trained dogs had been used during the applicants' transportation to prevent any attempts to disrupt the trial. The Government also pointed out that the applicants had made no complaints concerning either the conditions of their transportation or detention in the courthouse to the domestic authorities. In their view, any discomfort the applicants might have suffered had not attained the minimum level of severity under art.3.[6] Furthermore, they noted that the complaint concerning the use of handcuffs in the courtroom had been raised by the third applicant for the first time in her observations of 9 July 2014[7] and should be declared inadmissible on account of a failure to comply with the six-month time-limit.

125 As regards the glass dock in which the applicants had been held during the hearings, the Government noted, first, that apart from complaining that the glass had prevented them from communicating freely with counsel, the applicants had failed to substantiate in what way the glass dock could be considered as cruel treatment. They further submitted that metal cages or their replacement, glass docks, had been in use in courts as a security measure for over 20 years and that anyone in pre-trial detention was routinely placed there. Participants in proceedings, including defendants and the public, were therefore used to such conditions and there was nothing to support any assertion that the measure reflected any sort of prejudice against the applicants.

126 The Government also pointed out that the practice of placing defendants behind special barriers existed in several European countries, such as Armenia, Moldova and Finland. Furthermore, glass docks in particular were in use in Spain, Italy, France, Germany, Ukraine and in some courts in the UK and Canada. They noted that the Court had found in a number of judgments that the use of metal cages in

[6] See *Kalashnikov v Russia* (2003) 36 E.H.R.R. 34 at [65].
[7] See [130] below.

courtrooms was incompatible with art.3,[8] however, they were unaware of similar findings with respect to glass docks. In the Government's view, a glass dock, unlike handcuffs or other security measures, allowed the accused to choose a comfortable position or to move around inside the dock while feeling safe from possible attack by victims, which was particularly relevant in the applicants' case as many members of the public inside the courtroom had had a hostile and aggressive stance towards them. Furthermore, in contrast to *Ramishvili*,[9] the glass dock did not in the least either "humiliate the applicants in their own eyes" or "arouse in them feelings of fear, anguish and inferiority", which was corroborated by the fact that not only did the applicants not shy away from the public, but directly addressed them during the proceedings. Likewise, in contrast with *Harutyunyan*,[10] there was no evidence that the glass dock had had any "impact on [their] powers of concentration and mental alertness" either. The Government therefore argued that there had been no breach of art.3 in those circumstances.

2. The applicants' submissions

127 The applicants submitted that both the conditions of their transportation to and from the courthouse and the conditions in which they had been kept during the hearings were standard practice in Russia and that there were no effective domestic remedies with respect to those complaints. They pointed out that the Government had not suggested any remedy that they might have had recourse to.

128 The applicants maintained their complaint concerning the conditions of their transportation and the conditions in which they had been kept in the courthouse on the days of their hearings. They pointed out that the duration of the journey given by the Government was not accurate because it only took into account the vehicle's passing through the remand prison's gates. However, after arrival they had often remained inside the vehicle for one-and-a-half to two hours before being let out.

129 The applicants argued that the glass dock in which they had been paced during the hearings was not much different from a metal cage, which the Court had found incompatible with art.3.[11] They submitted, in particular, that the glass dock had been very small, which had significantly limited their movements inside it. Furthermore, the glass dock conveyed a message to an outside observer that individuals placed in it had to be locked up and were therefore dangerous criminals. That message had not only been reinforced by the small size of the dock and its position in the courtroom, but also by the high level of security and the guard dogs around it. The applicants contested the Government's submission that that had been necessary for their own safety. They argued that there had been no attempts to disrupt the trial and that the presence of such a high number of armed police officers, ushers and guard dogs had only served the purpose of intimidating them and their counsel, to debase them and, given that the trial had been closely followed by the media, to create a negative image of them as dangerous criminals in the eyes of the wide media audience which had followed the trial.

[8] See, among others, *Ramishvili v Georgia* (1704/06) 27 January 2009 at [96]–[102]; *Harutyunyan v Armenia* (2012) 55 E.H.R.R. 12 at [123]–[129]; and *Svinarenko v Russia* (32541/08 and 43441/08) 17 July 2014.
[9] *Ramishvili v Georgia* (1704/06) 27 January 2009 at [100].
[10] *Harutyunyan v Armenia* (2012) 55 E.H.R.R. 12 at [128].
[11] See *Svinarenko v Russia* (32541/08 and 43441/08) 17 July 2014 at [138].

130 Furthermore, according to the applicants, their placement in the glass dock had made it significantly more complicated to communicate with their counsel as, in that respect, it was even more restricting than a metal cage. In the applicants' view, such a measure, as well as creating a negative image of them in the eyes of the media audience, had also undermined the presumption of innocence in their regard. The third applicant also submitted that despite being held in the glass dock, she had also been handcuffed for three hours during the reading out of the judgment. Her hands had become swollen and had ached. Given that the applicants had had no history of violent behaviour, the treatment in question had in their view attained the "minimum level of severity" for the purposes of art.3.

B. Admissibility

131 The Court observes, first, that the third applicant's complaint about being handcuffed at the court hearing of 17 August 2012 was raised for the first time in her observations of 9 July 2014 submitted in reply to those of the Government, which is outside the six-month time-limit provided for by art.35(1). Accordingly, that part of the application must be rejected in accordance with art.35(1) and (4) of the Convention.

132 The Court notes that the Government raised a plea of non-exhaustion with regard to the applicants' complaint about the conditions of their transportation to the court and their detention there. The Court observes that in *Ananyev v Russia*[12] it found that the Russian legal system did not provide an effective remedy that could be used to prevent the alleged violation or its continuation and provide applicants with adequate and sufficient redress in connection with a complaint about inadequate conditions of detention. The Government provided no evidence to enable the Court to reach a different conclusion in the present case. The Government's objection must therefore be dismissed.

133 The Court notes that this complaint is not manifestly ill-founded within the meaning of art.35(3)(a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

1. Conditions of transport to and from the trial hearings

(a) General principles

134 For a summary of the relevant general principles see *Idalov v Russia*. [13]

(b) Application of those principles to the present case

135 The Court notes that it has relied in previous cases on the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (the CPT), which has considered that individual compartments measuring 0.4, 0.5 or even 0.8m² are unsuitable for transporting a person, no matter how short the journey.[14] It notes that the individual compartments in which the applicants were

[12] *Ananyev v Russia* (2012) 55 E.H.R.R. 18 at [100]–[119].
[13] *Idalov v Russia* (5826/03) 22 May 2012 at [91]–[95].
[14] See *Khudoyorov v Russia* (2007) 45 E.H.R.R. 5 at [117]–[120] and *MS v Russia* (8589/08) 10 July 2014 at [76].

transported measured from 0.37–0.49m², whereas the common compartments allowed less than 1 sq.m per person.

136 The Court observes that the applicants had to endure those cramped conditions twice a day, on the way to and from the courthouse, and were transported in such conditions 30 times over one month of detention. As regards the duration of each journey, the Court observes that according to the copies of the time logs submitted by the Government the time in transit varied between 35 minutes and one hour 20 minutes on the way to the court and between 20 minutes and four hours and 20 minutes on the way back.

137 The Court notes that it has found a violation of art.3 of the Convention in a number of cases against Russia on account of cramped conditions when applicants were being transported to and from court.[15] Having regard to the material in its possession, the Court notes that the Government has not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case.

138 The above considerations are sufficient to warrant the conclusion that the conditions of the applicants' transport to and from the trial hearings exceeded the minimum level of severity and amounted to inhuman and degrading treatment in breach of art.3 of the Convention. In view of this finding the Court does not consider it necessary to examine other aspects of the applicants' complaint.

139 There has accordingly been a violation of art.3 of the Convention in this respect.

2. Treatment during the court hearings

(a) General principles

140 As the Court has repeatedly stated, art.3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour.[16]

141 Ill-treatment must attain a minimum level of severity if it is to fall within the scope of art.3 of the Convention. The assessment of that minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.[17] The public nature of the treatment may be a relevant or an aggravating factor in assessing whether it is "degrading" within the meaning of art.3.[18]

142 In the context of courtroom security arrangements, the Court has stressed that the means chosen for ensuring order and security in those places must not involve measures of restraint which by virtue of their level of severity or by their very nature would bring them within the scope of art.3 of the Convention, as there can be no justification for torture or inhuman or degrading treatment or punishment.[19]

[15] See, e.g. *Khudoyorov v Russia* (2007) 45 E.H.R.R. 5 at [118]–[120]; *Starokadomskiy v Russia* (42239/02) 31 July 2008 at [53]–[60]; *Idalov v Russia* (5826/03) 22 May 2012 at [103]–[108]; and *MS v Russia* (8589/08) 10 July 2014 at [74]–[77].
[16] See, among many other authorities, *Labita v Italy* (2008) 46 E.H.R.R. 50 at [119].
[17] See, e.g. *Jalloh v Germany* (2007) 44 E.H.R.R. 32 at [67].
[18] See, inter alia, *Tyrer v United Kingdom* (1979-80) 2 E.H.R.R. 1 at [32]; *Yağız v Turkey* (2014) 59 E.H.R.R. 4 at [37]; and *Kummer v Czech Republic* (32133/11) 25 July 2013 at [64].
[19] See *Svinarenko v Russia* (32541/08 and 43441/08) 17 July 2014 at [127].

It found, in particular, that confinement in a metal cage was contrary to art.3, having regard to its objectively degrading nature.[20]

143 The Court has also found that while the placement of defendants behind glass partitions or in glass cabins does not in and of itself involve an element of humiliation sufficient to reach the minimum level of severity, that level may be attained if the circumstances of the applicants' confinement, taken as a whole, would cause them distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.[21]

(b) Application of those principles in the present case

144 The Court has first to establish whether the confinement in a glass dock attained the minimum degree of severity to enable it to fall within the ambit of this provision.

145 The Court considers that glass docks do not have the harsh appearance of metal cages, in which merely being exposed to the public eye is capable of undermining the defendants' image and of arousing in them feelings of humiliation, helplessness, fear, anguish and inferiority. It also notes that glass installations are used in courtrooms in other Member States,[22] although their designs vary from glass cubicles to glass partitions, and in the majority of states their use is reserved for high-security hearings.[23] It appears from the Government's submissions that in Russia all defendants are systematically placed in a metal cage or a glass cabin as long as they are in custody.

146 The Court has to scrutinise the overall circumstances of the applicants' confinement in the glass dock to determine whether the conditions there reached, on the whole, the minimum level of severity required to characterise their treatment as degrading within the meaning of art.3 of the Convention.[24]

147 The Court has insufficient evidence that the glass dock did not allow the applicants adequate personal space. It notes, at the same time, that the dock was constantly surrounded by armed police officers and court ushers and that a guard dog was present next to it in the courtroom.

148 The Court takes note of the Government's argument that the glass dock was used as a security measure and that specially trained dogs were used during the applicants' transportation to and from the courthouse to prevent possible attempts to disrupt the hearing owing to the aggressive attitude of certain members of the public, either towards the applicants or the police. The Court observes, first, that no allegation was made by the Government that there was any reason to expect that the applicants would attempt to disrupt the hearing, or that the security measures had been put in place owing to their conduct. It also notes that in the photographs submitted by the applicants all the police officers and court ushers surrounding the dock, except one, stand facing the applicants. The Court considers this to constitute sufficient evidence of the fact that they were closely watching the applicants rather than monitoring the courtroom. In the Court's view, the applicants must have felt intimidation and anxiety at being so closely observed throughout the hearings by armed police officers and court ushers, who, furthermore, separated them from

[20] See *Svinarenko v Russia* (32541/08 and 43441/08) 17 July 2014 at [135]–[138].
[21] See *Kudła v Poland* (2002) 35 E.H.R.R. 11 at [92]–[94] and *Yaroslav Belousov v Russia* (2653/13 and 60980/14) 4 October 2016 at [125]
[22] See *Svinarenko v Russia* (32541/08 and 43441/08) 17 July 2014 at [76].
[23] See *Yaroslav Belousov v Russia* (2653/13 and 60980/14) 4 October 2016 at [124].
[24] See *Yaroslav Belousov v Russia* (2653/13 and 60980/14) 4 October 2016 at [125].

their lawyers' desk on one side of the glass dock. The Court further observes that while the Government submitted that specially trained dogs were used to ensure security during the applicants' transportation, they provided no explanation for the dogs' presence in the courtroom.

149 The Court notes that the applicants' trial was closely followed by national and international media and they were permanently exposed to public view in a glass dock that was surrounded by armed police, with a guard dog next to it. The above elements are sufficient for the Court to conclude that the conditions in the courtroom at the Khamovnicheskiy District Court attained the minimum level of severity and amounted to degrading treatment in breach of art.3 of the Convention.

150 There has accordingly been a violation of art.3 of the Convention in this respect as well.

III. Alleged violation of art.5(3) of the Convention

151 The applicants complained that there were no valid reasons to warrant remanding them in custody, in breach of art.5(3) of the Convention, which reads as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be … entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. The parties' submissions

1. The Government's submissions

152 The Government maintained that when deciding on the preventive measure to be applied to the applicants the domestic courts had carefully weighed all the relevant factors, including the applicants' personal characteristics, the gravity of the offences they had been charged with, their family situation, age and state of health. They had also examined the applicants' arguments and found them unconvincing. At the same time, the courts had agreed with the prosecuting authorities that if they had not been remanded in custody the applicants could have absconded from the trial, obstructed the proceedings or continued their criminal activity. In particular, the courts had taken into consideration the fact that the applicants had been charged with an offence committed by a group, while some of its members had not been identified. Furthermore, they had taken into consideration the fact that the first and second applicants had not lived at the address where they were registered, while the third applicant had misled the investigation by at first having provided a false name. The courts had also taken account of a number of investigative measures that had still to be taken at the time. Therefore, the decisions to remand the applicants in custody and to extend their pre-trial detention had been well-grounded and had complied with art.5(3).

2. The applicants' submissions

153 The applicants maintained their complaint. The third applicant submitted that she had initially given the investigator a false name on advice of her lawyer, who had misled her. However, it had turned out that the investigator had known who

she was anyway. Therefore, in her view, her detention on the grounds that she had concealed her identity had been unfounded.

B. Admissibility

154 The Court notes that this complaint is not manifestly ill-founded within the meaning of art.35(3)(a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

155 The Court notes that the first applicant was arrested on 4 March 2012, the second applicant on 3 March 2012 and the third applicant on 16 March 2012. On 17 August 2012 the Khamovnicheskiy District Court completed the trial and found them guilty. It follows that the period of the applicants' detention to be taken into consideration under art.5(3) of the Convention amounted to five months and 14 days, five months and 15 days and five months and two days respectively.

156 The Court has already examined many applications against Russia raising similar complaints under art.5(3) of the Convention. It has found a violation of that article on the grounds that the domestic courts extended an applicant's detention by relying essentially on the gravity of the charges and using stereotyped formulae without addressing his or her specific situation or considering alternative preventive measures.[25]

157 The Court also notes that it has consistently found authorities' failure to justify even relatively short periods of detention, amounting, for example, to several months, to be in contravention of art.5(3).[26]

158 Having regard to the material in its possession, the Court notes that the Government has not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Accordingly, the Court considers that by failing to address the specific facts or consider alternative preventive measures, the authorities extended the applicants' detention on grounds which, although "relevant", cannot be regarded as "sufficient" to justify the applicants' being remanded in custody for over five months.

159 There has accordingly been a violation of art.5(3) of the Convention.

IV. Alleged violation of art.6 of the Convention

160 The applicants complained that their right to defend themselves effectively had been circumvented given that they were unable to communicate freely and privately with their lawyers during the trial. They also argued that they had been unable to effectively challenge the expert reports ordered by the investigators as the trial court had refused to call rebuttal experts or the experts who had drafted the reports. The applicants relied on art.6(1) and (3)(c) and (d) of the Convention, which reads, in so far as relevant:

[25] See, among many other authorities, *Mamedova v Russia* (7064/05) 1 June 2006; *Pshevecherskiy v Russia* (28957/02) 24 May 2007; *Shukhardin v Russia* (65734/01) 28 June 2007; *Belov v Russia* (22053/02) 3 July 2008; *Makarov v Russia* (15217/07) 12 March 2009; *Logvinenko v Russia* (44511/04) 17 June 2010; and *Samoylov v Russia* (57541/09) 24 January 2012.

[26] See, e.g. *Belchev v Bulgaria* (39270/98) 8 April 2004 at [82], where the applicant's pre-trial detention lasted four months and 14 days, and *Sarban v Moldova* (3456/05) 4 October 2005 at [95]–[104], where the applicant's pre-trial detention was slightly more than three months.

"1. In the determination … of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …

…

3. Everyone charged with a criminal offence has the following minimum rights:

…

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

…"

A. The parties' submissions

1. The Government's submissions

161 The Government argued that the applicants had fully used their right to have confidential consultations with counsel, as guaranteed by domestic law. All of them had had numerous meetings with their lawyers and neither the applicants nor their representatives had made any complaints in that regard. The Government provided a copy of the register of visits by the applicants' lawyers to the remand prison. They further pointed out that the applicants had likewise made no complaints to the trial court concerning the alleged impossibility to have confidential talks with their lawyers during the hearings. The state could also not be held accountable if the applicants had been unhappy with the quality of the legal assistance provided by counsel of their choice. In particular, the third applicant had filed a complaint to the Moscow Regional Bar Association concerning one of the lawyers that had represented her and had asked the court for time to find a different representative. The court had granted that request. The first and second applicants had also eventually refused the services of the lawyers who had represented them initially. The Government pointed out that only the first applicant had raised the issue of an alleged failure to secure her right to confidential meetings with her counsel on appeal. They argued therefore that the second and third applicants had failed to exhaust the available domestic remedies and that the complaint was manifestly ill-founded in respect of the first applicant.

162 The Government further argued that the trial court had acted within its discretionary powers when deciding on the applicants' request to exclude the expert report as evidence or to carry out another expert examination. The trial court had dismissed the applicants' application to question certain experts at the hearing as it had found that the questions were irrelevant for the proceedings. Furthermore, the applicants had not asked the court to order another expert examination by a different expert institution, nor had they sought to complement the list of questions put to the experts examined during the trial. The Government pointed out that the trial court had carefully studied all the expert opinions and had set out its assessment

thereof in detail in the judgment. In their view therefore there had been no violation of art.6(1) in that regard.

2. The applicants' submissions

163 The applicants submitted that they had raised all the complaints in question before the trial court and on appeal. They maintained their complaints concerning a violation of their rights under art.6. They contended that the register of the applicants' lawyers' visits to the remand prison provided by the Government was misleading as it related to visits before the trial. However, the relevant aspect of their complaint concerned their inability to communicate freely and privately with their lawyers during the trial, in particular, on account of the glass dock where they had been held during the hearings and because the timing of the hearings and the conditions of their transportation to and from court had left them exhausted.

B. Admissibility

164 As regards the plea of non-exhaustion raised by the Government with respect to the complaint concerning the lack of confidential consultations between the applicants and their lawyers during the trial, the Court notes that it was raised by the applicants before the trial court.[27] Furthermore, it was raised by the first applicant in her appeal statement, where she submitted that none of the accused could have confidential consultations with their lawyers.[28] However, it was not examined by the appeal court.[29] In the light of the foregoing the Court does not see how there could have been a different outcome if the second and third applicants had raised the complaint on appeal. It therefore dismisses the Government's objection.

165 The Court notes that this complaint is not manifestly ill-founded within the meaning of art.35(3)(a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

166 The Court notes that the applicants raised two distinct issues, relying on specific guarantees of art.6(3) of the Convention as well as on the general right to a fair hearing provided for by art.6(1). As the requirements of art.6(3) are to be seen as particular aspects of the right to a fair trial guaranteed by art.6(1) of the Convention,[30] each of the complaints should be examined under those two provisions taken together.

167 The Court will first examine the complaint under art.6(3)(c) concerning the applicants' inability to communicate freely and privately with their lawyers during the trial. The applicants contended that the courtroom arrangement, involving a glass dock in which they sat throughout the trial, had not only constituted degrading treatment but had also hampered them in consulting their lawyers. The Court notes that in the present case the glass dock was a permanent courtroom installation, a place designated for defendants in criminal proceedings. In the applicants' case it was surrounded throughout the hearing by police officers and court ushers who

[27] See [31] above.
[28] See [55] above.
[29] See [57] above.
[30] See, among many other authorities, *Van Mechelen v Netherlands* (1998) 25 E.H.R.R. 647 at [49].

kept the applicants under close observation. On one side, they also separated the glass dock from the desk where the applicants' lawyers sat during the trial.

168 The Court reiterates that a measure of confinement in a courtroom may affect the fairness of a trial, as guaranteed by art.6 of the Convention. In particular, it may have an impact on the exercise of an accused's rights to participate effectively in the proceedings and to receive practical and effective legal assistance.[31] It has stressed that an accused's right to communicate with his lawyer without the risk of being overheard by a third party is one of the basic requirements of a fair trial in a democratic society; otherwise legal assistance would lose much of its usefulness.[32]

169 The Court is mindful of the security issues a criminal court hearing may involve, especially in a large-scale or sensitive case. It has previously emphasised the importance of courtroom order for a sober judicial examination, a prerequisite of a fair hearing.[33] However, given the importance attached to the rights of the defence, any measures restricting the defendant's participation in the proceedings or imposing limitations on his or her relations with lawyers should only be imposed in so far as is necessary, and should be proportionate to the risks in a specific case.[34]

170 In the present case, the applicants were separated from the rest of the hearing room by glass, a physical barrier which to some extent reduced their direct involvement in the hearing. Moreover, that arrangement made it impossible for the applicants to have confidential exchanges with their legal counsel, to whom they could only speak through a small window measuring 15×60cm, which was only a metre off the ground and which was in close proximity to the police officers and court ushers.

171 The Court considers that it is incumbent on the domestic courts to choose the most appropriate security arrangement for a given case, taking into account the interests of administration of justice, the appearance of the proceedings as fair, and the presumption of innocence; they must at the same time secure the rights of the accused to participate effectively in the proceedings and to receive practical and effective legal assistance.[35] In the present case, the use of the security installation was not warranted by any specific security risks or courtroom order issues but was a matter of routine. The trial court did not seem to recognise the impact of the courtroom arrangements on the applicants' defence rights and did not take any measures to compensate for those limitations. Such circumstances prevailed for the duration of the first-instance hearing, which lasted for over one month, and must have adversely affected the fairness of the proceedings as a whole.

172 It follows that the applicants' rights to participate effectively in the trial court proceedings and to receive practical and effective legal assistance were restricted and that those restrictions were neither necessary nor proportionate. The Court concludes that the criminal proceedings against the applicants were conducted in violation of art.6(1) and (3)(c) of the Convention.

173 In view of that finding, the Court does not consider it necessary to address the remainder of the applicants' complaints under art.6(1) and (3)(d) of the Convention.

[31] See *Yaroslav Belousov v Russia* (2653/13 and 60980/14) 4 October 2016 at [149] and *Svinarenko v Russia* (32541/08 and 43441/08) 17 July 2014 at [134] and the cases cited therein.
[32] See *Svinarenko v Russia* (32541/08 and 43441/08) 17 July 2014 at [97].
[33] See *Ramishvili v Georgia* (1704/06) 27 January 2009 at [131].
[34] See *Van Mechelen v Netherlands* (1998) 25 E.H.R.R. 647 at [58]; *Sakhnovskiy v Russia* (21272/03) 2 November 2010 at [102]; and *Yaroslav Belousov v Russia* (2653/13 and 60980/14) 4 October 2016 at [150].
[35] See *Yaroslav Belousov v Russia* (2653/13 and 60980/14) 4 October 2016 at [152].

V. Alleged violation of art.10 of the Convention on account of criminal prosecution for the performance of 21 February 2012

174 The applicants complained that the institution of criminal proceedings against them, entailing their detention and conviction, for the performance of 21 February 2012 had amounted to a gross, unjustifiable and disproportionate interference with their freedom of expression, in breach of art.10 of the Convention, which reads as follows:

> "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."

A. The parties' submissions

1. The Government's submissions

175 The Government contested that argument. They submitted, first, that the applicants had not been convicted of hooliganism for expressing their opinions but because they had committed an offence punishable by the Criminal Code. The fact that while committing the offence the applicants had believed that they were expressing their views or had given a performance was not sufficient to conclude that the conviction had actually constituted an interference with their freedom of expression. Any such interference had been of an indirect and secondary nature and had not fallen under the protection of art.10. The Government referred in that regard to *Kosiek v Germany* and *Glasenapp v Germany*.[36]

176 The Government further argued that if the Court considered that there had been an interference with the applicants' right under art.10 then it had been "in accordance with the law". In particular, art.213 of the Criminal Code clearly set out what constituted hooliganism, which had been further elaborated by the Supreme Court in Ruling No.45 of 15 November 2007.[37] The legislation in question was therefore clear and foreseeable. The applicants had been bound to realise that an Orthodox church was not a concert venue and that their actions would be liable to sanctions.

177 As regards the legitimate aim of the interference, the Government submitted that it had sought to protect Orthodox Christians' right to freedom of religion. As

[36] *Kosiek v Germany* (1987) 9 E.H.R.R. 328 and *Glasenapp v Germany* (1987) 9 E.H.R.R. 25.
[37] See [88] above.

for the proportionality of the interference, in the Government's view it had been "necessary in a democratic society" in order to safeguard the rights guaranteed by art.9 of the Convention. They referred in that regard to *Otto-Preminger Institut*,[38] where the Court had stated that "whoever exercises the rights and freedoms enshrined in the first paragraph of [Article 10] undertakes 'duties and responsibilities'. Amongst them … an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs". The Government also endorsed the relevant part of the submissions of the Alliance Defending Freedom.[39]

178 The Government argued that the applicants' manifestly provocative behaviour in a place of religious worship, which, furthermore, was one of the symbols of the Russian Orthodox community and had been chosen specifically by the applicants to amplify the provocative nature of their actions, had targeted the Christians working in and visiting the cathedral as the audience, had undermined tolerance and could not be regarded as a normal exercise of Convention rights. Furthermore, the applicants had made a video of their performance and uploaded it to the internet, where it had been viewed several thousand times a day, which had thereby made their performance even more public.

179 The Government emphasised that the applicants had not been punished for the ideas or opinions that they might have been seeking to impart, whether political or religious, but for the form in which that had been done. They stated that the Court should consider the context and not the content of their speech. In their view, the applicants' conduct could not "contribute to any form of public debate capable of furthering progress in human affairs" and had merely been a provocative act and a public disturbance, which had constituted an unjustified encroachment on others' freedom of religion. They also pointed out that while art.213(2) of the Criminal Code provided for imprisonment of up to seven years, the applicants had only been sentenced to two years in jail and that the third applicant had been exempted from serving her sentence.

180 The Government argued that in the given circumstances the state had been called upon to take measures in order to protect art.9 rights and to punish those responsible for violating places of religious worship and expressing opinions incompatible with the exercise of those rights. Accordingly, in the Government's view there had been no violation of art.10 in the present case.

2. The applicants' submissions

181 The applicants maintained that the criminal proceedings against them had constituted an interference with their right to freedom of expression as they had been prosecuted for their performance. In their view, the Government's argument to the contrary and, in particular, the reference to *Kosiek*[40] was misconceived. It also argued that the cases of *Otto-Preminger Institut*[41] and *İA v Turkey*[42] had concerned entirely different situations. In any event, in both those cases the punishment had been much milder than that imposed on the applicants, being a

[38] *Otto-Preminger Institut v Austria* (1995) 19 E.H.R.R. 34 at [47] and [49].
[39] See [185]–[186] below.
[40] *Kosiek v Germany* (1987) 9 E.H.R.R. 328.
[41] *Otto-Preminger Institut v Austria* (1995) 19 E.H.R.R. 34.
[42] *İA v Turkey* (2007) 45 E.H.R.R. 30.

ban on showing the film in question in the former case and a fine in the latter. The applicants further argued that the domestic courts had failed either to recognise that their song had an explicit political message or to assess the proportionality of the interference. Furthermore, the conclusion that their actions had been motivated by religious hatred was arbitrary and based on an incomplete assessment of the evidence owing to the refusal of their applications for additional evidence and to question additional witnesses.

182 The applicants submitted that they had chosen Christ the Saviour Cathedral for their performance because the Patriarch of the Russian Orthodox Church had used that venue for a political speech. In particular, he had criticised demonstrations against President Putin in the cathedral and had announced that he supported him for a third term as President. The applicants pointed out that they had criticised public and religious officials in their song for the manner in which they exercised their official functions, and argued that political speech enjoyed the highest level of protection under the Convention as being of paramount importance in a democratic society.

183 The applicants further argued that the domestic courts' findings that their actions had been offensive to Orthodox believers had also been unsubstantiated because their performance had only lasted about a minute-and-a-half and had been witnessed by about six people who had been working in the cathedral. The extremely short duration of the incident, the fact that it had not interrupted any religious service and had been witnessed by a very limited number of people should have led to the incident being classified as an administrative offence rather than a criminal one. In the applicants' view, the courts' analysis had not in the main been built on the incident as such, but on the video of it that had been posted on the internet, which had been seen one-and-a-half million times in 10 days. Finally, the applicants contended that sentencing them to one year and 11 months in jail had been grossly disproportionate.

B. Submissions by third-party interveners

1. Submissions from the Alliance Defending Freedom (ADF)

184 The ADF noted that there was growing intolerance against Christians throughout Council of Europe Member States, which had been addressed by a number of international organisations, in particular by the Parliamentary Assembly of the Council of Europe in Resolution 1928 (2013) on Safeguarding Human Rights in Relation to Religion and Belief, and Protecting Religious Communities from Violence.

185 They further submitted that Christians, like any other group in society, did not have the right not to be offended. On the contrary, they had to be prepared to be "offended, shocked and disturbed" within the meaning of the Court's case-law.[43] They argued, however, that Christians had the right to worship freely without fear of obscene, hostile or even violent protests taking place within their church buildings.

186 The ADF pointed out that when state authorities had to take action against activists who invaded a church and protested during a religious service they would

[43] See *Handyside v United Kingdom* (1979-80) 1 E.H.R.R. 737 at [49].

necessarily be restricting those activists' freedom of speech. In the ADF's view, the Court should look at the context of events rather than the particular content of the speech when determining whether such a restriction had been proportionate. In that regard, the ADF referred to several cases where the Court had found a restriction on the manner and form of expression to be proportionate as long as the expression itself had not been prohibited from taking place.[44] The ADF argued that a content-based approach to determining acceptable limitations on speech lacked clarity, was open to abuse and ran the risk of decisions being influenced by personal and political convictions rather than objective standards.[45] At the same time, a context-based approach was preferable as it did not require an assessment of whether the speech in question had been "insulting", "hateful" or "disrespectful" and was therefore beyond the protection of art.10, or whether it had been "offensive", "shocking" or "disturbing" but had amounted to a fundamental right under the Convention.

2. Submissions by Amnesty International and Human Rights Watch

187 Amnesty International and Human Rights Watch (the interveners) noted that while freedom of expression was one of the foundations of a democratic society, states were permitted, and in certain circumstances even obligated, to restrict it in order to protect the rights of others. However, when applying such restrictions states had to choose to that end the least restrictive instrument, with criminal sanctions rarely meeting that requirement. In that regard, the interveners referred in particular to the Rabat Plan of Action and the Committee on the Elimination of Racial Discrimination General Recommendation No.35: Combating Racist Hate Speech.[46]

188 The interveners argued that criminal sanctions should only be applied to offences that concerned advocacy of hatred that constituted incitement to violence, hostility or discrimination on the grounds of nationality, race, religion, ethnicity, gender or sexual orientation. Punitive laws should be formulated with sufficient precision and have a narrow scope of operation as otherwise they would have a chilling effect on other types of speech.

189 In so far as religious hatred might be at issue, the interveners' view was that there should be a clear distinction between expression that constituted incitement to religious discrimination, hostility and violence on the one hand, and expression that criticised or even insulted religions in a manner that shocked or offended the religion's adherents. They noted in that regard that States Parties to the ICCPR were required to prohibit the former, but were not permitted to punish the latter.[47] It had therefore to be clearly defined what constituted the offence of incitement to religious discrimination, hostility and violence.

190 The interveners further observed that laws restricting freedom of expression in the interests of protecting religions or their adherents from offences such as blasphemy, religious insult and defamation were often vague, subject to abuse and punished expression that fell short of the threshold of advocacy of hatred and were

[44] They referred, inter alia, to *Rai v United Kingdom* (1995) 19 E.H.R.R. CD93 and *Barraco v France* (31684/05) 5 March 2009, both cases examined under art.11.
[45] They referred, inter alia, to *Féret v Belgium* (15615/07) 16 July 2009 and *Vejdeland v Sweden* (2014) 58 E.H.R.R. 15.
[46] See [108] and [110] above.
[47] See [104] above.

therefore detrimental to other human rights. In that regard the interveners referred, in particular, to the Report of the Venice Commission, the Human Rights Committee's General Comment No.34 and the Rabat Plan of Action.[48]

3. Submissions by ARTICLE 19

191 ARTICLE 19 sought to outline the context of the present case. They noted a number of domestic legal instruments, which they argued constituted impediments to political speech in Russia. Apart from the Suppression of Extremism Act,[49] those included art.282 of the Criminal Code prohibiting the incitement of hatred on the grounds, inter alia, of sex, race, nationality or religion which, according to ARTICLE 19, did not meet the standards of the Rabat Plan of Action[50] and was used to stifle voices critical of the Government. They likewise criticised Law No.139-FZ on Amending the Federal Law on the Protection of Children from Information Harmful to their Health and Development, which had increased the executive authorities' power to block certain websites.

192 ARTICLE 19 also noted the following legal provisions passed after 2012 which, in their view, restricted freedom of expression. First, it referred to Federal Law No.433-FZ of 28 December 2013 on Amendments to the Criminal Code of the Russian Federation, which had added art.2801 to the Code, criminalising public incitement to actions aimed at breaching Russian territorial integrity. ARTICLE 19 noted that the provision did not specify that it only applied to calls for territorial changes by means of violent action. Secondly, it cited Federal Law No.135-FZ of 29 June 2013 on an Amendment to art.148 of the Criminal Code and Other Legislative Acts of the Russian Federation with the Aim to Counter Insults to the Religious Convictions and Feelings of Citizens, which had criminalised insulting religious feelings. Thirdly, it noted that libel, which had been decriminalised in 2011, had again been made a criminal offence by Federal Law No.141-FZ of 28 July 2012 on Amendments to the Criminal Code of the Russian Federation and Certain Legislative Acts of the Russian Federation. ARTICLE 19 referred to a number of convictions for libel under art.128.1 where the statements at issue had been directed against state officials. Fourthly, it referred to Federal Law No.190-FZ of 12 November 2012 on Amendments to the Criminal Code of the Russian Federation and art.151 of the Code of Criminal Procedure of the Russian Federation. It had broadened the definition of the crime of "high treason" contained in art.275 of the Criminal Code by including "assistance … to a foreign State, an international or foreign organisation or their representatives in activity directed against the security of the Russian Federation". The definition of "espionage" contained in art.276 of the Criminal Code had also been broadened to add international organisations to the list of entities cooperation with which could be considered as espionage.

193 Furthermore, ARTICLE 19 noted the following legal acts passed after 2012, which it submitted had restricted freedom of assembly and association. First, it cited Federal Law No.121-FZ of 20 July 2012 on Amendments to Certain Legislative Acts of the Russian Federation in the Part Related to the Regulation of the Activity of Non-Commercial Organisations Acting as Foreign Agents, which

[48] See [101], [107] and [110] above.
[49] See [239] below.
[50] See [110] above.

required non-governmental organisations (NGOs) that received foreign funding and engaged in political activity to register as "foreign agents". Secondly, it referred to Federal Law No.272-FZ of 28 December 2012 on Measures in respect of Persons Involved in a Breach of Fundamental Human Rights and Freedoms, Rights and the Freedoms of Nationals of the Russian Federation. Apart from imposing sanctions on a number of US officials on account of violations of the human rights of Russian citizens and banning the adoption of Russian children by US nationals, the law had also banned Russian NGOs that either engaged in political activity and received funding from the US or engaged in activities that threatened Russia's interests. Thirdly, it mentioned Federal Law No.65-FZ of 8 June 2010 on Amendments to the Code of Administrative Offences of the Russian Federation and the Federal Law on Assemblies, Meetings, Demonstrations, Marches and Picketing, which had introduced numerous restrictions on the right of assembly. In particular, entire categories of people had been forbidden from organising public events on account of having a criminal record or of having committed administrative offences; the law provided for broad liability for an organiser for possible damage caused during an event; maximum penalties for a breach of the law in question had been increased and a new administrative offence of organising the simultaneous presence and/or movement of citizens in public places which entailed a breach of public order had been introduced in art.20.2.2 of the Code of Administrative Offences.

194 Finally, ARTICLE 19 submitted that the repression of civil society activists in Russia had increased significantly in 2012. They referred to a number of examples in 2012–2013 where such activists had been subjected to physical attacks, administrative penalties for online publications, fabricated criminal charges and even kidnapping.

4. The Government's comments on the third-party interventions

195 The Government referred to its position stated in its observations concerning the applicants' complaint.[51]

C. Admissibility

196 The Court notes that this complaint is not manifestly ill-founded within the meaning of art.35(3)(a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

D. Merits

1. General principles

197 According to the Court's well-established case-law, freedom of expression, as secured in para.1 of art.10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to para.2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend, shock or disturb; such are the demands of pluralism, tolerance and broadmindedness, without which

[51] See [175]–[180] above.

there is no "democratic society". Moreover, art.10 of the Convention protects not only the substance of the ideas and information expressed but also the form in which they are conveyed.[52]

198 As set forth in art.10, freedom of expression is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.[53]

199 In order for an interference to be justified under art.10, it must be "prescribed by law", pursue one or more of the legitimate aims listed in the second paragraph of that provision and be "necessary in a democratic society"—that is to say, proportionate to the aim pursued.[54]

200 The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by art.10.[55]

201 In assessing the proportionality of the interference, the nature and severity of the penalty imposed are among the factors to be taken into account.[56]

2. Application of the above principles to the present case

(a) Existence of act of "expression"

202 The first question for the Court is whether the actions for which the applicants were prosecuted in criminal proceedings and subsequently imprisoned were covered by the notion of "expression" under art.10 of the Convention.

203 The Court notes in that connection that it has examined various forms of expression to which art.10 applies. In particular, it was held to include freedom of artistic expression—notably within the scope of freedom to receive and impart information and ideas—which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence there is an obligation on states not to encroach unduly on an author's freedom of expression.[57]

204 The Court has also held that opinions, apart from being capable of being expressed through the media of artistic work, can also be expressed through conduct. For example, it has considered that the public display of several items of dirty clothing for a short time near Parliament, which had been meant to represent the

[52] See, among many other authorities, *Oberschlick v Austria* (1995) 19 E.H.R.R. 389 at [57] and *Women On Waves v Portugal* (31276/05) 3 February 2009 at [29] and [30].
[53] See *Stoll v Switzerland* (2008) 47 E.H.R.R. 59 at [101].
[54] See, e.g. *Steel v United Kingdom* (1999) 28 E.H.R.R. 603 at [89].
[55] See, among many other authorities, *Perna v Italy* (2004) 39 E.H.R.R. 28 at [39]; *Ekin Association v France* (2002) 35 E.H.R.R. 35 at [56]; and *Cumpănă v Romania* (2005) 41 E.H.R.R. 14 at [88].
[56] See *Ceylan v Turkey* (2000) 30 E.H.R.R. 73 at [37]; *Tammer v Estonia* (2003) 37 E.H.R.R. 43 at [69]; and *Skałka v Poland* (2004) 38 E.H.R.R. 1 at [38].
[57] See *Müller v Switzerland* (1991) 13 E.H.R.R. 212 at [27] and [33].

"dirty laundry of the nation", amounted to a form of political expression.[58] Likewise, it has found that pouring paint on statues of Ataturk was an expressive act performed as a protest against the political regime at the time.[59] Detaching a ribbon from a wreath laid by the President of Ukraine at a monument to a famous Ukrainian poet on Independence Day has also been regarded by the Court as a form of political expression.[60]

205 In the case at hand, the applicants, members of a punk band, attempted to perform their song *Punk Prayer—Virgin Mary, Drive Putin Away* from the altar of Moscow's Christ the Saviour Cathedral as a response to the ongoing political process in Russia.[61] They invited journalists and the media to the performance to gain publicity.

206 For the Court, that action, described by the applicants as a "performance", constitutes a mix of conduct and verbal expression and amounts to a form of artistic and political expression covered by art.10.

(b) Existence of an interference

207 Having regard to the foregoing, the Court considers that criminal proceedings against the applicants on account of the above actions, which resulted in a prison sentence, amounted to an interference with their right to freedom of expression.

(c) Compliance with Article 10 of the Convention

(i) "Prescribed by law"

208 According to the Government, the interference was "in accordance with the law" as the applicants had been convicted of hooliganism under art.213 of the Criminal Code, which was clear and foreseeable. The applicants contested the applicability of that provision to their actions.

209 Although there may be a question as to whether the interference was "prescribed by law" within the meaning of art.10, the Court does not consider that, in the present case, it is called upon to examine whether art.213 of the Criminal Code constituted adequate legal basis for the interference as, in its view, the applicants' grievances fall to be examined from the point of view of the proportionality of the interference. The Court therefore decides to leave the question open and will address the applicants' arguments below when examining whether the interference was "necessary in a democratic society".

(ii) Legitimate aim

210 Given that the applicants' performance took place in a cathedral, which is a place of religious worship, the Court considers that the interference can be seen as having pursued the legitimate aim of protecting the rights of others.

(iii) "Necessary in a democratic society"

211 In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole. In particular, it must determine

[58] See *Tatár v Hungary* (2014) 59 E.H.R.R. 8 at [36].
[59] See *Murat Vural v Turkey* (9540/07) 21 October 2014 at [54]–[56].
[60] See *Shvydka v Ukraine* (17888/12) 30 October 2014 at [37]–[38].
[61] See [7]–[8] above.

whether the interference in question was "proportionate to the legitimate aims pursued"[62] and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".[63] Furthermore, the Court must examine with particular scrutiny cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence.[64]

212 It notes that the applicants wished to draw the attention of their fellow citizens and the Russian Orthodox Church to their disapproval of the political situation in Russia and the stance of Patriarch Kirill and some other clerics towards street protests in a number of Russian cities, which had been caused by recent parliamentary elections and the approaching presidential election.[65] Those were topics of public interest. The applicants' actions addressed these topics and contributed to the debate about the political situation in Russia and the exercise of parliamentary and presidential powers. The Court reiterates in that connection that there is little scope under art.10(2) of the Convention for restrictions on political speech or debates on questions of public interest. It has been the Court's consistent approach to require very strong reasons for justifying restrictions on political debate, for broad restrictions imposed in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned.[66]

213 That being said, the Court reiterates that notwithstanding the acknowledged importance of freedom of expression, art.10 does not bestow any freedom of forum for the exercise of that right. In particular, that provision does not require the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property, such as, for instance, government offices and ministries.[67] Furthermore, the Court considers that holding an artistic performance or giving a political speech in a type of property to which the public enjoys free entry may, depending on the nature and function of the place, require respect for certain prescribed rules of conduct.

214 In the present case the applicants' performance took place in Moscow's Christ the Saviour Cathedral. It can be considered as having violated the accepted rules of conduct in a place of religious worship. Therefore, the imposition of certain sanctions might in principle be justified by the demands of protecting the rights of others, although the Court notes that no proceedings were instituted against the applicants following their mock performance of the same song at the Epiphany Cathedral in the district of Yelokhovo in Moscow on 18 February 2012 in similar circumstances.[68]

215 However, in the case at hand the applicants were subsequently charged with a criminal offence and sentenced to one year and 11 months in prison. The first and second applicants served approximately one year and nine months of that term before being amnestied while the third applicant served approximately seven months before her sentence was suspended. The Court notes that the applicants' actions did not disrupt any religious services, nor did they cause any injures to people inside the cathedral or any damage to church property. In those circumstances the

[62] See *Chauvy v France* (2005) 41 E.H.R.R. 29 at [70].
[63] See, inter alia, *Fressoz v France* (2001) 31 E.H.R.R. 2 at [45].
[64] See *Taranenko v Russia* (19554/05) 15 May 2014 at [87].
[65] See [7]–[8] above.
[66] See *Feldek v Slovakia* (2000) 30 E.H.R.R. CD291 at [83] and *Sürek v Turkey* (26682/95) 8 July 1999 at [61].
[67] See *Appleby v United Kingdom* (2003) 37 E.H.R.R. 38 at [47] and *Taranenko v Russia* (19554/05) 15 May 2014 at [78].
[68] See [12] above.

Court finds that the punishment imposed on the applicants was very severe in relation to the actions in question. It will further examine whether the domestic courts put forward "relevant and sufficient" reasons to justify it.

216 The Court notes that the domestic courts convicted the applicants of hooliganism motivated by religious hatred and enmity, committed in a group acting with premeditation and in concert, under art.213(2) of the Criminal Code. It is significant that the courts did not examine the lyrics of the song *Punk Prayer—Virgin Mary, Drive Putin Away* performed by the applicants, but based the conviction primarily on the applicants' particular conduct. The trial court emphasised the applicants' being "dressed in brightly coloured clothes and wearing balaclavas", making "brusque movements with their heads, arms and legs, accompanying them with obscene language and other words of an insulting nature" to find that such behaviour did not "respect the canons of the Orthodox Church", and that "representatives of other religions, and people who do not consider themselves believers, also [found] such behaviour unacceptable".[69] The trial court concluded that the applicants' actions had "offend[ed] and insult[ed] the feelings of a large group of people" and had been "motivated by religious hatred and enmity".[70]

217 The Court reiterates that it has had regard to several factors in a number of cases concerning statements, verbal or non-verbal, alleged to have stirred up or justified violence, hatred or intolerance where it was called upon to decide whether the interferences with the exercise of the right to freedom of expression of the authors of such statements had been "necessary in a democratic society" in the light of the general principles formulated in its case-law.

218 One of them has been whether the statements were made against a tense political or social background; the presence of such a background has generally led the Court to accept that some form of interference with such statements was justified. Examples include the tense climate surrounding the armed clashes between the PKK (the Workers' Party of Kurdistan, an illegal armed organisation) and the Turkish security forces in south-east Turkey in the 1980s and 1990s[71]; the atmosphere engendered by deadly prison riots in Turkey in December 2000[72]; problems relating to the integration of non-European immigrants in France, especially Muslims[73]; and relations with national minorities in Lithuania shortly after the re-establishment of its independence in 1990.[74]

219 Another factor has been whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance.[75] In assessing that point, the Court has been particularly sensitive towards sweeping statements

[69] See [52] above.
[70] See [52] above.
[71] See *Zana v Turkey* (1999) 27 E.H.R.R. 667 at [57]–[60]; *Sürek v Turkey* (26682/95) 8 July 1999 at [52] and [62]; and *Surek v Turkey* (24735/94) 8 July 1999 at [40].
[72] See *Falakaoğlu and Saygılı v Turkey* (22147/02 and 24972/03) 23 January 2007 at [33] and *Saygılı and Falakaoğlu v Turkey* (38991/02) 17 February 2009 at [28].
[73] See *Soulas v France* (15948/03) 10 July 2008 at [38]–[39] and *Le Pen v France* (18788/09) 20 April 2010.
[74] See *Balsyte-Lideikiene v Lithuania* (72596/01) 4 November 2008 at [78].
[75] See, among other authorities, *Incal v Turkey* (2000) 29 E.H.R.R. 449 at [50]; *Sürek v Turkey* (26682/95) 8 July 1999 at [62]; *Özgür Gündem v Turkey* (2001) 31 E.H.R.R. 49 at [64]; *Gündüz v Turkey* (2005) 41 E.H.R.R. 5 at [48] and [51]; *Soulas v France* (15948/03) 10 July 2008 at [39]–[41] and [43]; *Balsyte-Lideikiene v Lithuania* (72596/01) 4 November 2008 at [79]–[80]; *Féret v Belgium* (15615/07) 16 July 2009 at [69]–[73] and [78]; *Hizb ut-Tahrir v Germany* (2012) 55 E.H.R.R. SE12 at [73]; *Kasymakhunov and Saybatalo* (26261/05 and 26377/06) 14 March 2013 at [107]–[112]; *Fáber v Hungary* (40721/08) 24 July 2012 at [52] and [56]–[58]; and *Vona v Hungary* (35943/10) 9 July 2013 at [64]–[67].

attacking entire ethnic, religious or other groups or casting them in a negative light.[76]

220 The Court has also paid attention to the manner in which statements were made, and their capacity—direct or indirect—to lead to harmful consequences. Examples include *Karataş v Turkey*, [77] where the fact that the statements in question had been made through poetry rather than in the media led to the conclusion that the interference could not be justified by the special security context otherwise existing in the case; *Féret*,[78] where the medium was electoral leaflets, which had enhanced the effect of the discriminatory and hateful message that they were conveying; *Gündüz*,[79] which involved statements made in the course of a deliberately pluralistic televised debate, which had reduced their negative effect; *Fáber*,[80] where the statement had consisted in the mere peaceful holding of a flag next to a rally, which had had a very limited effect, if any at all, on the course of the rally; *Vona*,[81] where the statement had involved military-style marches in villages with large Roma populations, which, given the historical context in Hungary, had carried sinister connotations; and *Vejdeland*,[82] where the statements had been made on leaflets left in the lockers of secondary school students.

221 In all of the above cases, it was the interplay between the various factors involved rather than any one of them taken in isolation that determined the outcome of the case. The Court's approach to that type of case can thus be described as highly context-specific.[83]

222 In similar vein, the Court notes that the ECRI General Policy Recommendation No.15 on Combating Hate Speech states that, when determining whether an expression constituted incitement to hatred, the following elements are essential for assessment of whether or not there is a risk of acts of violence, intimidation, hostility or discrimination: (i) "the context in which the hate speech concerned is being used"; (ii) "the capacity of the person using the hate speech to exercise influence over others"; (iii) "the nature and strength of the language used"; (iv) "the context of the specific remarks"; (v) "the medium used"; and (vi) "the nature of the audience".[84] It further notes that, with regard to artistic expression, Frank La Rue, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, in his Report of 7 September 2012 specifically noted that it "should be considered with reference to its artistic value and context, given

[76] See *Seurot v France* (57383/00) 18 May 2004; *Soulas v France* (15948/03) 10 July 2008 at [40] and [43]; and *Le Pen v France* (18788/09) 20 April 2010, all of which concerned generalised negative statements about non-European immigrants in France, in particular Muslims; *Norwood v United Kingdom* (2005) 40 E.H.R.R. SE11, which concerned statements linking all Muslims in the UK with the terrorist acts in the US on 11 September 2001; *WP v Poland* (42264/98) 2 September 2004; *Ivanov v Russia* (35222/04) 20 February 2007; *M'Bala M'Bala v France* (25239/13) 20 October 2015, which concerned vehement anti-Semitic statements; *Feret v Belgium* (15615/07) 16 July 2009 at [71], which concerned statements portraying non-European immigrant communities in Belgium as criminally minded; *Hizb ut-Tahrir v Germany* (2012) 55 E.H.R.R. SE12 at [73] and *Kasymakhunov and Saybatalo* (26261/05 and 26377/06) 14 March 2013 at [107], which concerned direct calls for violence against Jews, the State of Israel, and the West in general; and *Vejdeland v Sweden* (2014) 58 E.H.R.R. 15 at [54], which concerned allegations that homosexuals were attempting to play down paedophilia and were responsible for the spread of HIV and Aids.

[77] *Karataş v Turkey* (23168/94) 8 July 1999 at [51–[52].

[78] *Féret v Belgium* (15615/07) 16 July 2009 at [76].

[79] *Gündüz v Turkey* (2005) 41 E.H.R.R. 5 at [43]–[44].

[80] *Fáber v Hungary* (40721/08) 24 July 2012 at [44]–[45].

[81] *Vona v Hungary* (35943/10) 9 July 2013 at [64]–[69].

[82] *Vejdeland v Sweden* (2014) 58 E.H.R.R. 15 at [56].

[83] See *Perinçek v Switzerland* (2016) 63 E.H.R.R. 6 at [208].

[84] See [103] above.

that art may be used to provoke strong feelings without the intention of inciting violence, discrimination or hostility".[85]

223 The Court further observes that according to international standards for the protection of freedom of expression, restrictions on such freedom in the form of criminal sanctions are only acceptable in cases of incitement to hatred.[86]

224 In that regard the Court also takes note of the UN Human Rights Committee's General Comment No.34 art.19: Freedoms of Opinion and Expression, of 12 September 2011, which states in para.48 that "[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the [ICCPR], except in the specific circumstances envisaged in article 20, paragraph 2, of the [ICCPR]".[87]

225 The Court observes that in the case at hand the applicants were convicted of hooliganism motivated by religious hatred on account of the clothes and balaclavas they wore, their bodily movements and strong language. The Court accepts that as the conduct in question took place in a cathedral it could have been found offensive by a number of people, which might include churchgoers, however, having regard to its case-law and the above-mentioned international standards for the protection of freedom of expression, it is unable to discern any element in the domestic courts' analysis which would allow a description of the applicants' conduct as incitement to religious hatred.[88]

226 In particular, the domestic courts stated that the applicants' manner of dress and behaviour had not respected the canons of the Orthodox Church, which might have appeared unacceptable to certain people,[89] but no analysis was made of the context of their performance.[90] The domestic courts did not examine whether the applicants' actions could be interpreted as a call for violence or as a justification of violence, hatred or intolerance. Nor did they examine whether the actions in question could have led to harmful consequences.[91]

227 The Court finds that the applicants' actions neither contained elements of violence, nor stirred up or justified violence, hatred or intolerance of believers.[92] It reiterates that, in principle, peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence,[93] and that interference with freedom of expression in the form of criminal sanctions may have a chilling effect on the exercise of that freedom, which is an element to be taken into account when assessing the proportionality of the interference in question.[94]

228 The Court therefore concludes that certain reactions to the applicants' actions might have been warranted by the demands of protecting the rights of others on account of the breach of the rules of conduct in a religious institution.[95] However,

[85] See [106] above.
[86] See Report of the Venice Commission at [101] above; HRC Report 2006 at [105] above; and the joint submission made at the OHCHR expert workshops on the prohibition of incitement to national, racial or religious hatred at [109] above.
[87] See [107] above.
[88] See *Sürek v Turkey* (26682/95) 8 July 1999 at [62]; *Féret v Belgium* (15615/07) 16 July 2009 at [78]; and *Le Pen v France* (18788/09) 20 April 2010.
[89] See [216] above.
[90] See *Erbakan v Turkey* (59405/00) 6 July 2006 at [58]–[60].
[91] See *Erbakan v Turkey* (59405/00) 6 July 2006 at [68].
[92] See, mutatis mutandis, *Aydın Tatlav v Turkey* (50692/99) 2 May 2006 at [28].
[93] See *Murat Vural v Turkey* (9540/07) 21 October 2014 at [66].
[94] See *Jersild v Denmark* (1995) 19 E.H.R.R. 1 at [35]; *Brasilier v France* (71343/01) 11 April 2006 at [43]; *Morice v France* (2016) 62 E.H.R.R. 1 at [176]; and *Reichman v France* (50147/11) 12 July 2016 at [73].
[95] See [214] above.

the domestic courts failed to adduce "relevant and sufficient" reasons to justify the criminal conviction and prison sentence imposed on the applicants and the sanctions were not proportionate to the legitimate aim pursued.

229 In view of the above, and bearing in mind the exceptional seriousness of the sanctions involved, the Court finds that the interference in question was not necessary in a democratic society.

230 There has therefore been a violation of art.10 of the Convention.

VI. Alleged violation of art.10 of the Convention on account of banning video-recordings of the applicants' performances

231 The first two applicants complained that the Russian courts had violated their freedom of expression, as protected by art.10 of the Convention, by declaring that the video materials available on the internet were extremist and placing a ban on access to that material.

A. The parties' submissions

1. The Government's submissions

232 The Government pointed out that the complaint had been raised for the first time in the application form of 29 July 2013 on behalf of the first and second applicants, but not on behalf of the third applicant. It argued that it had been open to the applicants to appeal against the decision of the Zamoskvoretskiy District Court of 29 November 2012, but they had failed to do so. In support of its argument that that would have been an effective remedy, the Government provided a judgment on appeal delivered by the Moscow City Court on 26 September 2013 in unrelated proceedings which had concerned a decision to declare a certain book extremist. The author of the book, who was not a party to the proceedings, had appealed and his appeal statement had been examined by the court in the enclosed judgment. In the Government's view, any complaints made by the third applicant at the domestic level should not be taken into consideration for the purposes of the present complaint as she had not brought them before the Court.

233 The Government further argued that if the first and second applicants considered that they had had no effective domestic remedies against the decision of 29 November 2012, they should have lodged their application within six months of that date. However, it had not been lodged until 29 July 2013, that is, outside the six-month time-limit.

234 As regards the merits of the applicants' complaint, the Government conceded that declaring the applicants' video as extremist had constituted an interference with their rights under art.10. However, the interference had been in accordance with the law, in particular s.1(1) and (3) and s.3 of the Suppression of Extremism Act, which the Constitutional Court had found to be accessible and foreseeable in Ruling No.1053-O of 2 July 2013. At the same time, the interference had pursued the legitimate aim of protecting the morals and rights of others and had been necessary in a democratic society. With regard to the latter point the Government referred to the cases of *Handyside*; *Müller*; *Wingrove*; and *Otto-Preminger Institut*.[96]

[96] *Handyside v United Kingdom* (1979-80) 1 E.H.R.R. 737; *Müller v Switzerland* (1991) 13 E.H.R.R. 212; *Wingrove v United Kingdom* (1997) 24 E.H.R.R. 1; and *Otto-Preminger Institut v Austria* (1995) 19 E.H.R.R. 34.

2. The applicants' submissions

235 The first and second applicants maintained their complaint. They submitted, first, that the Government's suggestion that there had been no appeal against the decision of 29 November 2012 was not true as the third applicant had appealed against it. However, by a decision of 30 January 2013 the Moscow City Court had left her appeal without examination on the grounds that she was not a party to the proceedings. In the first and second applicants' view, the third applicant, being in an identical position, had effectively exhausted the available domestic remedies on behalf of the whole group as a separate appeal by them would only have led to the same result. They also pointed out that they had never been officially informed of the proceedings in question as the domestic courts had considered that the rights of the authors of the videos had not been affected. Being in prison serving their sentence, they had also had no possibility to learn of the proceedings while they were underway. In their opinion, the matter of exhaustion was closely linked to the merits of the complaint.

236 The first and second applicants further argued that the applicable domestic legislation was too vague and the proceedings in their case had been flawed as they had not been able to participate in them. In their view the definitions of "extremism", "extremist activity" and "extremist materials" contained in the Suppression of Extremism Act were too broad. As regards the procedure involved, it neither provided for the participation of the authors of the materials in question, nor provided guarantees of the independence of the expert upon whose opinion the judicial decision in the case would be based. Hence, the procedure provided no safeguards against arbitrariness. The applicants also relied on the submissions by ARTICLE 19 concerning examples of political speech being declared extremist in 2012, although they had posed no threat to national security, public order or the rights of others.[97] Finally, the applicants contended that their right to freedom of expression had been violated because the domestic courts had declared their performances, which had contained political speech protected by art.10 of the Convention, as extremist.

B. Submissions of the third-party interveners

1. Submissions from Amnesty International and Human Rights Watch

237 The interveners noted that according to their research there had been a global increase in the adoption of laws against extremism. Those laws purported to combat criminal acts such as terrorism and other violent crimes, including those carried out ostensibly in the name of religion or on the basis of religious hatred. As with laws on incitement to religious hatred,[98] the laws in question could, in the interveners' view, violate freedom of expression if they gave too broad a definition of such terms as "extremism" or "extremist materials", which might lead to their arbitrary application. Therefore, such laws should provide precise definitions of such terms so as to ensure legal certainty and compliance with the obligation of states to respect such fundamental rights as freedom of expression, the right to hold opinions and the freedom of association and assembly.

[97] See [239] below.
[98] See [190] above.

238 The interveners pointed out, in particular, that the Russian Suppression of Extremism Act qualified certain forms of defamation of public officials as "extremist" and allowed any politically or ideologically motivated offences to be classified as extremist. Therefore, non-governmental organisations or activists criticising Government policy, or which were perceived by the Government as being supporters of the political opposition, ran the risk of being targeted under the law. That issue had been discussed in 2009 by the UN Human Rights Council, in the light of which Russia had undertaken to review its legislation on extremism, which it had not done so far.

2. Submissions by ARTICLE 19

239 ARTICLE 19 submitted that the Suppression of Extremism Act had been criticised by the Venice Commission and the Council of Europe Parliamentary Assembly for failing to meet international human rights standards.[99] They also noted a number of instances where political speech had been classified as extremist under the law, although it had posed no threat to national security, public order or the rights of others. They referred, in particular, to: (i) a Kaluga Regional Court decision of February 2012 declaring a painting by AS, "The Sermon on the Mount", from a cycle of works entitled "Mickey Mouse's Travels through Art History", as extremist; (ii) a criminal investigation instituted in April 2012 against ME, a blogger and the director of the Karelian regional branch of the regional Youth Human Rights Group, on account of an article headlined "Karelia is Tired of Priests" in which he had denounced corruption in the Russian Orthodox Church; (iii) a criminal investigation instituted in October 2012 into the activities of the website *orlec.ru* in connection with material that the prosecutor had regarded as undermining the public image of local administrations and the authorities in general; and (iv) a decision by the District Court of Omsk of October 2012 to classify an article by YuA, a public figure and liberal academic, headlined "Is the Liberal Mission Possible in Russia Today?", as extremist.

3. The Government's comments on the third-party interventions

240 The Government referred to their position stated in their observations concerning the applicants' complaint.[100]

C. Admissibility

241 The Court notes at the outset that on 29 November 2012 the district court issued an order banning a series of videos featuring performances in which all three applicants had played a part. The ban affected all of them in equal measure. However, at the time it was pronounced, only the third applicant was at liberty, while the first two applicants had been sent to serve custodial sentences to, respectively, the Perm Region and the Mordoviya Republic. According to the latter, they were not notified of the pending proceedings, which is not contested by the Government, and had no possibility to become aware of them until their

[99] See [101] above and the Parliamentary Assembly's Resolution 1896 (2012) on the Honouring of Obligations and Commitments by the Russian Federation of 2 October 2012.
[100] See [234] above.

completion.[101] The Court reiterates in this connection that in the matter of domestic remedies it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant.[102]

242 The Court further notes that neither the Suppression of Extremism Act nor the applicable procedural rules made a provision for any form of notification to authors, publishers or owners of the material in respect of which a banning order was sought about the institution of such proceedings. Unlike the first and second applicants whose access to printed media and television was curtailed in custody, the third applicant immediately learned of the prosecutor's application from the news and sought to join them as an interested party.[103] Her attempt proved to be unsuccessful. In its final decision refusing her application to join the proceedings, the Moscow City Court indicated that she should be able to raise her arguments in an appeal against the decision on the merits of the case.[104]

243 Subsequently, the third applicant sought to have the ban overturned by filing substantive grounds of appeal against the district court's order of 29 November 2012. The first and second applicants were still in custody and took no part in her endeavour. After the final decision denying the third applicant the right to appeal was issued on 30 January 2013,[105] she did not pursue her legal challenge by lodging an application with this Court while the first and second applicants did. They filed the complaint on 29 July 2013, that is to say, within six months of the rejection of the third applicant's substantive appeal but more than six months after the banning order of 29 November 2012. It follows that, in the particular circumstances of the present case, the Court may only deal with the merits of the present complaint if the six-month time-limit were to be counted from the date of rejection of the third applicant's substantive appeal against the banning order.

244 The Court reiterates the relevant general principles: as a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where no effective remedy is available to the applicant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant. In any event, art.35(1) cannot be interpreted in a manner which would require an applicant to seize the Court of his complaint before his position in connection with the matter has been finally settled at the domestic level. Where, therefore, an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it would be appropriate for the purposes of art.35(1) to take the start of the six-month period from the date when the applicant first became or ought to have become aware of those circumstances.[106]

245 In the light of these principles, the Court will consider, first, whether the substantive appeal could be considered a remedy capable of providing adequate redress or whether the circumstances rendering this remedy ineffective should have been apparent from the outset. Secondly, the Court will address the Government's

[101] See [235] above.
[102] See *İlhan v Turkey* (2002) 34 E.H.R.R. 36 at [59].
[103] See [73] above.
[104] See [79] above.
[105] See [80] above.
[106] See *El-Masri v Macedonia* (2013) 57 E.H.R.R. 25 at [136].

objections to the admissibility of the complaint by the first and second applicants who had not filed any appeals of their own.

246 On the issue whether the substantive appeal offered sufficient prospects of success so as not to be obviously futile, the Court notes that the prosecutor's application for a banning order was considered in accordance with the rules of civil procedure. Articles 42 and 43 of the Code of Civil Procedure established, in principle, the right of persons whose interests were affected by the proceedings to join them as interested parties. In raising the non-exhaustion objection against the first and second applicants, the Government cited the example of similar proceedings conducted under the Suppression of Extremism Act in which a Moscow court had accepted a substantive appeal from the author of the book which had been subject to a banning order.[107] In the same vein, a court in the Krasnodar Region allowed a substantive appeal against the banning order submitted by two followers of a Chinese spiritual movement who had not been informed of the proceedings in which the foundational book of the movement had been pronounced extremist.[108] Likewise, the Krasnoyarsk Regional Court allowed a substantive appeal by the Krasondar Muftiate against the order banning the book *The Tenth Word: The Resurrection and the Hereafter* as extremist.[109] The stance adopted by the Moscow City Court also appeared to indicate that the third applicant's substantive appeal would be considered on the merits.[110] In light of these elements, the Court finds that the third applicant could reasonably and legitimately expect that the court would seriously examine her arguments in favour of setting aside the banning order. Neither she nor her counsel could have expected that on the same day the same City Court would reject her substantive appeal for a lack of locus standi.[111] In these circumstances, where the third applicant made use of an existing remedy which was prima facie accessible and available but turned out to be ineffective, the six-month period would have started, in accordance with the Court's case-law cited above, on the date of the Moscow City Court's judgment rejecting her substantive appeal.

247 The Government argued that it was not sufficient that the third applicant had availed herself of that remedy. Since she was not the one who brought this complaint to the Court, the first and second applicants should have either complained within the six months of the banning order or made use of the same remedy independently of her. The Court has recognised that art.35(1) must be applied with some degree of flexibility and without excessive formalism, taking realistic account of, in particular, the applicant's personal circumstances.[112] As noted above, the third applicant was the only one who was given a suspended sentence and retained her freedom. Unrestricted in her contacts with the outside world and her legal team, she took it upon herself to challenge the banning order in the proceedings which appeared to offer a prospect of success, at least in the initial stage. All three applicants being members of the same band whose recorded performances had been declared extremist, they were in the same situation in relation to the challenge to the banning order she had mounted. The Court sees no reason to assume that the proceedings would have taken any different course had they filed separate

[107] See [232] above.
[108] See *Sinitsyn v Russia* (39879/12 and 5956/13) 30 August 2017.
[109] See *Yedinoe Dukhovnoye Upravleniye Musulman Krasnoyarskogo Kraya v Russia* (28621/11) 27 November 2013.
[110] See [79] above.
[111] See [80] above.
[112] See *DH v Czech Republic* (2008) 47 E.H.R.R. 3 at [116].

appeals against the banning order. It considers that the first and second applicant were not required to attempt the same remedy after the ineffectiveness of a substantive appeal had become apparent with the Moscow City Court's decision of 30 January 2013.[113] The purpose of the exhaustion rule is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them and the proceedings instituted by the third applicant had provided the Russian authorities with ample opportunity to remedy the violation alleged.[114] The fact that the third applicant chose not to pursue her application to the Court under this head is immaterial after the matter had already been dealt with at domestic level.[115]

248 In sum, the Court finds that the rule of exhaustion of domestic remedies did not call for a repetition of proceedings, whether concurrently or consecutively to those issued by the third applicant. In the absence of any prior indication that the remedy would turn out to be inefficient, the Court finds that having lodged the application within the six months from the Moscow City Court's decision 30 January 2013, that is after their position in connection with the matter had been finally settled at domestic level, the first and second applicants complied with the requirements of art.35(1).

249 The Court therefore dismisses the Government's objections and finds that the complaint is not belated. Since it is not manifestly ill-founded or inadmissible on any other grounds, it must therefore be declared admissible.

D. Merits

250 The applicable general principles are stated in [197]–[201] above.

(a) Existence of an interference

251 The Court observes that the video materials in question contained recordings of Pussy Riot's performances, were owned by the group Pussy Riot of which the applicants were members, and were posted on internet pages managed by the group. It further notes that there is no dispute between the parties that declaring the video-recordings of the applicants' performances available on the Internet as "extremist" and banning them amounted to "interference by a public authority" with the first and second applicants' right to freedom of expression. Having regard to the general principles set out in [197]–[201] above, the Court reiterates that such an interference will infringe the Convention unless it satisfies the requirements of para.2 of art.10. It must therefore be determined whether it was "prescribed by law", pursued one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" to achieve those aims.

(b) "Prescribed by law"

252 The Court notes that the domestic courts declared that the video materials in question were extremist under ss.1, 12 and 13 of the Suppression of Extremism Act and s.10(1) and (6) of the Federal Law on Information, Information

[113] Compare *Bagdonavicius v Russia* (19841/06) 11 October 2016 at [62].
[114] See *Oliari v Italy* (2017) 65 E.H.R.R. 26 at [77].
[115] See *MS v Croatia* (36337/10) 25 April 2013 at [69] and *Bilbija v Croatia* (62870/13) 12 January 2016 at [94], in both cases it was not the applicant, but a member of their family who was not an applicant before the Court who had already pursued the same remedy without success, and also *DH v Czech Republic* (2008) 47 E.H.R.R. 3 at [122], in which only five out of 12 applicants had lodged a constitutional complaint concerning the same grievance.

Technologies and the Protection of Information.[116] It observes, however, that whereas the provisions of the latter Law may have provided an additional legal basis for limiting access to those materials, it was the former Act that provided for the measures available to the authorities for combatting and punishing extremism. Accordingly, the Court considers that ss.1, 12 and 13 of the Suppression of Extremism Act constituted the statutory basis for the interference at issue.

253 The Court reiterates that the expression "prescribed by law" in the second paragraph of art.10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects.[117]

254 One of the requirements flowing from the expression "prescribed by law" is foreseeability. Thus, a norm cannot be regarded as a "law" within the meaning of art.10(2) unless it is formulated with sufficient precision to enable people to regulate their conduct; they must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice.[118]

255 The level of precision required of domestic legislation—which cannot provide for every eventuality—depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed.[119]

256 In the present case the parties' opinions differed as to whether the interference with the first and second applicants' freedom of expression was "prescribed by law". The applicants argued that the applicable domestic legislation was vague to the point of making the legal rule in question unforeseeable. In particular, the definitions of "extremism", "extremist activity" and "extremist materials" contained in the Suppression of Extremism Act were, in their view, too broad. The Government referred to Ruling No.1053-O of 2 July 2013, where the Constitutional Court had refused to find s.1(1) and (3) and s.13(3) unconstitutional for allegedly lacking precision in the definitions of "extremist activity" and "extremist materials".

257 The Court notes that the Venice Commission expressed reservations in its Opinion about the inclusion of certain activities in the list of those that were "extremist", considering their definitions to be too broad, lacking clarity and open to different interpretations.[120] The Venice Commission also deplored the absence of "violence" as a qualifying element of "extremism" or "extremist activity".[121]

[116] See [76] above.
[117] See, among other authorities, *VgT Verein gegen Tierfabriken v Switzerland* (2002) 34 E.H.R.R. 4 at [52]; *Gawęda v Poland* (2004) 39 E.H.R.R. 4 at [39]; *Maestri v Italy* (2004) 39 E.H.R.R. 38 at [30]; and *Delfi AS v Estonia* (2016) 62 E.H.R.R. 6 at [120]. However, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see *Centro Europa 7 Srl v Italy* (38433/09) 7 June 2012 at [140]; *Kruslin v France* (1990) 12 E.H.R.R. 547; and *Kopp v Switzerland* (1999) 27 E.H.R.R. 91 at [59]).
[118] See, e.g. *Lindon v France* (2008) 46 E.H.R.R. 35 at [41]; *Centro Europa 7 Srl v Italy* (38433/09) 7 June 2012 at [141]; and *Delfi AS v Estonia* (2016) 62 E.H.R.R. 6 at [121].
[119] See *Centro Europa 7 Srl v Italy* (38433/09) 7 June 2012 at [142] and *Delfi AS v Estonia* (2016) 62 E.H.R.R. 6 at [122].
[120] See para.31 of the Opinion of the Venice Commission at [102] above.
[121] See paras 31, 35 and 36 of the Opinion of the Venice Commission at [102] above.

Furthermore, it expressed concerns regarding the definition of "extremist materials", which it described as "broad and rather imprecise".[122]

258 Although there may be a question as to whether the interference was "prescribed by law" within the meaning of art.10, the Court does not consider that, in the present case, it is called upon to examine the corresponding provisions of the Suppression of Extremism Act as, in its view, the applicants' grievances fall to be examined from the point of view of the proportionality of the interference. The Court therefore decides to leave the question open and will address the applicants' arguments below when examining whether the interference was "necessary in a democratic society".

(c) Legitimate aim

259 Having regard to the Government's submissions,[123] the Court accepts that the interference could be considered as having pursued the legitimate aims of protecting the morals and rights of others.

(d) Necessary in a democratic society

260 The Court reiterates that there is little scope under art.10(2) of the Convention for restrictions on political speech or on debate of questions of public interest.[124] Where the views expressed do not comprise incitements to violence—in other words, unless they advocate recourse to violent actions or bloody revenge, justify the commission of terrorist offences in pursuit of their supporter's goals or can be interpreted as likely to encourage violence by expressing deep-seated and irrational hatred towards identified persons—Contracting States must not restrict the right of the general public to be informed of them, even on the basis of the aims set out in art.10(2).[125]

261 The Court notes that in its decision of 29 November 2012 to declare the video material in question as "extremist", the Zamoskvoretskiy District Court referred to four types of such actions listed in s.1(1) of the Suppression of Extremism Act: (1) "the stirring up of social, racial, ethnic or religious discord"; (2) "propaganda about the exceptional nature, superiority or deficiency of persons on the basis of their social, racial, ethnic, religious or linguistic affiliation or attitude to religion"; (3) "violations of human and civil rights and freedoms and lawful interests in connection with a person's social, racial, ethnic, religious or linguistic affiliation or attitude to religion"; and (4) "public appeals to carry out the above-mentioned acts or the mass dissemination of knowingly extremist materials, and likewise the production or storage thereof with the aim of mass dissemination".[126] It subsequently relied on the results of Report No.55/13 of 26 March 2012 of the psychological linguistic expert examination performed by experts from the Federal Scientific Research University "The Russian Institute for Cultural Research", according to which the video materials in question were of an extremist nature.[127] In the Court's view, the domestic court's decision in the applicants' case was deficient for the following reasons.

[122] See para.49 of the Opinion of the Venice Commission at [102] above.
[123] See [234] above.
[124] See *Wingrove v United Kingdom* (1997) 24 E.H.R.R. 1 at [58] and *Seher Karataş v Turkey* (33179/96) 9 July 2002 at [37].
[125] See *Dilipak v Turkey* (29680/05) 15 September 2015 at [62].
[126] See [76] above.
[127] See [76] above.

262 In the first place, it is evident from the Zamoskvoretskiy District Court's decision that it was not the court which made the crucial legal findings as to the extremist nature of the video material but linguistic experts. The court failed to assess the expert report and merely endorsed the linguistic experts' conclusions. The relevant expert examination clearly went far beyond resolving merely language issues, such as, for instance, defining the meaning of particular words and expressions, and provided, in essence, a legal qualification of the video materials. The Court finds that situation unacceptable and stresses that all legal matters must be resolved exclusively by the courts.[128]

263 Secondly, the domestic court made no attempt to conduct its own analysis of the video materials in question. It did not specify which particular elements of the videos were problematic so as to bring them within the scope of the provisions of s.1(1) of the Suppression of Extremism Act it referred to in the decision.[129] Moreover, the court did not so much as quote the relevant parts of the expert report, referring only briefly to its overall findings. The virtual absence of reasoning by the domestic court makes it impossible for the Court to grasp the rationale behind the interference.

264 In the light of the lack of reasons given by the domestic court, the Court is not satisfied that it "applied standards which were in conformity with the principles embodied in Article 10 " or based itself "on an acceptable assessment of the relevant facts".[130] The domestic court consequently failed to provide "relevant and sufficient" reasons for the interference in question.

265 Furthermore, the Court takes note of the first and second applicants' argument that the proceedings in the case at hand were flawed as they could not participate in them. In fact, the applicants were unable to contest the findings of the expert report relied upon by the domestic court as none of them were able to participate in the proceedings. Not only were they not even informed of the proceedings in question, but the application to join the proceedings lodged by the third applicant was dismissed at three levels of jurisdiction.[131] Furthermore, it was precisely on the grounds that she was not a party to the proceedings that her appeal against the decision of 29 November 2012 was left without examination.[132]

266 The Court observes that it was not a particular shortcoming in their case which meant that the applicants were unable to participate in the proceedings, but because of the state of the domestic law, which does not provide for concerned parties to participate in proceedings under the Suppression of Extremism Act. The Court notes that it has found a breach of art.10 of the Convention in a number of cases in situations where under the domestic law an applicant was unable effectively to contest criminal charges brought against him, as he was either not allowed to adduce evidence of the truth of his statements, or to plead a defence of justification, or due to the special protection afforded to the party having the status of the victim in the

[128] See *Dmitriyevskiy v Russia* (42168/06) 3 October 2017 at [113].
[129] See *Kommersant Moldovy v Moldova* (41827/02) 9 January 2007 at [36] and *Terentyev v Russia* (25147/09) 26 January 2017 at [22].
[130] See *Jersild v Denmark* (1995) 19 E.H.R.R. 1 at [31] and *Kommersant Moldovy v Moldova* (41827/02) 9 January 2007 at [38].
[131] See [74], [78] and [79] above.
[132] See [80] above.

criminal proceedings.[133] It further notes that it has likewise found a violation of art.10 on account of a breach of equality of arms in civil defamation proceedings.[134]

267 The Court considers that similar considerations apply to proceedings instituted under the Suppression of Extremism Act. In the Court's view, a domestic court can never be in a position to provide "relevant and sufficient" reasons for an interference with the rights guaranteed by art.10 of the Convention without some form of judicial review based on a weighing up of the arguments put forward by the public authority against those of the interested party. Therefore, the proceedings instituted in order to recognise the first and second applicants' activity or materials belonging to them as "extremist", in which the domestic law did not allow their participation, thereby depriving them of any possibility to contest the allegations made by the public authority that brought the proceedings before the courts, cannot be found compatible with art.10 of the Convention.

268 The foregoing considerations are sufficient to enable the Court to conclude that declaring that the applicants' video materials available on the internet were extremist and placing a ban on access to them did not meet a "pressing social need" and was disproportionate to the legitimate aim invoked. The interference was thus not "necessary in a democratic society".

269 Accordingly, there has been a violation of art.10 of the Convention in respect of the first and second applicants.

VII. Application of art.41 of the Convention

270 Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

271 The first and second applicants claimed €120,000 in respect of non-pecuniary damage. The third applicant claimed €5,000. They submitted that they had suffered and were still suffering from anxiety and frustration on account of the numerous violations of their rights, including the inhuman and degrading treatment they had been subjected to, the uncertainty they had endured in pre-trial detention, the denial of a fair trial and the prison term they had served following their conviction.

272 The Government found the amounts claimed to be excessive and unfounded.

273 The Court considers that on account of the violations it has found the applicants sustained non-pecuniary damage that cannot be compensated for by the mere finding of a violation. Ruling on an equitable basis as required by art.41 of the Convention, it awards the first and second applicants the amount of €16,000 each and the third applicant the amount claimed in respect of non-pecuniary damage.

[133] See *Castells v Spain* (1992) 14 E.H.R.R. 445 at [48]; *Colombani v France* (51279/99) 25 June 2002 at [66]; *Pakdemirli v Turkey* (35839/97) 22 February 2005 at [52]; and *Mondragon v Spain* (2015) 60 E.H.R.R. 7 at [55].
[134] See *Steel v United Kingdom* (2005) 41 E.H.R.R. 22 at [95].

B. Costs and expenses

274 The first and second applicants also claimed €11,760 for the costs and expenses incurred before the Court. They submitted an agreement on legal services of 11 June 2014 concluded between the first applicant and Mr Grozev. The agreement contains a reference to their earlier agreement that Mr Grozev would represent the three applicants in the present case. According to the agreement, the first applicant undertook to pay for Mr Grozev's services at the hourly rate of €120, with the final amount to be transferred to Mr Grozev's account if the application before the Court was successful. The applicants also provided an invoice for 98 hours of work by Mr Grozev at the rate of €120 an hour, which includes studying the case material and preparing the application form and observations in reply to those of the Government.

275 The Government contested the applicants' claims for legal expenses. They argued that the reference to an "earlier agreement" should be deemed invalid as no such agreement had been provided to the Court. It argued that compensation should only be provided for costs and expenses incurred after the date of the agreement, that is 11 June 2014. In any event, they considered the amount claimed to be excessive.

276 According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the amount claimed for the proceedings before the Court.

C. Default interest

277 The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

For these reasons, the Court:

1. *Declares*, unanimously, the complaints under art.3 about the conditions of the applicants' transportation and detention in the courthouse and their treatment during the court hearings, under art.5(3), art.6 and art.10 about the applicants' criminal prosecution for the performance of 21 February 2012, and about declaring the video-recordings of their performances as "extremist" in respect of the first two applicants, admissible and the remainder of the application inadmissible.
2. *Holds*, by six votes to one, that there has been a violation of art.3 of the Convention.
3. *Holds*, unanimously, that there has been a violation of art.5(3) of the Convention.
4. *Holds*, unanimously, that there has been a violation of art.6(1) and (3)(c) of the Convention.
5. *Holds*, unanimously, that there is no need to examine the complaint under art.6(1) and (3)(d) of the Convention.
6. *Holds*, by six votes to one, that there has been a violation of art.10 of the Convention on account of the applicants' criminal prosecution.

7. *Holds*, unanimously, that there has been a violation of art.10 of the Convention in respect of the first and second applicants on account of declaring the video material available on the internet as extremist and banning it.
8. *Holds*, unanimously,

   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with art.44(2) of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

      (i) €16,000, plus any tax that may be chargeable, to the first and second applicants each in respect of non-pecuniary damage;
      (ii) €5,000, plus any tax that may be chargeable, to the third applicant in respect of non-pecuniary damage;
      (iii) €11,760, plus any tax that may be chargeable to the applicants, in respect of costs and expenses; and

   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

9. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

PARTLY DISSENTING OPINION OF JUDGE ELÓSEGUI[135]

OI-1 I agree with the majority that in the present case there has been a violation of arts 5(3), 6(1) and 6(3), as well as a violation of art.10 of the Convention on account of the fact that the video material available on the internet was declared extremist and was banned.

OI-2 However, I dissent with regard to the finding of a violation of art.3 of the Convention on account of the special control measures adopted during the trial, and the finding of a violation of art.10 on account of the applicants' criminal prosecution and punishment. As I will explain, I share the opinion that the applicants' conduct should not have been classified as criminal. But I consider that the Court should have emphasised that these facts could have been punished by means of an administrative or civil sanction.

OI-3 Starting with the analysis of the violation of art.3 of the Convention, I dissent from the conclusions of the majority in [145], [148], [149] and [150]. The applicants complain that during the trial their public image was tarnished and they felt humiliated. On this point the judgment states as follows[136]:

> "The Court notes that the applicants' trial was closely followed by national and international media and they were permanently exposed to public view in a glass dock that was surrounded by armed police, with a guard dog next to it."

[135] Paragraph numbers have been added by the publisher.
[136] See [149] of the judgment

OI-4 According to the judgment in *Von Hannover v Germany*,[137] one criterion by which to measure the interference with the right to private life is the previous conduct of the applicants in relation to the media. In the present case the applicants performed inside a church, inviting several media outlets to attend their performance. At several other previous events, the applicants had expressly sought publicity. The previous conduct of the applicants at several events had sought to interfere with private property, museums and shops in a disruptive manner. It was foreseeable that the applicants would take the opportunity of disturbing the court hearing if they were given the possibility. Hence, the authorities were fulfilling their legal obligations by taking special control measures during the proceedings in the courtroom, including the presence of a glass dock and of armed police.

OI-5 As regards the feelings of humiliation, it is beyond dispute that this is a subjective concept which is undetermined from a legal point of view. However, the Court has used criteria such as previous behaviour, context and the applicants' circumstances to assess these feelings. In the present case the applicants exposed themselves voluntarily to publicity and even posted images on the internet showing their faces and their naked bodies in public places.

OI-6 In consequence, I subscribe to the statement of the judgment in [148], according to which:

> "The Court considers this to constitute sufficient evidence of the fact that they were closely watching the applicants rather than monitoring the courtroom."

However, I do not arrive at the same conclusion, because the special kind of control of the courtroom was justified and proportionate to the risk of disturbance posed by the applicants. Thus, I do not consider that there has been a violation of art.3 of the Convention.

OI-7 The next major analysis in my dissenting opinion is related to the limits of art.10(2) of the Convention, which provides:

> "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."

As I have said above, I share the majority opinion that the applicants' conduct should not have been classified as criminal. But I consider that the Court should have emphasised that these facts could have been punished by means of an administrative or civil sanction. In sum, I do not share completely the conclusion of [230], which states that there has been a violation of art.10 of the Convention, because, in my view, art.10 does not protect the invasion of churches and other religious buildings and property. In fact, as Judge Pinto de Albuquerque stated in his concurring opinion in *Krupko v Russia*[138]:

[137] *Von Hannover v Germany* (2012) 55 E.H.R.R. 15 at [111].
[138] *Krupko v Russia* (26587/07) 26 June 2014 at [12].

> "… the State has a positive obligation to protect believers' freedom of assembly, namely by ensuring that they and their places of worship are fully respected by State and non-State actors and when attacks against them occur, to investigate and punish them."

OI-8 In my view, the Court should have added to the sentence in [207] ("Having regard to the foregoing, the Court considers that criminal proceedings against the applicants on account of the above actions, which resulted in a prison sentence, amounted to a disproportionate interference with their right to freedom of expression") some words to the effect that it might have been proportionate in the circumstances of the present case to apply an administrative or civil sanction to the applicants, taking into account the fact that they had invaded a church and that Christians have the right to worship freely without fear of obscene, hostile or even violent protest taking place within the church.[139]

OI-9 Freedom of expression allows for political criticism, but it does not protect, as stated in [177] of the majority judgment:

> "… expressions that are gratuitously offensive to others and thus an infringement of their rights and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs."

According to the principle of proportionality, the aim of the applicants (to express their political criticism) does not justify the means that they used. The means used by the applicants to express their political beliefs were clearly disproportionate.

OI-10 In [225] of the judgment, the majority should have taken into account the fact that art.10 of the Convention does not protect a right to insult or to humiliate individuals. This obligation is a direct obligation for the state, but also an indirect obligation for all individuals according to the doctrine of the "horizontal effect" of fundamental rights, which is also applicable to Convention rights. Freedom of expression does not protect deliberate calumny or a discourse with the aim of provoking discrimination.[140] Even value judgments of an offensive nature require a minimum of factual basis, otherwise they are considered excessive.[141]

OI-11 According to the Explanatory Memorandum to ECRI General Policy Recommendation No.15 on Combating Hate Speech, the criteria by which to identify hate speech include the following:

> "…
> (c) the nature and strength of the language used (such as whether it is provocative and direct, involves the use of misinformation, negative stereotyping and stigmatisation or otherwise capable of inciting acts of violence, intimidation, hostility or discrimination) …"

In the present case the Court accepted that, since the conduct in question took place in a cathedral, it could have been found offensive by a number of people. In my opinion, having regard to the international standards (including ECRI standards),

[139] United Nations General Assembly Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, A/RES/36/55, 25 November 1981 (the 1981 UNGA Declaration) art.6(a); General Assembly Resolution 55/97, A/RES//55/97, 1 March 2001, para.8.

[140] See *Jersild v Denmark* (1995) 19 E.H.R.R. 1 and *Gündüz v Turkey* (2005) 41 E.H.R.R. 5.

[141] See *Paturel v France* (54968/00) 22 December 2005 at [36]. See also Dirk Voorhoof, "The European Convention on Human Rights: The Rights to Freedom of Expression and Information restricted by Duties and Responsibilities in a Democratic Society", available at *https//biblio.ugent.be* [Accessed 18 February 2019], on the subject of defamation without sufficient factual basis, p.20.

the applicants' conduct cannot be seen as incitement to religious hatred, but it can be seen as "provocative" and directly involving "negative stereotyping" of Christian Orthodox believers. This is enough to harm the dignity of Orthodox believers by despising and insulting them as well as treating them as inferiors.[142]

OI-12 I agree with the conclusion of the majority in [227]:

> "The Court finds that the applicants' actions neither contained elements of violence, nor stirred up or justified violence, hatred or intolerance of believers …"

This is well-established case law, which the Court also invoked in the case of *Stomakhin v Russia*[143]:

> "In its assessment of the interference with freedom of expression in cases concerning expressions alleged to stir up or justify violence, hatred or intolerance, the Court takes into account a number of factors … the context in which the impugned statements were published, their nature and wording, their potential to lead to harmful consequences and the reason adduced by Russian courts to justify the interference in question."

However, I consider it necessary to emphasise that the conduct and the content of the song could have justified an administrative sanction or a finding of civil liability instead of a criminal penalty. According to the Explanatory Memorandum to ECRI General Policy Recommendation No.15, mentioned above, the criminal law may be used only when no other, less restrictive measure would be effective, namely when speech is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it.

OI-13 My conclusions are reinforced by the following two criteria set out in ECRI's Explanatory Memorandum[144]:

> "…
> (e) the medium used (whether or not it is capable of immediately bringing about a response from the audience such as at a 'live' event); and
> (f) the nature of the audience (whether or not this had the means and inclination or susceptibility to engage in acts of violence, intimidation, hostility or discrimination) …"

In the circumstances of this case, it could be concluded that the applicants' actions had a large audience via the internet because they recorded their performance and made it available on a digital platform. As stated in [16]:

> "A video containing footage of the band's performances of the song, both at the Epiphany Cathedral in Yelokhovo and at Christ the Saviour Cathedral, was uploaded to YouTube."

[142] It is not a justification for invoking the principle of protection of critical ideas which offend, shock or disturb. See the Council of Europe's Compilation of Council of Europe Standards relating to the principles of freedom of thought, conscience and religion and links to other human rights, Strasbourg, Council of Europe, 2015, pp.103–105.
[143] *Stomakhin v Russia* (26587/07) 26 June 2014 at [90].
[144] Explanatory Memorandum to ECRI General Policy Recommendation No.15 on Combating Hate Speech, para.16.

The applicants also invited journalists to be present.[145] All these circumstances warrant characterisation as unlawful conduct under civil or administrative law.[146]

OI-14 My conclusions are also strengthened by the Report of the United Nations High Commissioner for Human Rights on the prohibition of incitement to national, racial or religious hatred, which includes the Rabat Action Plan.[147] It recommends that a clear distinction be made between:

> "(a) forms of expression that should constitute a criminal offence;
> (b) forms of expression that are not criminally punishable, but may justify a civil suit; and
> (c) forms of expression that do not give rise to criminal or civil sanctions, but still raise concerns in terms of tolerance, civility and respect for the convictions of others."[148]

In this sense, a test has been prepared consisting of six parts, in order to define a threshold that makes it possible to establish adequately what types of expression constitute a criminal offence: the context, the speaker, the speaker's intention, the content and form of the speech act, its scope and magnitude, and the possibility of damage occurring as well as its imminence.[149]

OI-15 I can agree with the majority finding in [228]:

> "The Court therefore concludes that certain sanctions for the applicants' actions might have been warranted by the demands of protecting the rights of others on account of the breach of the rules of conduct in a religious institution (see paragraph 214 above)."

Precisely on the basis of this argument I maintain that, although the domestic courts failed to adduce relevant and sufficient reasons to justify the criminal conviction and prison sentence imposed on the applicants, the latter's conduct goes beyond the scope of art.10. In consequence, this conduct could have been punished by means of administrative or civil sanctions. Although "in the concrete case the criminal conviction and prison sentence imposed were not proportionate to the legitimate aim pursued", this is not a reason to consider that the applicant's conduct deserves protection under art.10.[150]

OI-16 In conclusion, I do not agree that there has been a violation of art.10 of the Convention, because art.10 does not protect conduct consisting of invading churches and other religious buildings or property for political purposes, nor does it protect conduct comprising intimidation and hostility against Christian Orthodox believers.

[145] See [13] of the judgment.
[146] See [89] of the judgment concerning the relevant Russian administrative law, namely art.5.26 of the Code of Administrative Offences, as in force until 29 June 2013.
[147] Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred, which includes the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes an incitement to discrimination, hostility or violence, 5 October 2012.
[148] Report of the United Nations High Commissioner for Human Rights (fn.138 above), para.12.
[149] The Rabat Plan of Action, para.29.
[150] F. Tulkens, "When to say is to do. Freedom of expression and hate speech in the case-law of European Court of Human Rights", European Court of Human Rights—European Judicial Training Network. Seminar on Human Rights for European Judicial Trainers, Strasbourg, 9 October 2012, pp.1–15.

Appendix

Release the Cobblestones

"Egyptian air is good for your lungs
Turn Red Square into Tahrir
Spend the day with wild strong women
Look for a wrench on your balcony, release the cobblestones
It's never too late to become a mistress
Batons at the ready, screaming louder and louder
Warm up your arm and leg muscles
The cop is licking you between your legs
Toilet bowls have been polished, chicks are in plainclothes
Zizek's ghosts have been flushed down the drain
Khimki forest has been cleaned up, Chirikova got a 'no pass' to vote,
Feminists are sent on maternity leave."

Kropotkin Vodka

"Occupy the city with a frying pan
Go out with a vacuum, get off on it
Police battalions seduce virgins
Naked cops rejoice at the new reforms."

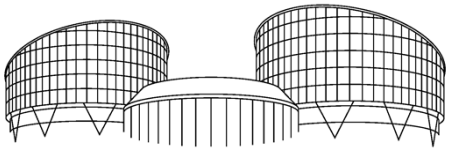
Death to Prison, Freedom to Protest

"The joyful science of occupying squares
The will to power, without these damn leaders
Direct action—the future of mankind!
LGBT, feminists, defend the nation!
Death to prison, freedom to protest
Make the cops serve freedom.
Protests bring on good weather
Occupy the square, carry out a peaceful takeover
Take away the guns from all the cops
Death to prison, freedom to protest
Fill the city, all the squares and streets.
There are many in Russia, put aside oysters
Open all the doors, take off the epaulettes
Taste the smell of freedom together with us
Death to prison, freedom to protest."

Putin Wet Himself

"A group of insurgents moves toward the Kremlin
Windows shatter at FSB headquarters
Bitches piss themselves behind red walls
Pussy Riot is here to abort the system
An attack at dawn? Don't mind if I do
When we are whipped for our freedom
The Mother of God will learn how to fight

Mary Magdalene the feminist will join the demonstration.
Riot in Russia—the charm of protest
Riot in Russia—Putin wet himself
Riot in Russia—we exist
Riot in Russia—riot, riot
Take to the streets
Occupy Red Square.
Show them your freedom
A citizen's anger
Dissatisfied with the culture of male hysteria
Gangster management devours the brain
Orthodox religion is a hard penis
Patients get a prescription of conformity
The regime is going to censor the dream
The time has come for a subversive clash
The pack of bitches from the sexist regime
Begs forgiveness from the phalanx of feminists
Riot in Russia—the charm of protest
Riot in Russia—Putin wet himself
Riot in Russia—we exist
Riot in Russia—riot, riot
Take to the streets
Occupy Red Square.
Show them your freedom
A citizen's rage."



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF TUSKIA AND OTHERS v. GEORGIA

(Application no. 14237/07)

JUDGMENT

STRASBOURG

11 October 2018

FINAL

11/01/2019

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Tuskia and Others v. Georgia,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Angelika Nußberger, *President,*
Yonko Grozev,
André Potocki,
Síofra O'Leary,
Gabriele Kucsko-Stadlmayer,
Lətif Hüseynov,
Lado Chanturia, *judges,*
and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 18 September 2018,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 14237/07) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by nine Georgian nationals, ("the applicants") on 16 March 2007.

2. The applicants were represented successively by Ms N. Tuskia, Mr A. Baramidze, and Mr I. Baratashvili, lawyers practising in Tbilisi. The Georgian Government ("the Government") were represented by their successive Agents, most recently Mr B. Dzamashvili, of the Ministry of Justice.

3. The applicants complained, in particular, that the dispersal of their protest at Tbilisi State University on 3 July 2006 and the related administrative proceedings had amounted to an unlawful and disproportionate interference with their freedom of expression and freedom of assembly under Article 10 and Article 11 of the Convention. They furthermore alleged that they had not been given a fair trial, in violation of Article 6 §§ 1 and 3 (d) of the Convention.

4. On 17 October 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Background

5. The applicants, listed in the appendix, were all professors who at the material time were working at Tbilisi State University ("the University"). They opposed reforms initiated by the new University administration as a part of the nation-wide higher education reform in 2004-2005 and had initiated several court proceedings against the University in that regard. As part of their activities, they also held numerous public meetings at the University, made public statements and wrote to various public officials, denouncing what they called the "destruction" of the University. The applicants, with the exception of Mr Tuskia, Ms Sikharulidze, and Mr D. Bakhtadze (the first, sixth and ninth applicants respectively), were at the material time members of the Grand Academic Council, the highest representative body of the University (composed of seventy-eight members), which operated under the University charter (approved by the President of Georgia on 13 July 2001) and which led the protests against the changes at the University.

6. On 8 June 2005 the President of Georgia issued Presidential Decree no. 473, which, among other measures, repealed the University charter, thus abolishing the Grand Academic Council. The representatives of the Council challenged before the Constitutional Court of Georgia the constitutionality and legality of Presidential Decree no. 473 and several newly amended provisions of the Law on Higher Education. On 25 July 2005 the Constitutional Court rejected the above-mentioned challenge as inadmissible.

7. On 5 April 2006 the President of Georgia appointed Mr G.Kh. as acting Rector („რექტორი") of the University.

B. The events of 19-20 June 2006

8. On 19 June 2006 the already-dissolved Grand Academic Council organised a meeting of University staff. After the meeting, several former members of the Council met the new acting Rector of the University, Mr G.Kh., for the purpose of expressing their concerns to him regarding the changes at the University. The meeting ended without any results and the University employees – among them all of the applicants – decided to stay at the University in one of the lecture halls and to hold a further meeting themselves.

9. According to the applicants, at around 1 a.m. the police arrived at the University. Without giving any explanations or any prior warning, they forced everyone out of the University building. Despite the applicants' repeated requests, the police officers did not show them any order authorising the removal of the people gathered.

10. The next day, the applicants, along with other employees of the University, gathered again in one of the lecture halls of the University. Towards the evening the police allegedly again dispersed their meeting.

C. The events of 3-4 July 2006

11. On 3 July 2006, in response to the request of Mr Sanadze (the fourth applicant), the acting Rector of the University authorised a meeting of University employees in the Grand Hall of the main University building between 3.30 p.m. and 7 p.m. of the same day. In the letter authorising the gathering G.Kh. stressed that the participants of the planned gathering were asked to maintain order and to conclude the meeting before 7 p.m.

12. At the meeting, which started as planned, the already-dissolved Grand Academic Council "elected" the second applicant as the new Rector of the University. Thereafter, a group of about twenty people, including all of the applicants, headed to the office of the acting Rector in order to inform the latter of the Council's decision and to demand his resignation.

13. According to the applicants, they entered the acting Rector's office without using any force and informed him of the Grand Council's decision. They asked G.Kh. to leave the office; the latter, however, refused to do so. While the meeting at the Rector's office continued, the police entered the University grounds. The police officers went straight to the office of the acting Rector, who upon their entrance immediately left the room. Afterwards, the police asked the applicants, along with the other people present, to leave. They left the Rector's office without any resistance and moved to a lecture hall.

14. The Government disputed the applicants' version of events. According to the official version of events, at least twenty people forced their way into G.Kh.'s office, while dozens of others stayed in the reception area and the corridor chanting slogans against G.Kh. The second applicant informed the acting Rector of the former Grand Academic Council's decision and demanded that he leave his office within ten minutes. The University security service was no longer in control of the situation and the functioning of the University administration was disrupted. Given that the applicants and other protesters were refusing to leave, the police were called to restore order. G.Kh. left his office as soon as the police arrived. Then it took more than one hour for the police to negotiate the applicants' removal from the Rector's office.

15. According to the case file, after their removal from the Rector's office, the applicants – together with other protesters (in total, some 400 people) – gathered in one of the lecture halls of the main University building, where they continued their protest. The applicants alleged that at around 11 p.m. the police had closed the doors of the lecture hall and prevented the people inside from leaving it. They had been locked in the lecture hall without access to water, food or toilet facilities until approximately 8-10 a.m. the next day.

D. Subsequent developments

1. Criminal proceedings

16. On 3 July 2006 criminal proceedings were initiated under Article 226 of the Criminal Code of Georgia against unidentified perpetrators in respect of the organisation and participation in group actions violating public order.

17. According to the applicants on 4 July 2006 the Minister of Education held a press briefing denouncing the events that had taken place at the University on the preceding day. He referred to those involved in the 3 July 2006 events as "hooligans" and gave an assurance that they would all bear responsibility for their actions.

18. Over the following several days, twenty witnesses were questioned in connection with the events of 3 July 2006 – among them six police patrol officers, three members of the University security service, and eleven administrative staff members (including the acting Rector, G.Kh., and his deputy). The staff members (eyewitnesses to the events) all identified the applicants as being among those who had forced their way into the Rector's office, insulted him and demanded his resignation. They noted that while there had been no physical confrontation, the group of so-called "protesting professors" had been acting in a highly disrespectful manner, chanting insulting expressions against Mr G.Kh. They also claimed that the University had remained paralysed during the incident with several meetings being disrupted and the Rector and several members of the University administration being prevented from carrying out their duties.

19. The acting Rector testified that around twenty people, among them all the applicants, in disregard of the orders of the security staff, had burst into his office. The second applicant had informed him of the former Grand Academic Council's decision and had "categorically" (კატეგორიულად) demanded that he leave his office, "bag and baggage", (*ბარგი-ბარხანა*) within ten minutes. G.Kh. explained that their meeting had continued against a background of noise and chanting, with the protestors chanting "leave, leave". He had not been personally insulted, although his colleagues had told him that protesters in the corridor adjacent to his office had been

chanting insulting slogans. In reply to a direct question, he explained that no foul language had been used by protesters in his office, either in respect of him or of his colleagues. He remembered, however, Mr Dolidze inciting via cell phone other protesters to join them in the acting Rector's office. Lastly, G.Kh. noted that the incident in his office had lasted for about an hour and a half, paralysing not only his work but the functioning of the whole administration of the University.

20. The security service members, who were also questioned during the pre-trial investigation, claimed that they had been unable to identify the professors involved in the events by name. They confirmed, however, that a large group of about fifty people – in disobedience of the orders given by the security service – had entered the reception area of the office of the Rector by force. Then around fifteen or twenty people had forced their way into the Rector's office, where they had stayed for about two hours and until the police secured their removal from the office.

21. On 5 July 2006 the second, fourth, fifth, seventh and eighth applicants were also questioned as witnesses in the course of the above-mentioned criminal proceedings.

22. On 24 July 2006 several members of the former Grand Academic Council, among them the second, third, fourth, fifth and seventh applicants, sent a letter to the President of Georgia complaining about the events of 19-20 June and 3-4 July 2006. With reference to the events of 3-4 July 2006, they made a particular complaint that they, along with several hundred other people, had been locked in the University lecture hall for the whole night. They alleged that this had amounted to inhuman and degrading treatment, as they had been denied access to drinking water and a toilet and had been left without fresh air. They requested the initiation of criminal proceedings in this regard.

23. A copy of the above-mentioned letter was sent to the Prosecutor General of Georgia. In support of their request, the applicants submitted statements given by fifteen people accounting in detail for the events of 19-20 June and 3-4 July 2006.

24. On 29 July 2006 the relevant prosecutor issued a ruling terminating the criminal proceedings concerning the alleged organisation and participation in group actions violating public order. The prosecutor concluded that the actions of the applicants had not comprised elements of a crime. The ruling read further as follows:

> "They committed offences – namely arbitrary behaviour, a minor violation of public order, and disobeying the lawful instructions of law-enforcement personnel – which constitute administrative offences under Articles 174, 166 and 173 of the Code of Administrative Offences."

25. In the operative part of the prosecutor's ruling, the prosecutor stated that the ruling, along with the case file, was to be sent to the Tbilisi City

Court in order for administrative proceedings to be conducted against the applicants.

26. In the same ruling the prosecutor also decided on the termination of the proceedings that apparently had been opened against the police officers in respect of their alleged unlawful use of force on 3-4 July 2006, finding the complaint lodged by the applicants in that connection unsubstantiated. The decision to discontinue the criminal proceedings provided in its operative part a fifteen-day time-limit for an appeal. The prosecutor's ruling did not mention the applicants' complaint concerning the events of 19-20 June 2006.

27. The applicants were served with a copy of the above-mentioned ruling late in the evening of 29 July 2006. They were told at the same time that a hearing in the administrative proceedings initiated against them had been scheduled for the next day.

2. Administrative proceedings against the applicants

28. On 30 July 2006 a hearing took place at the Tbilisi City Court. The applicants objected that owing to the initiation of the administrative proceedings they could not avail themselves of the opportunity to challenge the prosecutorial ruling of 29 July 2006. They furthermore complained that they had not had sufficient time to acquaint themselves with the relevant material in the case file and to hire a lawyer. The applicants also requested that the acting Rector of the University and the security staff of the University be questioned. The prosecutor, for his part, requested the questioning of three of the police officers involved in the events that had developed in the Rector's office on 3 July 2006. The judge allowed a request lodged by the prosecutor for the three police officers to be examined in court and postponed the hearing until 3 August 2006.

29. At the hearing on 3 August 2006 the applicants reiterated their request for the acting Rector to be examined in court. They furthermore requested that the court hear the deputy Rector of the University and four other eyewitnesses to the events of 3 July 2006, including two journalists who had not been questioned at the pre-trial stage of the discontinued criminal proceedings. The judge granted the applicants leave to question the four new witnesses, while refusing their request for the questioning of the acting Rector and his deputy. In that connection, the court reasoned that those two individuals had already been questioned at the pre-trial stage and observed that their statements had been included in the case file.

30. According to the minutes of the 3 August 2006 hearing, the applicants challenged the factual circumstances of the events of 3 July 2006, as presented by the prosecutor. They maintained that they had not broken into the Rector's office, but rather that they had entered the office and had sat there calmly without using any force; that they had not insulted or threatened the acting Rector, but had simply presented him with the decision

of the Grand Academic Council; and that they had not disobeyed the instructions of the police, but had left the Rector's office within ten or fifteen minutes of being ordered to do so by the police. The second applicant stated that he had been taken out of the office sitting on a chair because he had apparently looked very tired. The applicants' lawyers also argued that the Rector's office did not constitute a public space for the purposes of Article 166 of the Code of Administrative Offences ("CAO") (see paragraph 47 below) and that in any event the applicants had simply been exercising their right to freedom of assembly and freedom of expression, as provided for in the Constitution of Georgia. Lastly, they alleged that the prosecutor had presented the case in a manner suggesting the collective administrative liability of the applicants, as the individual role of each applicant in the events of 3 July 2006 had not been identified.

31. The applicants also reiterated their complaint that they had been locked in the University lecture hall for the night of 3-4 July 2006 without their having access to water or toilets. They tried to put to the prosecutor several questions in this regard but the presiding judge dismissed the questions as irrelevant, having no bearing on the case.

32. During the hearing of 3 August 2006 the following witnesses were questioned. V.J., a member of the University security service, claimed that about fifty people – disregarding his orders and pushing him away – had forced their way to the reception area of the Rector's office. In reply to the judge's question, he said that he could not recall exactly who had pushed him. He furthermore stated that various protesters had been making insulting statements and noise and that as a result the work in the main building of the University had been disrupted.

33. According to the statement given in court by G.Ch., a police patrol officer, at the moment of his arrival at the University there had been around 200 people protesting outside. He had entered the building and had tried to enter the Rector's office, which had been blocked by protestors. After making his way through protesters and entering the office of G.Kh, he had seen around twenty people inside. It had taken him and the other officers about one hour to persuade the protesters to leave the office. In reply to a question he clarified that no one had physically resisted the police, but that the protesters had simply refused to leave the office. He also specified that insulting statements had been made by protestors in the corridor and not in the acting Rector's office.

34. Z.S., another police officer, confirmed that while no force had been used, they had spent an hour persuading a group of about twenty people to leave the Rector's office. He said that Mr Mebonia (the second applicant) had been taken out of the office still sitting on a chair as he had refused to stand up and leave by himself. He added that he recalled all of the applicants, except for Ms Sikharulidze (the sixth applicant), being inside the Rector's office. The third police officer, K.B., who was also questioned in

court, similarly maintained that there had been no physical confrontation inside the office, but that it had taken a while before those inside had agreed to leave.

35. On the same date the Court examined two members of the University staff, who gave evidence similar to their pre-trial statements (see paragraph 18 above). In addition, the court questioned two journalists and two professors, all of whom had been among the group of protesters on 3 July 2006. All four claimed that there had been no confrontation (either physical or verbal) in the office of the Rector, that the group had been simply demanding the resignation of G.Kh., and that they had left the office at the request of the police.

36. By a decision of 4 August 2006 the Tbilisi City Court found the first, second, third, fourth, fifth, seventh and eight applicants guilty of the above-mentioned administrative offences under Articles 166, 173 and 174 of the CAO and imposed a fine of 100 Georgian laris (GEL – approximately 45 euros) on each of them. The court terminated the proceedings concerning the alleged disobeying of a lawful order given by the police (Article 173) with respect to the sixth and ninth applicants, finding that they had left the office of the Rector before the arrival of the police and held them guilty of the administrative offences under Articles 166 and 174 of the CAO only, imposing a fine of GEL 100 on each of them (see paragraph 39 below).

37. In reaching its decision, the Tbilisi City Court concluded that the Grand Academic Council had begun acting unlawfully starting from 8 June 2005, when the old University charter had been repealed by Presidential Decree no. 473. Consequently, the court found that the restoration of the dissolved body, the impugned election of the new University Rector on 3 July 2006, and the subsequent demand for the resignation of G.Kh. in view of the election had been unlawful and constituted the administrative offence arbitrary behaviour within the meaning of Article 174 of the CAO (see paragraph 47 below).

38. In connection with the charge of a minor breach of public order (minor hooliganism), the court established that the applicants had burst into the office of G.Kh., calling for his resignation. They had demanded, in an insulting manner, that he immediately leave his office and take all his belongings with him. The court concluded that given that the applicants had occupied the office of the acting Rector against his will for about two hours and had disregarded his repeated requests for them to leave it in order to allow everyone to resume their work, their behaviour had amounted to insulting harassment (*შეურაცხმყოფელი გადაკიდება*) with respect to G.Kh. as well as the other staff present, and to "other similar action" that had violated public order and peace. The Tbilisi City Court dismissed the applicants' argument that the Rector's office was merely a private working space, reasoning that the presence of the public rendered it a public space for the purposes of the CAO. As to the submission by the defence that the

applicants had simply been exercising their right to freedom of assembly and freedom of expression, as provided in the Constitution of Georgia, the court concluded as follows:

> "The court notes that although a person is entitled to exercise the rights and freedoms enshrined in Articles 19, 24 and 25 of the Constitution, he or she is at the same time obliged, in the process of exercising his or her rights, to abstain from violating others' rights and interests, from encroaching upon [others'] honour and dignity, [and] from violating ... public order ... . [He or she] should not, in exercising his or her constitutional rights, commit acts prohibited by law, which, in the court's view, in fact happened on 3 July 2006 in the office of the Rector ..."

39. As for the charge of disobeying a lawful order given by the police, the court concluded that the sixth and ninth applicants had left the office of G.Kh. before the arrival of the police. They were thus acquitted of the above-mentioned charge. As for the remainder of the applicants, the court established that despite the repeated requests of the police, they had refused to leave the office of the acting Rector. In the court's view, notwithstanding the fact that no physical force had been used, the applicants' refusal for more than an hour to obey the orders of the police had amounted to a breach of Article 173 of the CAO (see paragraph 47 below).

40. The applicants appealed against the first-instance court's decision to the chairwoman of the Tbilisi Court of Appeal. They complained that there had been no record of an administrative offence having been made individually in respect of each of them, that their individual roles in the commission of the impugned administrative offences had not been established, and that the proceedings had been brought in a manner suggesting their collective liability. In that connection, they referred to the statements of witnesses who had noted that there had been two hundred people outside and twenty people inside the acting Rector's office during the events of 3 July 2006 and that it was impossible to identify the individuals who had allegedly insulted the acting Rector and forced their way into his office. The applicants also complained of the failure of the Tbilisi City Court to examine the acting Rector and his deputy in the course of the trial. Lastly, they challenged the categorisation of their actions as administrative offences by the first-instance court, submitting that they had simply been exercising their freedom of expression and freedom of assembly.

41. On 4 September 2006, the chairwoman of the Tbilisi Court of Appeal, sitting privately and without holding an oral hearing, dismissed the applicants' appeal as unsubstantiated. She concluded that the decision of the first-instance court had been lawful and properly reasoned. The operative part of the decision of 4 September 2006 indicated that no further appeal was possible.

E. Television report by the Imedi broadcasting company about the events of 3 July 2006

42. The case file contains a copy of a television report by the Imedi broadcasting company about the events of 3 July 2006. As was shown in Imedi's recording of the events of 3 July 2006, at least twenty people had entered the reception area of the acting Rector's office by force, in disregard of the protests of the security staff and reception staff. Then some of them had walked into the office itself, notifying G.Kh. of the decision of the Grand Academic Council and demanding his resignation. According to the video, dozens of protesters had simultaneously gathered in the corridor adjacent to the acting Rector's office and had chanted "step down!"

43. Imedi also ran an extract from the press briefing held by the Minister of Education on 4 July 2006. While commenting on the events in the University the preceding day, the Minister said the following:

> "Those people, who went beyond all the limits of academia and ethics yesterday, will of course, face responsibility for that."

II. RELEVANT DOMESTIC LAW

44. The relevant Articles of the Constitution of Georgia provide:

Article 24

> "1. Everyone shall be free to receive and impart information, to express and disseminate his/her opinion orally, in writing, or otherwise.
>
> ...
>
> 4. The exercise of the rights listed in the first and second paragraphs of this article may be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of state security, territorial integrity or public safety, to prevent crime, to safeguard rights and dignity of others, to prevent disclosure of information acknowledged as confidential, or to ensure the independence and impartiality of justice."

Article 25

> "1. Everyone, except those serving in the military forces and the Ministry of Internal Affairs, shall have the right to gather publicly, unarmed, both indoors and outdoors, without prior permission.
>
> ...
>
> 3. Authorities may terminate a public assembly or a manifestation only if it assumes unlawful character."

45. The relevant Articles of the Law of Georgia on Assembly and Demonstrations, as worded at the material time, read as follows:

Article 1

"1. The current law regulates the exercise of the right guaranteed by the Constitution of Georgia to gather publicly, unarmed, both indoors and outdoors, without prior permission.

...

3. This law provides the requirement that the authorities be notified if an assembly or a demonstration is due to be held in a public place [or a place through which] transport passes."

Article 9 § 1

"It is prohibited to hold an assembly or a demonstration inside the building of the Parliament of Georgia, the residency of the President of Georgia, the Constitutional Court and the Supreme Court of Georgia, on the premises of courts, prosecutor's offices or of police, penitentiary or military units and sites, [in] railway stations, airports, hospitals or diplomatic missions ([or] within a 20-metre radius thereof), on the premises of governmental institutions [or] local self-government bodies, [or] in the buildings of companies, institutions and organisations [that operate under] special labour security rules or are under armed guard. It is prohibited to fully block the entrance to those sites."

46. Under Article 9 of the Law on the Police, as in force at the material time (it was replaced by a new Act in 2013), the police were responsible, *inter alia,* for dispersing unlawful rallies, demonstrations, pickets and other assemblies that posed a threat to public safety, the lives and health of people, property, and other rights guaranteed by law.

47. The CAO was adopted on 15 December 1984, when Georgia was part of the Soviet Union. Subsequently, numerous amendments were introduced. At the material time the relevant provisions of this Code read as follows:

Article: 166: Minor hooliganism (a minor breach of public order)

"Minor hooliganism, e.g. swearing and cursing in a public place, [causing] insulting harassment to a person, or other similar actions which disturb public order and peace, shall be punishable by a fine in the amount of GEL 100, or – if, in the circumstances of the case and having regard to the offender's personality, this measure is not deemed to be sufficient – with up to thirty days' administrative detention."

Article 173: Disobeying a lawful instruction or order [issued by] law-enforcement or military service personnel

"Maliciously disobeying a lawful instruction or order [issued by] a law enforcement officer ... shall be punishable by a fine amounting to ten times the minimum [monthly] wage, or by one to six months' correctional labour compounded by the withholding of 20% of [the offender's] wages, or – if, in the circumstances of the case and having regard to the offender's personality these measures are not deemed to be sufficient – by up to thirty days' administrative detention."

Article 174: Arbitrary behaviour (თვითნებობა)

"Arbitrary behaviour, i.e. the exercise of a right in violation of a law, which does not cause any significant damage to people, the State or to public bodies, shall be punishable by a warning or a fine of half the minimum [monthly] wage [of the offenders concerned], or – in the case of public officials – with a warning or a fine of one minimum [monthly] wage."

THE LAW

I. *LOCUS STANDI* OF THE FOURTH APPLICANT'S WIFE

48. On 15 December 2011 the fourth applicant passed away. On 10 May 2012 his wife, Ms A. Davituliani, expressed her wish to pursue the case before the Court. The Government submitted no comments on the *locus standi* of Ms A. Davituliani.

49. The Court notes that, where the original applicant has died after lodging the application, the Court normally permits the next-of-kin to pursue an application, provided he or she has a legitimate interest (see *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, ECHR 2000 XII; see also *Murray v. the Netherlands* [GC], no. 10511/10, § 79, ECHR 2016, with further references, and *Paposhvili v. Belgium* [GC], no. 41738/10, § 126, ECHR 2016). Having regard to the subject matter of the application and all the elements in its possession, and without prejudice to its decision on the objection relating to non-exhaustion of domestic remedies, the Court considers that the fourth applicant's wife has a legitimate interest in pursuing the application and that she thus has the requisite *locus standi* under Article 34 of the Convention (see *Dalban v. Romania* [GC], no. 28114/95, §§ 38-39, ECHR 1999-VI; *Çakar v. Turkey*, no. 42741/98, §§ 18-21, 23 October 2003; and *Ahmet Sadık v. Greece*, 15 November 1996, §§ 24-26, *Reports of Judgments and Decisions* 1996-V).

50. For practical reasons, Mr T. Sanadze will continue to be called "the fourth applicant" in this judgment, even though Ms A. Davituliani should now be regarded as such.

II. ALLEGED VIOLATION OF ARTICLES 3, 5, 10 AND 11 OF THE CONVENTION

51. The applicants complained that their peaceful protests at the University over the period of 19-20 June and 3-4 July 2006 had been violently dispersed and that the prosecuting authorities had failed to initiate an investigation against the responsible authorities. They also denounced the imposition of administrative fines on them in connection with the events

of 3 July 2006. They relied on Article 3, Article 5, Article 10 and Article 11 of the Convention, which in their relevant parts read as follows:

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 5

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ..."

Article 10

"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. ...

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 ... public safety, for the prevention of disorder ..., for the protection of health or morals, for the protection of the reputation or rights of others...."

Article 11

"1. Everyone has the right to freedom of peaceful assembly ...

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 ... public safety, for the prevention of disorder ..., for the protection of health or morals or for the protection of the rights and freedoms of others. ..."

A. Admissibility

1. The parties' submissions

52. The Government submitted that the applicants' various complaints with respect to both of the alleged instances of the dispersal of the protest at the University were inadmissible owing to their having been lodged out of time. They claimed in this connection that an inquiry initiated on the basis of the applicants' complaint of 24 July 2006 had been discontinued on 29 July 2006. This had been the final domestic decision for the purposes of the calculation of the six-month time-limit, given that the subsequent administrative proceedings had been limited to the examination of the applicants' "guilt" only. There had been no basis for the applicants, in the Government's view, to expect their allegations of violence against police to be addressed within the scope of the administrative proceedings conducted exclusively against them. Therefore, the applicants' complaints with respect

to the events of 19-20 June and 3-4 July 2006 should be declared inadmissible, in accordance with Article 35 § 1 of the Convention.

53. The Government, in addition, claimed that the first, fifth, sixth, eighth and ninth applicants had failed to exhaust the available domestic remedies, as they had not been part of the group of professors who had written and sent the criminal complaint of 24 July 2006 to the Prosecutor General (see in this respect paragraph 22 above).

54. The applicants disagreed with the Government's objection. They maintained that they had expected their allegations to be addressed within the scope of the administrative proceedings conducted against them. Accordingly, the point of departure for the calculation of the six-month time-limit should have been 21 September 2006, the date on which the decision of the Tbilisi Court of Appeal had been served on one of the applicants. As regards the non-exhaustion argument, they submitted (following the same line of reasoning) that the complaints of all the applicants, notwithstanding whether they had personally signed the criminal complaint of 24 July 2006 or not, had been dealt with by the national courts in the course of the relevant administrative proceedings.

2. The Court's assessment

55. The Court finds it appropriate to consider separately the objections raised by the Government in connection with the events of 19-20 June 2006 and of 3-4 July 2006 at the University.

(a) The events of 19-20 June 2006

56. As regards the events of 19-20 June 2006, the Court notes the following: the prosecutor's ruling on the termination of the criminal proceedings into the applicants' allegations of violence on the part of the police made no reference to the events of 19-20 June 2006 at all (see paragraphs 24 and 26 above); and the domestic courts in the course of the subsequent administrative proceedings only examined the events of 3 July 2006, disregarding the events of 19-20 June 2006 (see paragraphs 37-39 above). The applicants themselves in their appeal to the chairwoman of the Tbilisi Court of Appeal made no reference to the events of 19-20 June 2006 (see paragraph 40 above).

57. In such circumstances the Court finds unconvincing the applicants' argument that they had been expecting the domestic courts to address their allegations concerning the events of 19-20 June 2006 in the course of the administrative proceedings conducted against them. There was neither legal nor factual foundation for such an expectation. It follows accordingly that as regards the alleged events of 19-20 June 2006, the last domestic decision for the purposes of the calculation of the six-month time-limit was the prosecutorial ruling of 29 July 2006 in which the applicants' complaints regarding the events of 19-20 June 2006 had been disregarded. The

applicants failed to appeal against that ruling. Therefore, without even addressing the Government's non-exhaustion plea, and in view of the fact that the current application was lodged on 16 March 2007 – that is to say almost eight months after the above-mentioned triggering date – the Court concludes that the applicants' various complaints concerning the events of 19-20 June 2006 are inadmissible, in accordance with Article 35 §§ 1 and 4 of the Convention.

(b) The events of 3-4 July 2006

58. As to the events of 3-4 July 2006, the Court notes the following: the alleged violation of the applicants' rights under Article 10 and Article 11 of the Convention was at the centre of the administrative proceedings conducted against them. Notably, the national courts were to assess two sides of the same coin – on the one hand, the alleged breach of public order; on the other hand, the applicants' exercise of their rights to freedom of expression and freedom of assembly.

59. By contrast, the applicants' grievances *vis-à-vis* the police concerning their alleged ill-treatment and the unlawful restriction of their liberty over the night of 3-4 July 2006 fell beyond the scope of the impugned administrative proceedings (see paragraphs 24 and 26 above). According to the relevant court minutes, the domestic courts did not examine the applicants' allegation that they had been locked into a lecture hall during the night of 3-4 July 2006 (see paragraph 31 above). Had the applicants been willing to pursue this aspect of their grievances under Article 3 and Article 5 of the Convention they should have followed up and appealed against the prosecutorial ruling of 29 July 2006 dismissing their allegations as unsubstantiated (see *Identoba and Others v. Georgia*, no. 73235/12, §§ 104-15, 12 May 2015; see also, *Smirnova v. Russia* (dec.) [Committee], no. 37267/04, §§ 45-49, 8 July 2014).

60. In the light of the foregoing, the Court considers that the applicants' complaints under Article 10 and Article 11 of the Convention concerning the events of 3 July 2006 are admissible, while their complaints under Article 3 and Article 5 of the Convention must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

B. Merits

1. The parties' observations

(a) The applicants

61. The applicants claimed that the University was not "private property", which the Respondent State had a duty to protect. Rather, it was their workplace, which they had the right to enter freely any time they wanted. They dismissed in this connection the Government's argument

about the exclusive role of the University in the field of educational services and submitted that they had a right to discuss various issues concerning the University not only outside its premises but also inside them (see the Government's argument in paragraph 63 below).

62. The applicants furthermore maintained that physical force had been used against them by police, and that that force had not been necessary in a democratic society and had in any event been disproportionate to whatever legitimate aim the Government had claimed to be pursuing. While reiterating the Court's reasoning in the case of *Bukta and Others v. Hungary* (no. 25691/04, § 37, ECHR 2007-III), they submitted that the public authorities should have shown a certain degree of tolerance towards their peaceful gatherings at the University. Lastly, in their view, the imposition of administrative fines had only served to punish them for their having exercised their rights under Article 10 and Article 11 of the Convention and had been intended to have a "chilling effect" upon anyone who might have been willing to protest against the Government's reforms in the educational sphere.

(b) The Government

63. The Government submitted that the right to hold demonstrations inside the premises of public institutions was not unlimited (see *Appleby and Others v. the United Kingdom*, no. 44306/98, § 47, ECHR 2003-VI). They referred in this connection to Article 9 § 1 of the Law on Assembly and Demonstrations, which provided that no assembly or demonstration could be held, *inter alia,* in a building of a governmental institution (see paragraph 45 above). They stated that there had been alternative venues at the disposal of the applicants and their supporters, such as the courtyard of the University, where they could have organised their protest. They stressed in this connection the idea that a university, being an educational establishment, was exclusively devoted to providing educational services; therefore, if the Government were to allow unrestricted demonstrations on its premises it would put a disproportionate burden on the educational establishment, jeopardising its proper functioning. They thus maintained that in the instant case, no interference with the applicants' right to freedom of expression and peaceful assembly had taken place at all.

64. In the alternative, the Government submitted that the interference had been justified under the second paragraphs of Article 10 and Article 11 of the Convention. In particular, the interference had been based on the internal regulations of the University, which explicitly provided that, prior to the organising of an assembly on the premises of the University, authorisation from its Rector was required. The applicants had been well aware of the requirement of prior notification and authorisation, as they had obtained it for a meeting scheduled to take place in the Grand Hall between 3.30 p.m. and 7 p.m. of 3 July 2006 (see paragraph 11 above). The

interference had also been based on Article 9 § 1 of the Law on Assembly and Demonstrations, which prohibited gatherings on the premises of certain institutions (see paragraph 45 above). The Government maintained in this connection that the University was a legal entity of public law that functioned under the umbrella of the Ministry of Education, which meant that it was a public institution for the purposes of the above-mentioned regulations. Lastly, the Government also relied on Article 9 § 1 (e) of the Law on the Police. The latter authorised the police to interfere with a demonstration that violated public order and the rights of others.

65. As to the aim pursued, the Government submitted that the dispersal of the protest had served the purpose of protecting the interests of others. The decision to engage the police had been taken only after it had become obvious from the statements and actions of the applicants that they would not leave the office of G.Kh. until the latter resigned from his position as acting Rector. In support of this argument, the Government submitted a copy of a letter signed by G.Kh. and apparently sent to the head of the district police department on behalf of the University after the applicants had burst into G.Kh.'s office. In that letter G.Kh. had noted that at around 4:30 p.m. members of the former Grand Academic Council had forced their way into his office, insulting him and other employees of the University. The situation was further described as follows:

> "Over two hours the acting Rector and his deputy requested them to leave the office, [and] to observe order, and expressed on behalf of the University administration readiness to engage in subsequent dialogue. Notwithstanding that, they stayed in the office, insulting the Rector, announcing that they would take over the management of the University, and inciting via cell phones the people [who had remained] in the courtyard of the University and in the corridors to burst [into the Rector's office] and to participate in the forceful expulsion of the [acting] Rector."

66. At the end of the letter G.Kh. had requested the police "to take the measures provided for by law." In the Government's view, that letter and other evidence made it clear that the intervention of the police had been absolutely necessary and proportionate, given that the administration building of the University had been seized by protesters (including the applicants) for several hours, and that their actions had impeded the proper functioning of the University and had prevented students from enjoying their rights at the University.

67. The Government further stressed that no force had been used against the applicants, and that none of them had been arrested. They noted that the applicants had not been locked up in the Grand Hall, as the back door had remained open. Hence, they could have easily exited the University (without the possibility, however, of returning). Lastly, they had been fined not for holding an assembly but for violating specific provisions of the CAO.

2. The Court's assessment

(a) The general principles

68. Freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend, shock or disturb; such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society" (see, e.g., *Oberschlick v. Austria* (no. 1), 23 May 1991, § 57, Series A no. 204). Although freedom of expression may be subject to exceptions, they "must be narrowly interpreted" and "the necessity for any restrictions must be convincingly established" (see, e.g., *Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216). Furthermore, the Court stresses that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on the debate of questions of public interest (see, e.g., *Feldek v. Slovakia*, no. 29032/95, § 74, ECHR 2001–VIII, and *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, § 61, ECHR 1999–IV).

69. 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 (see *Djavit An v. Turkey*, no. 20652/92, § 56, ECHR 2003-III, and *Barraco v. France*, no. 31684/05, § 41, 5 March 2009). It should be emphasised that Article 11 of the Convention only protects the right to "peaceful assembly", a notion which does not cover a demonstration where the organisers and participants have violent intentions. The guarantees of Article 11 therefore apply to all gatherings except those where the organisers and participants have such intentions, incite violence or otherwise reject the foundations of a democratic society (see, *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 92, ECHR 2015, with further references therein).

70. The Contracting States have a margin of appreciation in making the proportionality assessment under the second paragraph of Article 10 or 11. However, that goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, the Court being empowered to give the final ruling on whether a "restriction" is reconcilable with Convention rights. The expression "necessary in a democratic society" in Article 10 § 2 or 11 § 2 of the Convention implies that the interference corresponds to a "pressing social need" and, in particular, that it is proportionate to the legitimate aim pursued. The Court also notes at this juncture that, whilst the adjective "necessary", within the meaning of Article 10 § 2 or 11 § 2 is not synonymous with "indispensable", it remains

for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context (see *Handyside v. the United Kingdom*, 7 December 1976, § 48, Series A no. 24).

71. When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 10 or 11 the decisions that they delivered. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine, after having established that it pursued a "legitimate aim", whether it was proportionate to that aim and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 47, Reports of Judgments and Decisions 1998-I).

72. Lastly, the right to freedom of assembly includes the right to choose the time, place and manner of conduct of the assembly, within the limits established in paragraph 2 of Article 11 (see *Sáska v. Hungary*, no. 58050/08, § 21, 27 November 2012). At the same time and notwithstanding the acknowledged importance of freedom of expression, Article 10 does not bestow any freedom of forum for the exercise of that right. In particular, that provision does not require the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property, such as, for instance, government offices and ministries (see *Appleby and Others*, cited above, § 47).

(b) Application of those principles to the present case

73. The Court notes at the outset that in relation to the same facts the applicants relied on two separate Convention provisions: Article 10 and Article 11 of the Convention. It further notes that it has already considered a number of cases where protests took place on either private or State property under Article 10 of the Convention, read in the light of Article 11 (see *Taranenko v. Russia*, no. 19554/05, § 69, 15 May 2014, and *Açık and Others v. Turkey*, no. 31451/03, § 36, 13 January 2009; see also *Angirov and Others v. Russia* [Committee], no. 30395/06, § 34, 17 April 2018). In the current case, the thrust of the applicants' complaint was their allegedly forceful removal from the office of the acting Rector and the imposition of administrative fines for their role in the events of 3 July 2006. They claimed that these measures had amounted to an interference with their peaceful protest. In such circumstances, the Court is of the opinion that

Article 11 is to be regarded as a *lex specialis* and that it is unnecessary to take the complaint under Article 10 into consideration separately (see, in this connection, *Primov and Others v. Russia*, no. 17391/06, §§ 91-92, 12 June 2014, where the Court noted that in the exercise of the right to freedom of assembly the participants would not only be seeking to express their opinion, but to do so together with others). At the same time, notwithstanding its autonomous role and particular sphere of application, Article 11 must, in the present case, also be considered in the light of the principles developed under Article 10 of the Convention (see *Kudrevičius*, cited above, §§ 85-86, with further references therein).

(i) Whether there has been an interference with the exercise of the right to freedom of peaceful assembly

74. The Government submitted that there had been no interference with the applicants' rights guaranteed by Article 11 of the Convention. The Court observes in this connection that the applicants had permission to organise a meeting on the premises of the University on 3 July 2006 and that they had availed themselves of that opportunity. During the first phase of their protest on that day they gathered, as duly authorised by the University administration, in one of the lecture halls (see paragraph 11 above). They moved, however, soon afterwards to the acting Rector's office, protesting against the ongoing University reform and demanding his resignation. The events which developed subsequent to their unauthorised entry to the Rector's office do not represent, in the Court's view, a standard situation of a "peaceful assembly" within the meaning of Article 11 of the Convention. As noted in *Kudrevičius and Others*, although not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies, physical conduct purposely obstructing the ordinary course of life in order to seriously disrupt the activities carried out by others is not at the core of that freedom as protected by Article 11 of the Convention (cited above, paragraph 97; see also *Annenkov and Others v. Russia*, no. 31475/10, §§ 123-128, 25 July 2017). Nevertheless, the Court notes that the applicants were not held responsible for using violence. While the events at issue happened in a situation of tension, the applicants' conduct was not established to have been of a violent nature. The Court thus does not consider that the applicants' protest on 3 July 2006, viewed as a whole, was of such a nature and degree as to exclude them from the scope of protection under Article 11 of the Convention, read in the light of Article 10.

75. The Court, hence, concludes that the applicants were entitled in the course of their protest at the University to invoke the guarantees of Article 11 of the Convention. It further notes that the applicants were removed by police from the office of the acting Rector of the University. Subsequently, they were charged and found responsible for several administrative offences in connection with what had happened in the

University. It thus concludes that their removal and administrative responsibility constituted an interference with their right to freedom of assembly (see *Açık and Others*, cited above, § 40).

(ii) Whether the interference was prescribed by law, pursued a legitimate aim and was necessary in a democratic society

76. The Court finds it appropriate to assess separately the lawfulness, necessity and proportionality of each instance of the alleged interference with the applicants' rights under Article 11 of the Convention.

(α) The applicants' removal from the office

77. The Government claimed that the applicants' removal with the involvement of the police had had a legal basis in the Law on the Police and the Law on Assembly and Demonstrations, and had been aimed at preventing further disruption to public order, as well as the protection of the rights of G.Kh. and others. The Court accepts that the impugned interference had a basis in domestic law. It notes that the police acted at the request of the acting Rector of the University (see paragraph 65 above). The removal was preceded by G.Kh. and other administrative staff members, and then by the police, explicitly and repeatedly asking the applicants to leave the acting Rector's office. It therefore finds that the requirement of lawfulness is satisfied.

78. As to whether the interference in question had a legitimate aim, the Court accepts the Government's argument that given the circumstances of the current case, the impugned interference pursued the legitimate aims of preventing public disorder and protecting the rights of others. It notes in this connection the national court's conclusion according to which on 3 July 2006, after the impugned "election" of the second applicant as the new Rector of the University, the situation at the University escalated, with the applicants entering by force the office of the acting Rector and many more protesters chanting anti-G.Kh. slogans in the corridor of the University and in its courtyard (see paragraph 42 above). Although the parties disagree as to the extent of the disruption that the applicants' protest caused to the University, the Court is of the opinion that in view of the scale and duration of the protest, also having regard to the content of the video recording at the disposal of the Court, the disruption to the work of the University was noticeable. As the Tbilisi City Court concluded, the behaviour of the applicants − intensified by the number of protesters in the corridors of the building – intimidated the employees and students and disrupted the normal functioning of the educational establishment. At the same time, the applicants' protest at the very least impeded the work of the acting Rector and his immediate colleagues for about two hours. Against this background, the Court accepts the domestic court's conclusion that the decision of the police to remove the applicants and other protesters from G.Kh.'s office was

justified by the demands of public order and the interests of others (see *Taranenko*, *and Açık and Others,* both cited above, §§ 78-79 and § 45 respectively; see also *Steel and Others v. the United Kingdom*, 23 September 1998, § 97, *Reports of Judgments and Decisions* 1998-VII).

79. As to the necessity in a democratic society of the interference at issue, it is true that the applicants by means of their protest wished to draw the attention of the University staff and the general public to their disapproval of the ongoing reforms at the University and their demand for the resignation of G.Kh. This was a topic of public interest at the material time and there was little scope under Articles 10 § 2 and 11 § 2 of the Convention for restrictions on debate relating thereto (see *Taranenko*, cited above, § 77, and *Murat Vural v. Turkey*, no. 9540/07, § 52, 21 October 2014). The Court notes, however, that the applicants were allowed to proceed, uninterruptedly, with a pre-authorised gathering in the Grand Hall of the main University building on the very same day for several hours (see paragraph 11 above). Subsequently, they had protested for about two hours in the office of the acting Rector, and the administration of the University (including the acting Rector) − and subsequently the police − showed the necessary tolerance (compare *Kakabadze and Others v. Georgia*, no. 1484/07, § 88, 2 October 2012; *Açık and Others,* cited above, § 46; and *Oya Ataman v. Turkey*, no. 74552/01, §§ 41-42, ECHR 2006-XIV). No physical force was used by the police against the applicants. Instead, as established in the course of the domestic proceedings, police officers negotiated with the applicants for more than an hour for their peaceful removal from G.Kh.'s office (contrast *Açık and Others*, cited above, § 46). Moreover, after their removal from the office of the acting Rector, they were allowed to stay on the premises of the University and continue with their protest.

80. In view of the above, and given the margin of appreciation applicable in such cases, the Court considers that the removal of the applicants from the acting Rector's office in order to achieve the legitimate aims pursued was not disproportionate.

(β) The applicants' administrative responsibility

81. For the purposes of the discussion in respect of Article 11 of the Convention, seen in the light of Article 10, the Court will focus on the administrative penalty imposed on the applicants in respect of the charges of a minor breach of public order under Article 166 and resistance to the police under Article 173 of the CAO.

82. The domestic courts found in the context of Article 166 that the conduct of the applicants had amounted to the insulting harassment of the acting Rector and of other representatives of the University administration who had been present, as well as to "other similar action" that had violated public order and peace (see paragraph 38 above). As to the allegations of

insulting harassment, the national courts established that the applicants had forced their way into G.Kh.'s office, calling for his resignation and demanding in an insulting manner that he leave his office, "bag and baggage" (see *ibid.*). In the Court's view, in calling for the resignation of a public official the applicants were exercising their right to freedom of expression (see, in this connection, *Kandzhov v. Bulgaria*, no. 68294/01, § 70, 6 November 2008). Their call for the acting Rector's resignation could not in and of itself have been deemed to be insulting. The domestic courts did not identify any specific insulting phrases that the applicants had used with respect to G.Kh. or his colleagues (compare *Skałka v. Poland*, no. 43425/98, §§ 26-27, 27 May 2003; *Janowski v. Poland* [GC], no. 25716/94, § 32, ECHR 1999-I; and *Kakabadze and Others,* cited above, §§ 88-89). In this connection the Court finds noteworthy the pre-trial statement of the acting Rector himself, who noted that he had not been personally insulted and that no foul language had been used by protesters in his office, either with respect to him or to his colleagues (see paragraph 19 above).

83. The Court notes that in its reasoning the Tbilisi District Court also concluded that the conduct of the applicants had disturbed public order and peace (see paragraph 38 above). Indeed, Article 166 of the CAO, along with "[causing] offensive annoyance to a person", refers to other similar actions which disturb public order and peace (see paragraph 47 above). The Court accepts in this connection the conclusion of the domestic courts that any place, whatever its legal status or function, may become by virtue of the presence of a group of persons a public space within the meaning of Article 166 of the CAO (see paragraph 38 above). Furthermore, the Court cannot overlook the fact that the applicants' conduct did indeed disrupt public order on the premises of the University (see the conclusion of the Court reached in paragraph 78 above). The Court is thus of the opinion that the interpretation of this provision given by the domestic courts in the present case was not arbitrary, and that the applicants could have foreseen, to a degree reasonable in the circumstances, that their actions entailing disruption to the functioning of the University, could have been deemed to amount to a minor breach of public order attracting the application of Article 166 of the CAO.

84. As for the resistance mounted by the applicants, the Court notes that in the course of the domestic proceedings it was established that although they encountered no physical resistance, it took the police about one hour to negotiate the applicants' removal from G.Kh.'s office (see paragraph 39 above). The refusal for about one hour of the applicants to obey the police officers' reiterated requests was deemed by the domestic court to have constituted resistance to a lawful order issued by the police within the meaning of Article 173 of the CAO, notwithstanding the fact that at the end of those negotiations the applicants left the office voluntarily.

85. Mindful of the Court's supervisory role, according to which it is not for the Court to take the place of the competent national authorities but rather to review the decisions taken by the latter, pursuant to their power of appreciation, the Court considers that the interference by way of imposing administrative sanctions in the current case was prescribed by law. The Court furthermore notes that, as already established above, the legitimate aim of the interference was the prevention of disruption to public order and to the interests of others. It remains to be seen whether the interference in the light of the case as a whole was proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify it were relevant and sufficient.

86. The Court notes in this connection that the criminal proceedings for breach of public order were discontinued (see paragraph 24 above). The administrative proceedings conducted against the applicants resulted in the imposition of fines in the amount of GEL 100. None of the applicants were arrested or detained. The foregoing, in view of the overall context of the events − in particular the fact that the applicants were allowed to protest against the ongoing University reform for months, by, among other ways, holding meetings on the premises of the University, and in view of the nature of the protest on 3 July 2006 which culminated with the forceful entry of the applicants into the Rector's office, the disruption to the work of the University administration, and the refusal to obey explicit and reiterated requests of the police for them to leave the office of G.Kh.− is sufficient for the Court to conclude that the interference with the applicants' rights under Article 11 of the Convention read through the prism of Article 10 was proportionate to the legitimate aim pursued and necessary in a democratic society (see the overview of the Court's relevant case-law in *Taranenko*, cited above, §§ 81-89).

87. There has accordingly been no violation of Article 11 of the Convention read in the light of Article 10.

III. ALLEGED VIOLATION OF ARTICLE 6 §§ 1, 2, and 3 (d) OF THE CONVENTION

88. The applicants complained that the administrative proceedings conducted against them had been unfair. Notably, they argued that the decisions had been manifestly unreasonable and written in a manner suggesting their collective administrative liability, and that the domestic courts had failed to question in court the acting Rector and his deputy. They also alleged that the Minister of Education had acted in violation of the presumption of their innocence. The applicants relied on Article 6 §§ 1, 2 and 3 (d) of the Convention, which reads as follows:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charges with a criminal offence has the following minimum guarantees:

...

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; ...”

A. Admissibility

89. The Government submitted that the applicants’ complaint under Article 6 § 2 of the Convention was inadmissible for non-exhaustion of domestic remedies. In particular, they referred to Article 18 § 2 of the Civil Code of Georgia, which stipulated that “a person is entitled to demand in court the retraction of information that defames his honour, dignity, privacy, personal inviolability or business reputation.” Apart from failing to use the above-mentioned remedy, the applicants, according to the Government, had raised the issue of the alleged violation of the principle of presumption of innocence for the first time only before the Court. Therefore, according to the Court’s well-established practice, the applicants’ complaint under Article 6 § 2 of the Convention should be declared inadmissible.

90. The applicants argued, in reply, that any action on their part in this regard would have been futile and inefficient.

91. The Court reiterates that the purpose of the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention is to afford the Contracting States the opportunity to prevent or put right the violations alleged against them before those allegations are submitted to the Court. Consequently, States do not have to answer for their actions before an international body before they have had an opportunity to put matters right through their own legal system (see *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V, with further references therein). The Court notes that in the current case the applicants did not even once at the domestic level voice their grievances concerning the press conference given by the Minister of Education. They could have done so within the context of the impugned administrative proceedings (see, for example, *Fatullayev v. Azerbaijan*, no. 40984/07, § 153, 22 April 2010) or, as proposed by the Government, by lodging a civil complaint (see, for example, *Martin Babjak and Others v. Slovakia* (dec.), no. 73693/01, 30 March 2004). While it is true that in the absence of any domestic case-law concerning Article 18 § 2 of the Civil Code, the Court is not in a position to conclude that that remedy was indeed available and effective in practice, it still finds unacceptable the applicants’ failure to complain at the domestic level about the alleged violation of the principle of the presumption of innocence. By not giving the Government an opportunity to address this complaint at the domestic level,

the applicants in the Court's view did not meet the requirements of Article 35 § 1 of the Convention. Their complaint under Article 6 § 2 of the Convention is therefore inadmissible owing to their failure to exhaust domestic remedies.

92. As regards the applicants' remaining complaints under Article 6 §§ 1 and 3 (d) of the Convention, the Court notes that they are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor are they inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' arguments

(a) The applicants

93. The applicants maintained their complaint that the decisions of the national courts had not been adequately reasoned as regards their individual administrative responsibility. In connection with the allegations under Article 6 § 3 (d) of the Convention, they submitted − citing the relevant case-law of the Court − that they had been deprived of the possibility to challenge key witnesses in court. Whatever the content of G.Kh.'s and his deputy's pre-trial statements, that failure had in the applicants' view a detrimental effect on their defence and their position *vis-à-vis* that of the administrative authorities.

(b) The Government

94. Without challenging the applicability of Article 6 of the Convention to the impugned administrative proceedings, the Government submitted that the decisions of the national courts had been adequately and sufficiently reasoned both in general and in particular as regards the individual responsibility of each and every applicant. Thus, the decisions were adopted on the basis of a comprehensive and in-depth examination of all the evidence submitted to the courts. The administrative offence of a minor breach of public order was confirmed with respect to the applicants on the basis of the statements of more than eight eyewitnesses. The Government submitted, with reference to the relevant evidence, that all the applicants involved had been individually identified as being among those people who had burst into G.Kh.'s office and insulted him.

95. As regards the administrative offence of arbitrary behaviour (Article 174 of the CAO), the Government stressed that the Grand Academic Council had ceased to exist by virtue of Presidential Decree no. 473. Therefore, the line of reasoning of the domestic courts − according to which the election of the second applicant as Rector of the University by a dissolved body had been arbitrary and unlawful − could not have been

unreasonable. The fact that the first, sixth and ninth applicants had not participated in the above-mentioned process (that is to say the process of electing the second applicant as Rector) could not absolve them, in the Government's view, of their share of responsibility for the subsequent unlawful developments at the University. As to disobedience with respect to the unlawful instructions given by the police, the fact that the sixth and ninth applicants had not been found responsible on those counts was in itself an indication, according to the Government, of the well-foundedness and accuracy of the reasoning of the national courts and of the individual approach taken in respect of the administrative responsibility of each and every applicant involved.

96. In connection with the applicants' complaint under Article 6 § 3 (d) of the Convention, the Government submitted that given all the circumstances of the case, the refusal of the Tbilisi City Court to examine in court the acting Rector of the University and his deputy had not affected the applicants' defence rights to an extent incompatible with Article 6 of the Convention. They claimed that having regard to the Court's "sole or decisive test" and to the fact that the Tbilisi City Court had more than twenty witness statements at its disposal, the reliance on the pre-trial statements of G.Kh. and his deputy had not affected the overall fairness of the trial.

2. The Court's assessment

(a) The general principles

97. The Court reiterates that Article 6 of the Convention guarantees the right to a fair hearing, and the Court's task is to ascertain whether the proceedings as a whole, including the way in which evidence was obtained and heard, were fair – in particular, whether the applicant was given the opportunity of challenging the evidence and of opposing its use, and whether the principles of adversarial proceedings and equality of arms between the prosecution and the defence were respected (see *Bykov v. Russia* [GC], no. 4378/02, §§ 88, 90, 10 March 2009, and *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 60, ECHR 2000-II).

98. The Court reiterates that, as the requirements of paragraph 3 of Article 6 are to be seen as particular aspects of the right to a fair trial guaranteed by paragraph 1, it often examines the complaints under both provisions taken together (see, among many other authorities, *Lucà v. Italy*, no. 33354/96, § 37, ECHR 2001-II; *Krombach v. France*, no. 29731/96, § 82, ECHR 2001-II; and *Poitrimol v. France*, 23 November 1993, § 29, Series A no. 277-A). Moreover, where the applicant complains of numerous procedural defects, the Court may examine the various grounds giving rise to the complaint in turn in order to determine whether the proceedings,

considered as a whole, were fair (see *Insanov v. Azerbaijan*, no. 16133/08, §§ 159 et seq. 14 March 2013, and *Mirilashvili v. Russia*, no. 6293/04, §§ 164 et seq., 11 December 2008).

99. Article 6 § 3 (d) enshrines the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument. Exceptions to this principle are possible but must not infringe the rights of the defence, which, as a rule, require that the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness makes his statement or at a later stage of the proceedings. Thus, when a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence may be restricted to an extent that is incompatible with the guarantees provided by Article 6 (see *Blokhin v. Russia* [GC], no. 47152/06, §§ 200-202, ECHR 2016, with further references therein).

100. In *Schatschaschwili v. Germany* ([GC], no. 9154/10, § 111-31, ECHR 2015) the Grand Chamber confirmed that the absence of good reason for the non-attendance of a witness could not of itself render a trial unfair, although it remained a very important factor to be weighed in the balance when assessing the overall fairness of a trial, and one which could tip the balance in favour of a breach of Article 6 §§ 1 and 3 (d). Furthermore, given that the Court's concern is to ascertain whether the proceedings as a whole were fair, it must review the existence of sufficient counterbalancing factors not only in cases in which the evidence given by an absent witness was the sole or the decisive basis for the accused's conviction. It must also do so in those cases where it finds it unclear whether the evidence in question was the sole or decisive basis but is nevertheless satisfied that it carried significant weight and that its admission may have handicapped the defence. The extent of the counterbalancing factors necessary in order for a trial to be considered fair will depend on the weight of the evidence of the absent witness. The more important that evidence, the more weight the counterbalancing factors will have to carry in order for the proceedings as a whole to be considered fair (see *Seton v the United Kingdom*, no. 55287/10, § 59, 12 September 2016).

(b) The application of those principles in the current case

101. The Court confirms, at the outset, having regard to its earlier case-law concerning administrative offences punishable by detention, that the criminal limb of Article 6 of the Convention is applicable to the impugned administrative proceedings in the current case (see, among many other authorities, *Karelin v. Russia*, no. 926/08, § 42, 20 September 2016, with further references therein; see also *Mikhaylova v. Russia*, no. 46998/08,

§§ 70-74, 19 November 2015, and *Nicoleta Gheorghe v. Romania*, no. 23470/05, §§ 25-26, 3 April 2012). In view of the fact that the applicants' complaint under Article 6 of the Convention consisted of two main limbs: firstly, the alleged manifestly arbitrary reasoning in the decisions suggesting the collective criminal liability of all the applicants; and secondly, the violation of the defence rights of the applicants on account of the failure to examine G.Kh. and his deputy in court – the Court will address them in turn.

(i) The allegedly arbitrary reasoning

102. The Court notes, having regard to all the case material before it, that the main issue that it has to address in this connection is whether the national courts sufficiently and adequately reasoned their decisions so as to indicate and specify the extent of the individual involvement of each and every applicant in the commission of the three impugned administrative offences. Starting with the administrative offence of resistance to the police, the Court notes that Ms Sikharulidze and Mr Bakhtadze (the sixth and ninth applicants) were acquitted of that offence since it was established that they had left the office of the acting Rector before the arrival of the police (see paragraph 39 above); the remaining applicants never challenged the official version of events regarding their encounter with the police officers in G.Kh.'s office – they merely maintained that there had been no physical confrontation. However, the domestic courts concluded that even in the absence of a physical confrontation, those of the applicants who had remained in the Rector's office had refused to obey the official orders of the police, and that refusal had amounted to the offence of resisting the police (see paragraph 39 above). The Court sees no issue of arbitrariness arising with respect to the above-mentioned conclusion (see *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, §§ 83-85, 11 July 2017).

103. As to the administrative offence of minor breach of public order, as concluded above, the national court had failed to establish the specific offensive and insulting words and remarks that the applicants had apparently individually used with respect to G.Kh. (see the Court's conclusion in paragraph 82 above). However, the administrative offence in question was found to have been committed by the applicants not exclusively on account of their alleged insulting of G.Kh. but also on account of their being involved in a protest that had caused disruption to the University and violated public order and the rights of others (see paragraph 38 above; see also the Court's conclusion in paragraph 78 above). While the reasoning of the national courts in this regard is not entirely careful or detailed, it is not in question that the applicants were part of a group of protesters that forced their way into the office of G.Kh., demanding his resignation and stayed there for at least two hours, disrupting

the work of the University. In such circumstances, the Court does not see that any issue arises under Article 6 § 1 of the Convention.

104. Lastly, as regards the offence of arbitrary behaviour, the Court notes that all the applicants, with the exception of Mr Tuskia, Ms Sikharulidze, and Mr Bakhtadze (the first, sixth and ninth applicants respectively), confirmed in the course of the domestic proceedings that they had participated in the "elections" organised by the dissolved Grand Academic Council. They furthermore never contested the fact that as a part of a protest group they had demanded the resignation of G.Kh. The three above-mentioned applicants alleged, on account of their non-involvement in the elections, that they could not have been held responsible under Article 173 of the CAO. The Court notes, however, that they did not pursue this argument before the domestic courts.

105. In view of the above, the Court finds the reasoning of the domestic courts sufficient and adequate to meet the requirements of Article 6 § 1 of the Convention.

(ii) The failure to question G.Kh. and his deputy in court

106. As regards the applicant's complaint under Article 6 § 3 (d) of the Convention, the Court finds it appropriate to address this aspect of the trial separately, within the context of each and every administrative charge of the applicants. Thus, the charge of arbitrary behaviour referred exclusively to the episode of the allegedly unlawful election of the second applicant as Rector by a dissolved body. The applicants' line of argument was that the election had been lawful. In this connection, the national courts examined carefully the relevant legislative acts and concluded that the Grand Academic Council was an unlawful body. While G.Kh. and his deputy could have shed light on this matter, the main issue pending before the national courts within this context was purely legal – whether or not the old charter of the University was still valid (see, in this connection, paragraph 6 above). The Court is, thus, of the view that the evidence of G.Kh. and his deputy could not have been considered to constitute the sole or decisive evidence for the purposes of establishing the legal status of the Grand Academic Council and the impugned election.

107. Turning to the second episode, for which all of the applicants were found responsible − the allegedly forceful entrance of a group of around twenty people, including the applicants, into the office of G.Kh. and its unlawful occupation for about two hours − in this connection the national courts relied on the statements of more than ten eyewitnesses. While the applicants denounced the legal characterisation of their actions, never did they challenge the fact of entering the office of G.Kh., requesting the latter's resignation, and staying there for about two hours as such. In view of the above, the Court is of the view that the pre-trial statements of G.Kh. and his

deputy constituted neither the sole nor the decisive piece of evidence against the applicants.

108. As to the offence of disobeying orders given by police officers, the Court notes that neither G.Kh. nor his deputy could have provided any information in this regard, as by the time of the arrival of the police, both of them had left the Rector's office (see paragraph 13 above). The decisive evidence in this regard was provided by those who had stayed in the room, including the police officers and the applicants themselves.

109. Thus, despite the failure to examine G.Kh. and his deputy in court, and while assessing the overall fairness of the proceedings conducted against the applicants, the Court finds that the applicants' defence rights were not restricted to an extent incompatible with the guarantees provided by Article 6 of the Convention. Accordingly, it finds no violation of Article 6 §§ 1 and 3 (d) of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

110. The applicants also alleged a violation of Article 13 of the Convention and Article 1 of Protocol No. 1 on account of the administrative proceedings conducted against them. In view of all the materials in its possession, and in so far as the matters complained of are within its competence, the Court finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application is manifestly ill-founded and must be rejected, in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY

1. *Holds* that the fourth applicant's widow has standing to continue the proceedings in the present case in his stead;

2. *Declares* the complaints under Article 6 §§ 1 and 3 (d) of the Convention and Articles 10 and 11 of the Convention concerning the events of 3 July 2006 admissible and the remainder of the application inadmissible;

3. *Holds* that there has been no violation of Article 11 of the Convention read in the light of Article 10;

4. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (d) of the Convention.

Done in English, and notified in writing on 11 October 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Deputy Registrar

Angelika Nußberger
President

APPENDIX

Nº.	First name Last name	Birth date
1.	Vakhtang TUSKIA	21/12/1935
2.	Jemal MEBONIA	29/06/1939
3.	Maia NATADZE	27/05/1929
4.	Tengiz SANADZE	30/01/1930
5.	Giorgi GOGOLASHVILI	24/07/1948
6.	Medea SIKHARULIDZE	03/01/1955
7.	Avtandil ARABULI	24/03/1953
8.	Gela DOLIDZE	16/06/1963
9.	Demur BAKHTADZE	16/05/1939

A

Queen's Bench Division

Director of Public Prosecutions *v* Ziegler and others

Director of Public Prosecutions *v* Cooper and others

[2019] EWHC 71 (Admin)

B

2018 Nov 29;
2019 Jan 22

Singh LJ, Farbey J

Human rights — Freedom of expression and assembly — Interference with — Defendants obstructing highway during demonstration against arms fair — Whether defendants acting "without lawful . . . excuse" if lawfully exercising
C *Convention rights to freedom of expression and peaceful assembly — Whether interference with defendants' Convention rights proportionate — Highways Act 1980 (c 66), s 137 (as amended by Criminal Justice Act 1982 (c 48), ss 38, 46) — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 10, 11*

The defendants in two separate cases were charged with obstructing the highway, contrary to section 137 of the Highways Act 1980[1], after causing two roads to be
D closed during a protest against an arms fair that was taking place in a nearby conference centre. In the first case the defendants had lain in the middle of the approach road to the conference centre, while in the second case the defendants had suspended themselves by ropes from a bridge above a road that was a short distance from the centre. In each case the highway had been obstructed for between 80 and 90 minutes. The defendants accepted that their action had been planned, that it had taken place on a "highway" to which section 137 applied, and that the action had
E caused an "obstruction" thereon, but contended that they had not acted "without lawful . . . excuse" for the purposes of section 137, particularly since they had been exercising their rights to freedom of expression and of peaceful assembly under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2]. The district judge dismissed all charges in both cases, finding that the prosecution had failed to prove that the defendants' actions had been unreasonable and therefore without lawful excuse.

F On the prosecution's appeals by way of case stated—

Held, allowing the appeal in the first case but dismissing the appeal in the second case, that, reading and giving effect to section 137 of the Highways Act 1980 in a way which was compatible with articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, a person who was lawfully exercising his rights under articles 10 and 11 was acting reasonably and therefore with "lawful . . . excuse" for the purposes of section 137 of the 1980 Act; that, conversely, if any interference with those rights would have been proportionate, the person would not
G have been acting with lawful excuse for the purposes of section 137; that when assessing the conduct of the person purporting to exercise his article 10 and 11 rights, the content of the expression (for example political speech) might well require it to be given greater weight but the particular viewpoint being expressed was not something on which it was permissible for a court to express its own view by way of approval or disapproval; that the test to be applied by an appellate court on a question of proportionality was not whether the first instance court's conclusion was one which
H no reasonable court could have reached, but whether that court's assessment was "wrong"; that, on the facts of the first case, the district judge had failed to strike the

[1] Highways Act 1980, s 137, as amended: see post, para 27.
[2] Human Rights Act 1998, Sch 1, Pt I, art 10: see post, para 30. Art 11: see post, para 31.

necessary fair balance between the rights of the defendants to protest and the general interest of the community, including the rights of other members of the public to pass along the highway whose ability to go about their lawful business had been completely prevented by the conduct of the defendants for a significant period of time; that, therefore, the district judge had erred in his approach to the assessment of proportionality such that his overall assessment had been wrong; that, accordingly, since the defendants in the first case had no defence to the charge, convictions would be entered and the matter remitted for sentencing; but that the court lacked jurisdiction to consider the appeal with regard to the defendants in the second case because the prosecution's application for a case to be stated for the opinion of the High Court had been made out of time (post, paras 61–65, 69, 80, 86, 92, 94, 98, 104, 117–118, 129, 137).

In re B (A Child) (Care Proceedings: Threshold Criteria) [2013] 1 WLR 1911, SC(E) applied.

Harrison v Duke of Rutland [1893] 1 QB 142, CA, *Nagy v Weston* [1965] 1 WLR 280, DC, *Hirst v Chief Constable of West Yorkshire* (1986) 85 Cr App R 143, DC and *Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240, HL(E) considered.

Dicta of Ouseley J in *James v Director of Public Prosecutions* [2016] 1 WLR 2118, para 36, DC not applied.

The following cases are referred to in the judgment of the court:

B (A Child) (Care Proceedings: Threshold Criteria), In re [2013] UKSC 33; [2013] 1 WLR 1911; [2013] 3 All ER 929, SC(E)
Birch v Director of Public Prosecutions [2000] Crim LR 301, DC
Buchanan v Crown Prosecution Service [2018] EWHC 1773 (Admin); [2018] LLR 668, DC
City of London Corpn v Samede [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA
Director of Public Prosecutions v Jones (Margaret) [1999] 2 AC 240; [1999] 2 WLR 625; [1999] 2 All ER 257; [1999] 2 Cr App R 348, HL(E)
Harrison v Duke of Rutland [1893] 1 QB 142, CA
Hashman and Harrup v United Kingdom CE:ECHR:1999:1125JUD002559494; 30 EHRR 241, GC
Hirst v Chief Constable of West Yorkshire (1986) 85 Cr App R 143, DC
James v Director of Public Prosecutions [2015] EWHC 3296 (Admin); [2016] 1 WLR 2118, DC
Kudrevičius v Lithuania CE:ECHR:2015:1015JUD003755305; 62 EHRR 34, GC
Love v Government of the United States of America (Liberty intervening) [2018] EWHC 172 (Admin); [2018] 1 WLR 2889; [2018] 2 All ER 911, DC
Nagy v Weston [1965] 1 WLR 280; [1965] 1 All ER 78, DC
R v Weir [2001] 1 WLR 421; [2001] 2 All ER 216; [2001] 2 Cr App R 9, HL(E)
R (Director of Public Prosecutions) v Stratford Magistrates' Court [2017] EWHC 1794 (Admin); [2018] 4 WLR 47; [2017] 2 Cr App R 32, DC
R (Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55; [2007] 2 AC 105; [2007] 2 WLR 46; [2007] 2 All ER 529, HL(E)
R (Mishra) v Colchester Magistrates' Court [2017] EWHC 2869 (Admin); [2018] 1 WLR 1351; [2018] 1 Cr App R 24, DC
Redmond-Bate v Director of Public Prosecutions (1999) 163 JP 789, DC
Steel v United Kingdom CE:ECHR:1998:0923JUD002483894; 28 EHRR 603
Westminster City Council v Haw [2002] EWHC 2073 (QB)

The following additional cases were cited in argument:

Attorney General v Punch Ltd [2002] UKHL 50; [2003] 1 AC 1046; [2003] 2 WLR 49; [2003] 1 All ER 289, HL(E)

A *Sunday Times v United Kingdom* CE:ECHR:1979:0426JUD000653874; 2 EHRR 245
Oladimeji v Director of Public Prosecutions [2006] EWHC 119 (Admin)

The following additional cases, although not cited, were referred to in the skeleton arguments:

B *Aldred (Guy) v Miller* 1924 JC 117; 1924 SLT 613
McAra v Edinburgh City Council 1913 SC 1059; 2 SLT 110

CASES STATED by District Judge Hamilton sitting at Stratford Magistrates' Court

On 7 February 2018, following a trial on 1 and 2 February 2018, District Judge Hamilton, sitting at Stratford Magistrates' Court acquitted the C defendants in the first case, Nora Ziegler, Henrietta Cullinan, Joanna Frew and Christopher Cole, of the charge of obstruction of the highway, contrary to section 137 of the Highways Act 1980. On 20 February 2018, following a trial on 7 and 8 February 2018, the same district judge acquitted the defendants in the second case, Nicholas Cooper, Samuel Donaldson, Louis Dorton and Tom Franklin, of a similar charge.

D The prosecution served an application to state a case in the first case on 26 February 2018, and an application to state a case in the second case on 14 March 2018. The district judge completed the draft case stated relating to the eight defendants on 15 March 2018, which was served on the defendants on 20 March 2018. The appeals were heard together.

The facts are stated in the judgment of the court, post, paras 9–26 and the question for the opinion of the High Court is stated post, para 7.

E

John McGuinness QC (instructed by *Crown Prosecution Service, Appeals and Review Unit*) for the prosecution.

Under section 137 of the Highways Act 1980 the prosecution has to prove four things: (1) there was an obstruction, (2) the obstruction was wilful (deliberate), (3) there was no lawful authority for the obstruction, and F (4) there was no lawful excuse for the obstruction. "Lawful excuse" within section 137 "embraces activities otherwise lawful in themselves": *Hirst v Chief Constable of West Yorkshire* (1986) 85 Cr App R 143, 151. It stretches the language of article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms to breaking point to regard the defendants' activities as amounting to the holding of opinions or the receiving G or imparting of information.

The legislative aim of section 137 is clear and reflects the common law. Its aim is to give effective protection to the primary right of the public to pass and repass along a highway. The language of the section itself emphasises the primary right: the offence is not defined as merely obstruction of a highway, but instead is defined as obstruction of "the free passage along a highway". The public's right of access to a highway is wider and extends to H user by a group of persons assembling together, but only so long as the user does not unreasonably obstruct or prevent the primary purpose of the public right of free passage along the highway. The right to pass and repass is the "fundamental purpose" for the use of roads. The law as to trespass on the highway should be in conformity with that relating to wilful obstruction of

the highway under section 137: see *Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240, 257, 279, 287, 288–291. A

Section 137 does restrict the exercise of the rights of freedom of expression or peaceful assembly/association; but that restriction is prescribed by law and necessary in a democratic society for the protection of the rights of others, for the purposes of articles 10.2 and 11.2 of the Convention, namely the right of the public to pass freely along a public highway. The real issue, in terms of the Convention, is whether—giving due weight to the defendants' rights under articles 10.1 and 11.1—their actions were, or may have been, in all the circumstances a reasonable user of the highway. B

While it can be appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: see *City of London Corpn v Samede* [2012] PTSR 1624, para 41. To that end, the defendants' reliance on *Westminster City Council v Haw* [2002] EWHC 2073 (QB) is erroneous. It is specious to say, using Gray J's phrase, that article 10 is a "trump card" entitling any political protestor to circumvent regulations relating to use of highways while recognising it is a significant consideration in assessing the reasonableness of the user: see *Haw*, para 24. Where protestors intend to impede the right of the public to pass freely along a public highway, simply holding a long-standing commitment to the views supporting the protest are not decisive against the right of the public to pass freely along a public highway. C D

Henry Blaxland QC, *Blinne Ní Ghrálaigh*, and *Owen Greenhall* (instructed by *Hodge Jones & Allen Solicitors Ltd* and *Bindmans llp*) for the defendants. E

The assessment of reasonableness of an obstruction under section 137 of the Highways Act 1980 in the context of a demonstration is ultimately a fact-sensitive matter, requiring a court to balance any interference with the right of the public to pass and repass against the defendant's right to freedom of expression and assembly at common law and under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The expression "lawful authority or excuse" encompasses the concept of reasonableness. Whether or not the user amounting to an obstruction is an unreasonable use of the highway is a question of fact, but it depends on all the circumstances. The question of fact is for the magistrates: see *Nagy v Weston* [1965] 1 WLR 280, 284 and *Hirst v Chief Constable of West Yorkshire* (1986) 85 Cr App R 143, 150. F

If an activity does not unreasonably obstruct the public right of passage, then it is within the scope of activities for which the public may lawfully use the highway and it cannot constitute a trespass. Provided these activities are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the primary right of the general public to pass and repass, they should not constitute a trespass. Subject to these qualifications, therefore, there would be a public right of peaceful assembly on the public highway: see *Director of Public Prosecutions v Jones* [1999] 2 AC 240, 254–255. G H

The words "without lawful authority or excuse in any way wilfully obstructs . . . free passage" in section 137 of the 1980 Act do not prohibit those acts which involve wilful obstruction of the highway but which are not

otherwise of themselves unlawful and which may or may not be reasonable in the circumstances. The focus is on what is reasonable in all the circumstances: see *James v Director of Public Prosecutions* [2016] 1 WLR 2118.

The assessment of the reasonableness of an obstruction, and in particular the assessment of "the purpose for which" the obstruction is done, involves, amongst other things, a consideration of whether the right to freedom of speech and/or to peaceable assembly, under articles 10 and 11 of the Convention respectively, are engaged; if they are engaged, they are a significant consideration when assessing the reasonableness of any activity on a highway: see *Buchanan v Crown Prosecution Service* [2018] LLR 668, para 20.

Articles 10 and 11 of the Convention, and the parallel rights and obligations arising under the common law, must be considered when assessing the reasonableness of any obstruction of the highway. Articles 10.1 and 11.1 are not to be read restrictively and the qualifications on those rights in articles 10.2 and 11.2 are to be carefully confined. What is "necessary in a democratic society", means more than "admissible", "useful", "reasonable or desirable"; the interference must correspond to a pressing social need, must be proportionate to the legitimate aim pursued, and the reasons given to justify it must have been relevant and sufficient under articles 10.2 and 11.2: see *Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 62.

Restraints on freedom of expression are acceptable only to the extent that they are necessary and justified by compelling reasons. The need for the restraint must be convincingly established: see *Attorney General v Punch Ltd* [2003] 1 AC 1046, para 27. Peaceful acts of civil disobedience and direct action, including lock-ons, occupations of land and other activities which are obstructive and disruptive to others, fall within the scope of articles 10 and 11. Even if a protest took the form of physically impeding the activities of which the protestors disapproved, such a protest would constitute an expression of opinion within the meaning of article 10: see *Steel v United Kingdom* (1998) 28 EHRR 603, para 92.

The appropriate "degree of tolerance" cannot be defined in abstracto; the court must look at the particular circumstances of the case and particularly at the extent of the disruption to ordinary life. Even where a protest intentionally causes "serious disruption" to the activities carried out by others, to the extent of blocking several major highways for a number of days, it still falls under the ambit of article 11.

For a crime contrary to section 137 of the 1980 Act to be committed, it is insufficient to establish that the obstruction of the passage on the highway was the result of a deliberate act. The prosecution must also establish that there is no lawful excuse for such wilful obstruction, or that the wilful obstruction of passage on the highway was unreasonable. This assessment of reasonableness must have regard to all the circumstances, including the duration, place, purpose and effect of the wilful obstruction, and must have particular regard to the rights to freedom of expression and assembly, as protected under the common law and articles 10 and 11: see *Westminster City Council v Haw* [2002] EWHC 2073 (QB).

The common law and Convention rights to freedom of expression and freedom of assembly are plainly engaged in relation to peaceful direct

action protests, including protests that are intentionally obstructive. The interference with those rights may or may not be justified pursuant to articles 10.2 and 11.2, including to protect the rights of others and/or to prevent disorder or crime. While *Director of Public Prosecutions v Jones* [1999] 2 AC 240 is important authority in confirming the existence of the right to protest on the highway, it is not, as intimated by the prosecution, the "leading modern authority" concerning section 137 of the 1980 Act, its legislative intent and/or the right to protest in relation thereto, nor is it authority for the proposition contended for by the prosecution, namely, that any obstructive assembly on the highway must necessarily constitute an offence contrary to section 137 of the 1980 Act.

The correct approach must consider the reasonableness of any obstruction created. The assessment of reasonableness is and has always been a fact-sensitive matter. The proper approach to whether the crime contrary to section 137 of the 1980 Act has been made out is as follows: (i) whether there was an obstruction of free passage, (ii) whether it was deliberate, and (iii) whether it was without lawful authority or excuse. What the consistent—modern and not so modern—line of authority regarding section 137 makes absolutely clear is that in relation to consideration (iii), peaceful protest activity, including obstructive protest activity, is capable on the facts of a given case of providing a lawful excuse for the obstruction of the highway: see *Hirst v Chief Constable of West Yorkshire* (1986) 85 Cr App R 143.

The burden of proof in a criminal trial requires the prosecution to prove that any obstruction caused was unreasonable. This dovetails with the requirement on the state to justify interference with a defendant's article 10 and 11 rights. Courts of appeal, including the High Court on an appeal by way of case stated, should approach with reticence any invitation to interfere with determinations relating to findings of fact by courts of first instance. The threshold for challenging the factual findings of a magistrates' court in an appeal by way of case stated is high. A finding will only be perverse and/or amount to an error of law if no reasonable tribunal could have made such a finding: see *Oladimeji v Director of Public Prosecutions* [2006] EWHC 1199 (Admin).

Where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it: see *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, para 53. The consideration and determination of reasonableness is a question of fact to be determined by the trial court, on the basis of all the evidence before it. It is not properly to be considered a question of law. In light of the inherently fact-specific nature of the analysis of reasonableness in relation to the offence contrary to section 3 of the 1980 Act, the general approach to be adopted by the court in this case is to consider the specific case before it on its facts, rather than to pronounce on general points of principle: see *Buchanan v Crown Prosecution Service* [2018] LLR 668.

The court took time for consideration.

A 22 January 2019. **SINGH LJ** and **FARBEY J** handed down the following judgment of the court.

Introduction

1 This is the judgment of the court.

2 These are appeals by way of case stated in relation to two separate
B trials which concerned materially similar facts. The first trial was *R v Ziegler, Cullinan, Frew and Cole* ("*Ziegler*"), heard between 1 and 2 February 2018; and the second was *R v Cooper, Donaldson, Dorton and Franklin* ("*Cooper*"), heard between 7 and 8 February 2018, both taking place before District Judge (Magistrates' Court) Hamilton ("DJ Hamilton" or "the District Judge") at Stratford Magistrates' Court. All eight defendants (now
C the respondents) faced a charge of obstruction of the highway, contrary to section 137 of the Highways Act 1980.

3 All of the charges arose out of protests in which each of the defendants took part on 5 September 2017, some days prior to the opening of the biennial Defence and Security International ("DSEI") fair at the Excel Centre in East London.

4 In *Ziegler*, all four defendants lay in the middle of an approach road
D leading to the Excel Centre, locking their arms onto a bar in the middle of a box designed to make disassembly, removal and arrest more difficult. The police approached them and, after initiating a process known as the "five-stage process" to try and persuade them to remove themselves voluntarily from the road, arrested them and removed them to a police station around 90 minutes after their arrival. One carriageway (the one leading to the Excel
E Centre) was entirely blocked as a consequence.

5 In *Cooper*, the four defendants suspended themselves by ropes from a bridge above both carriageways of the Royal Albert Way, a short distance from the Excel Centre. The police closed the road to traffic for safety reasons, and the defendants were removed from the bridge 78 minutes after the incident took place (after the police had, again, undertaken the five-stage process).

F **6** Of the elements that must be proved under section 137 of the 1980 Act (an obstruction of the highway; which was wilful; there being no lawful authority or excuse for the obstruction), only the "lawful excuse" element was in dispute at either of the trials. As was common ground, this required an assessment of the "reasonableness" of the defendants' conduct. On this ground, DJ Hamilton dismissed the charges against all eight defendants at
G the two trials.

7 The question of law set out at para 41 of the case stated is whether the District Judge was entitled to reach the conclusions which he did in these particular cases; and therefore whether he was correct to have dismissed the case against the defendants in these circumstances.

Factual and procedural background

H **8** The primary facts were not in dispute and can be summarised briefly.

9 Shortly before 9.00 a m on 5 September 2017, a vehicle containing the defendants Ziegler, Cullinan, Frew and Cole stopped on a road leading to the Excel Centre. There was already, at that time, a sizeable police presence there, in anticipation of demonstrations taking place during the arms fair.

The four defendants decamped from the vehicle quickly, carrying two boxes. Each box had a pipe sticking out at the end, and a bar in the middle of it. The defendants placed the boxes in the middle of the road heading towards the Excel Centre, lay down, and locked themselves to the bar with the use of a carabiner clip. Two defendants were locked on each box. The locks on the boxes were colourful and bore messages of peace.

10 Police officers approached the defendants almost immediately and went through the five-stage process to try and persuade them to remove themselves voluntarily from the road. When the defendants failed to respond to the five-stage process, they were arrested. All were arrested by 9.05 a m. However, it took a considerable time after arrest to move the defendants, whose boxes were, by design, difficult to disassemble. This process took about 90 minutes, with the defendants arriving at their respective police stations at around 10.40 a m.

11 PC Wright, the only officer to give live evidence at trial, stated that he had been briefed to prevent obstructions of the road leading to the Excel Centre, and to assist vehicles getting into it. Protesters, other than the defendants, had been permitted to walk slowly in front of other vehicles destined for the Excel Centre, but no one had been permitted to block the road.

12 Turning to the facts of the second case, on 5 September 2017, shortly before 11.40 a m, the defendants arrived at the Connaught Bridge roundabout at the point at which it crosses over the Royal Albert Way. They used climbing equipment to lower themselves from the bridge so that each was suspended by rope above both carriages of the Royal Albert Way. It was not in dispute that each was suspended low enough to prevent lorries from using the carriageways, although cars, cyclists and pedestrians could pass underneath them. Nevertheless, the police closed the road to all traffic for safety reasons, and the road remained closed until the defendants had been arrested and brought to the ground by a specialist police team. It was also not in dispute that a police vehicle did pass underneath the defendants without incident while they were suspended above the road. After the five-stage process had been initiated, the defendants were arrested between 11.58 a m and 12.06 p m, although they were not all removed from the bridge until 12.58 p m.

13 All eight defendants gave evidence at their trials. They described their actions as "carefully targeted" and aimed at disrupting traffic heading for the DSEI arms fair. Although most of the defendants accepted that their actions may have caused disruption to traffic that was not headed to the fair, it was common ground that not all access routes to the DSEI arms fair were blocked by the defendants' actions, and it would have been possible for vehicles headed there to turn around and follow an alternative route.

14 The trial of Ziegler, Cullinan, Frew and Cole took place between 1 and 2 February 2018. DJ Hamilton dismissed all charges and handed down his written judgment on 7 February 2018.

15 Following this, the trial commenced in the cases of Cooper, Donaldson, Dorton and Franklin, taking place between 7 and 8 February 2018. DJ Hamilton found all defendants not guilty, giving oral reasons at that time, with his written judgment handed down on 20 February 2018.

16 From 7 to 9 February 2018, the trial in the related DSEI protest case, *R v Ammori, Hill, Johnson, Kirkeby and Sinfield* (involving charges of

A obstruction of the highway contrary to section 137 of the 1980 Act, on the same road as the eight defendants' protest), took place. At Stratford Magistrates' Court, DJ McGiver found that there was no case to answer in respect of Ammori, and that Hill, Johnson and Sinfield were not guilty, after which the prosecution was discontinued in relation to Kirkeby. In the related DSEI protest cases, *R v Dixon, Gibbons, Lysaczenko, Pasteur and Reader*, taking place between 14 and 16 February 2018, the prosecution was B discontinued for all but Lysaczenko, who was acquitted.

17 The Crown Prosecution Service ("CPS") served an application to state a case in *Ziegler* on 26 February 2018, and in *Cooper* on 14 March 2018. DJ Hamilton completed the draft case stated relating to all eight defendants on 15 March 2018, and the court served this on the defendants on 20 March 2018.

C

The judgments of the District Judge

18 As we have mentioned, DJ Hamilton handed down his judgment in *Ziegler* on 7 February 2018.

19 He identified at the outset that the single issue in the case was whether the obstruction caused was reasonable in all the circumstances, in particular D in light of the defendants' rights under articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). Account was also taken of Ms Frew's article 9 ECHR rights because of her faith. Essentially all other elements of the section 137 offence were not in dispute. The defendants all accepted that their action was planned, that it took place on a "highway" to which section 137 applied, and that the action caused an "obstruction" thereon. Finally, although the action E was not particularly long in duration there was no contention that it was de minimis or entirely minimal.

20 DJ Hamilton dismissed the charges that the four defendants faced. His reasons for this are set out at paras 38–44 of his judgment. His reasoning was broadly as follows.

21 First, there was no clear guidance or higher court authority on the F impact of articles 10 and 11 on the present situation, perhaps as a consequence of such cases being decided on their own individual facts: para 38.

22 Secondly, he nonetheless found that the judgment of Gray J in *Westminster City Council v Haw* [2002] EWHC 2073 (QB) (quoted more fully below) was authority for the proposition that an unauthorised demonstration that constitutes a prima facie obstruction of the highway will still be reasonable, and thus not constitute an offence under the 1980 Act, if G it is in pursuance of the rights set out in articles 10 or 11 of the ECHR: paras 39–40.

23 Thirdly, he took into consideration a list of various points, at para 41, which can be summarised as follows:

(a) The action in question was entirely peaceful.

(b) The action neither directly nor indirectly gave rise to any form of H disorder.

(c) The action did not involve the commission of any criminal offence beyond the allegation of the section 137 offence, such as abuse of police officers.

(d) The action was carefully targeted towards obstructing vehicles headed towards the DSEI arms fair.

(e) The action related to a "matter of general concern".

(f) The action was limited in duration. Arguably, the obstruction for which the defendants were responsible only occurred between the time of their arrival and the time of their arrests (a matter of minutes later), since they ceased to be "free agents" from this point, meaning that their action was no longer "wilful". But DJ Hamilton did not feel it necessary to determine this point since, even on the Crown's interpretation, the obstruction lasted about 90–100 minutes.

(g) There was no evidence of any complaint being made about the defendants' action (excluding the police's response).

(h) As a minor, final issue, DJ Hamilton noted the long-standing commitment to opposing the arms trade that all four defendants had demonstrated. They were not a random assortment of people attending the protests in order to cause trouble.

24 From this, DJ Hamilton concluded that the prosecution had "not proved to the requisite standard that the defendants [sic] limited, targeted and peaceful action, which involved the obstruction of the highway, was unreasonable". He accordingly dismissed the charges: para 42. He had received no clear submissions from the prosecution as to the qualification of articles 10 and 11 and the necessity of the restriction of the defendants' rights in these cases: para 43. He did not think it necessary to undertake an analysis of article 9 separately: para 29. He noted lastly that these findings were confined to the facts of the particular case, and did not represent binding authority in relation to others awaiting trial in relation to DSEI protests: para 46.

25 As we have mentioned, DJ Hamilton later handed down his written judgment in *Cooper* on 20 February 2018. He stated at para 3 that, although each case must of course be decided on its own facts, this case and *Ziegler* were so similar that he chose to adopt the same reasoning and reached the same conclusions. DJ Hamilton referred to his reasoning in *Ziegler* at paras 23–27. Significantly, the "checklist" of factors set out in *Ziegler* at para 41 equally applied to these defendants: para 26. Indeed, in relation to the fourth factor, the defendants in *Cooper* actually positioned themselves more closely to the Excel Centre, so that one could contend that the action was even more carefully targeted in the present case. Further, the action was of an overall shorter duration. Other factors raised by the prosecution, including the fact that the demonstrators had, and refused to consider upon instruction, alternative methods of demonstration available to them, or the fact that they blocked both sides of the carriageway, did not persuade DJ Hamilton that the prosecution had proved "unreasonableness": para 27.

26 Although each case must be decided on its own facts, the "essential" facts of this case were indistinguishable from those in *Ziegler*, so that the prosecution could not be said to have proved to the requisite standard that the action was unreasonable, and accordingly DJ Hamilton dismissed the charges: para 28.

The Highways Act 1980

27 Section 137 of the 1980 Act provides: "If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence . . ."

A *The Human Rights Act 1998*

28 Section 6 of the Human Rights Act 1998 ("HRA") makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights. A court is a public authority for this purpose: section 6(3)(a). Clearly the police would also be a public authority.

29 The relevant Convention rights are set out in Schedule 1 to the HRA.
B The two provisions which are now relevant are article 10, which concerns the right to freedom of expression, and article 11, which, so far as material, concerns the right to freedom of peaceful assembly.

30 Article 10, so far as material, provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information
C and ideas without interference by public authority and regardless of frontiers.

"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
D 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."

31 Article 11, so far as material, provides:

E "1. Everyone has the right to freedom of peaceful assembly . . .

"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."

F **32** Section 3(1) of the HRA provides: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

33 Where it is not possible to give such an interpretation to primary legislation, the higher courts have a power to make a "declaration of incompatibility" under section 4 of the HRA. The magistrates' court does not have that power but this court does. However, no issue as to making a
G declaration of incompatibility has been raised at any stage in the present proceedings. What is important for present purposes is that the obligation of interpretation in section 3 of the HRA applies to all courts (indeed it applies to anyone who has to interpret legislation) and is not confined to the higher courts.

H *Grounds of appeal*

34 On behalf of the Director of Public Prosecutions ("the DPP") Mr John McGuinness QC advances five overlapping grounds of appeal.

35 First, on the facts found, the defendants' use of the highway was unlawful and, if so, there could be no question of the engagement of

Convention rights. Citing well-known authority Mr McGuinness submits that the "lawful excuse" component of section 137 of the 1980 Act embraces "activities otherwise lawful in themselves". He submits that deliberately lying in the road with one's arm locked into a box is not on its face a lawful activity. The same point applies to suspending oneself from a bridge to prevent vehicles from passing under it.

36 Secondly, even assuming that the defendants' use of the highway was lawful, the District Judge took no, or insufficient, account of what Mr McGuinness calls "the primary right" of the public to use the highway for the purposes of free passage and re-passage. The legislative aim of section 137(1) is to give effective protection to this primary right. In that context Mr McGuinness cites *Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240. Mr McGuinness submits that, in the present cases, the express purpose of the defendants was to disrupt public passage along the highway. The District Judge was therefore wrong to relegate the primary right of free passage to a secondary status, behind the defendants' article 10 and 11 rights, when considering that the public could have turned around and followed an alternative route.

37 Thirdly, the District Judge took no, or insufficient, account of the qualifications to the defendants' Convention rights set out in articles 10.2 and 11.2 respectively. The issue before the court was whether, giving due weight to the defendants' Convention rights, their actions were in all the circumstances a reasonable use of the highway. Mr McGuinness submits that the District Judge overlooked a number of specific matters and that these oversights led him to treat article 10 as a "trump card", despite his statement to the opposite effect.

38 Fourthly, many of the reasons in support of the decision enumerated in the case stated at para 38 (reflecting the District Judge's judgment in *Ziegler* at para 41) are, on analysis, flawed. For example, first, DJ Hamilton's view that the actions were "carefully targeted" was misguided in that the blatant purpose of the action was to inhibit the public right of free passage. Secondly, the action was not as time limited as the District Judge seemed to consider, since the delay in their removal was fairly attributable to the defendants as they specifically intended to make their removal difficult. Thirdly, the lack of complaints by members of the public was irrelevant given that the police were on hand to react to the obstructions promptly.

39 Fifthly, and consequently, DJ Hamilton's conclusions were ones which no reasonable court could have reached.

The defendants' submissions

40 Mr Henry Blaxland QC made submissions on behalf of the defendants at the hearing before this court. His fundamental submission is that DJ Hamilton's decisions were ones he reached on the specific facts of these particular cases. The District Judge's determination that the prosecution had failed to "prove to the requisite standard that the defendants'. . . action . . . was unreasonable" is a finding of fact, with which this court should be cautious to interfere on appeal.

41 The defendants make the following further submissions in response to each of the five grounds of appeal.

42 First, articles 10 and 11 were plainly engaged in these cases. The DPP wrongly ignores an established line of authority that makes clear that the

A engagement of articles 10 and 11 is capable of providing a lawful excuse to an obstruction of a free passage that would otherwise be deemed unreasonable. There was nothing inherently unlawful about the defendants' conduct. The court must have regard to Convention rights when interpreting section 137 and, on the facts, articles 10 and 11 were plainly engaged here. The District Judge's conclusions on this issue were assessments to which he was entitled to
B come and should not be lightly interfered with by an appellate court.

43 Secondly, DJ Hamilton gave sufficient consideration to the rights of others to pass and re-pass along the highway. He was plainly conscious of this.

44 Thirdly, DJ Hamilton was well aware of the qualifications to be found in paragraph 2 of articles 10 and 11. He has said as such throughout the case stated, and his "factors" enumerated therein plainly mirror the
C criteria identified in case law on the ECHR. The contention that the District Judge did not give consideration to the extent of the interference with rights of passage is merely a reflection of a failure on the part of the prosecution to adduce evidence relevant to such.

45 Fourthly, the DPP's fourth ground as to the reasons given by DJ Hamilton in his judgments is misplaced and demonstrates a failure to
D appreciate that he was required to undertake a balancing exercise between the different interests in the case. He was correct to consider that the defendants' actions were carefully targeted and limited and that the action related to a matter of general concern. He was entitled to have regard to the nature of the defendants' opposition to the arms trade, as well as, on the other side of the balance, the alternative methods of protest available, the defendants' refusal to follow police directions, and the obstruction of the
E opposite carriageway. The appellate court should be reticent to interfere with such findings of a first instance trial judge.

46 Fifthly, DJ Hamilton's decision to dismiss the charges was reasonably open to him. Contrary to the view of the DPP that the decision is one that no reasonable tribunal could have reached, similar decisions were in fact reached by two other tribunals in the Stratford Magistrates' Court dealing
F with trials arising from the same series of demonstrations. Mr Blaxland submits therefore that the DPP's appeal should be dismissed.

47 There is a separate and distinct argument which is advanced on behalf of the fifth to eighth defendants, which is that the appeal against them was initiated out of time and that therefore this court lacks jurisdiction to entertain it. We will return to that issue of jurisdiction towards the end of
G this judgment, after we have addressed the main appeal, which relates to all of the defendants.

The rights to freedom of expression and freedom of assembly

48 The right to freedom of expression in article 10 of the ECHR is one of the essential foundations of a democratic society. This has long been recognised by the European Court of Human Rights. It has been recognised
H by the courts of this country, both before and since the introduction of the HRA. It has also been recognised by the highest courts of other democratic societies, for example in the United States, where freedom of speech and freedom of assembly are protected by the First Amendment to the US Constitution.

49 The jurisprudence, which is too well known to require citation here, discloses the following essential bases for the importance of the right to freedom of expression:

(1) It is important for the autonomy of the individual and his or her self-fulfilment. It is clear that the right extends far beyond what might ordinarily be described as "political" speech and includes, for example, literature, films, works of art and the development of scientific ideas. It is also clear that the right protects not only expression which is acceptable to others in society (perhaps the majority) but also that which may disturb, offend or shock others.

(2) It is conducive to the discovery of truth in the "marketplace of ideas". History teaches that what may begin as a heresy (for example the idea that the earth revolves around the sun) may end up as accepted fact and indeed the orthodoxy.

(3) It is essential to the proper functioning of a democratic society. A self-governing people must have access to different ideas and opinions so that they can effectively participate in a democracy on an informed basis.

(4) It helps to maintain social peace by permitting people a "safety valve" to let off steam. In this way it is hoped that peaceful and orderly change will take place in a democratic society, thus eliminating, or at least reducing, the risk of violence and disorder.

50 It is also clear from the jurisprudence of the European Court of Human Rights (like that of other democratic societies such as the United States) that the right to freedom of expression goes beyond what might traditionally be regarded as forms of "speech". It is thus not confined, for example, to writing or speaking as such. It can include other types of activity, even protests which take the form of "impeding the activities of which they disapproved": see *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241, para 28. In that passage the court cited its earlier judgment in *Steel v United Kingdom* (1998) 28 EHRR 603, para 92, where the court said:

> "the first and second applicants were arrested while protesting against a grouse shoot and the extension of a motorway respectively. It is true that these protests took the form of physically impeding the activities of which the applicants disapproved, but the court considers nonetheless that they constituted expressions of opinion within the meaning of article 10. The measures taken against the applicants were, therefore, interferences with their right to freedom of expression."

51 It is also important to draw attention to *Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 97, where the European Court of Human Rights said:

> "the applicants' conviction was not based on any involvement in or incitement to violence, but on the breach of public order resulting from the roadblocks. The court further observes that, in the present case, the disruption of traffic cannot be described as a side-effect of a meeting held in a public place, but rather as the result of intentional action by the farmers, who wished to attract attention to the problems in the agricultural sector and to push the government to accept their demands. In the court's view, although not an uncommon occurrence in the context

A of the exercise of freedom of assembly in modern societies, physical conduct purposely obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others is *not at the core of that freedom* as protected by article 11 of the Convention. This state of affairs might have implications for any assessment of 'necessity' to be carried out under the second paragraph of article 11." (Emphasis added.)

B

52 In other words, the fact that expression takes the form of obstruction of traffic does not mean that it falls outside the scope of protection of the Convention. However, it does mean that it is not at the core of the Convention rights in question and this may have implications for the question whether any interference with those rights is proportionate.

C **53** One reason for this is that the essence of the rights in question is the opportunity to persuade others. In a democratic society it is important that there should be a free flow of ideas so that people can make their own minds up about which they accept and which they do not find persuasive. However, persuasion is very different from compulsion. Where people are physically prevented from doing what they could otherwise lawfully do, such as driving along a highway to reach their destination, that is not an D exercise in persuasion but is an act of compulsion. This may not prevent what is being done falling within the concept of expression but it may be highly relevant when assessing proportionality under paragraph 2 of articles 10 and 11.

54 It will be clear from the above that, although all forms of freedom of expression are protected by articles 10 and 11, not all types of speech are E equally important. In a democratic society, great weight must be placed on the importance of the right to express political opinions. At the other end of the spectrum may be what is sometimes called "commercial speech", for example advertising. The latter is still protected by article 10 but the weight to be attached to it will be less than the weight to be attached to the expression of political opinions.

55 However, the courts—which are strictly neutral arbiters of people's F rights—cannot adjudicate upon the validity or legitimacy of particular points of view. An instructive distinction is drawn in American constitutional law between the "content" of speech and "viewpoint discrimination". The fact that the *content* of speech is political may well be highly significant in a democratic society. However, what the courts cannot do is to engage in discrimination as between different *viewpoints*. It is not the function of the G court to express a view about the acceptability of a political opinion, still less to express approval or disapproval of those opinions. We leave to one side the views of those organisations which are (exceptionally in a democratic society) proscribed organisations; and any other offences that may be committed, such as incitement to racial hatred, since those are not the subject of the present appeals.

H *The relationship between the HRA and the 1980 Act*

56 In his judgment the District Judge expressed surprise and concern that, although the HRA has been in force for many years since 2000, there appeared to be no authority from the higher courts on the kind of issue which has arisen in the present cases.

57 In fact there is some authority, including at the highest level of the House of Lords. It is unfortunate that this authority does not appear to have been drawn to the attention of the District Judge: see e g *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, paras 34–37 (Lord Bingham of Cornhill). In that passage Lord Bingham referred approvingly to the description of the Human Rights Act as marking a "constitutional shift" in the protection of the rights to freedom of expression (article 10) and assembly (article 11). That phrase ("constitutional shift") had been used by Sedley LJ in the Divisional Court case, *Redmond-Bate v Director of Public Prosecutions* (1999) 163 JP 789, 795.

58 In our judgment the correct analysis of the relationship between the HRA and the 1980 Act is as follows.

59 The starting point is section 6(1) of the HRA, which imposes a duty on every public authority (including the court) to act in a way which is compatible with the Convention rights.

60 The duty in section 6(1) is subject to exceptions, in particular where there is primary legislation which cannot be read in a way which is compatible with the Convention rights and which requires the interference in question. If there were such primary legislation (and it has not been suggested in the present appeal that there is) the court would have the power to make a declaration of incompatibility in respect of that primary legislation under section 4 of the HRA.

61 In the present case, as is usually the case, there is no need to go to section 4 because the first port of call is the strong obligation of interpretation in section 3 of the HRA. The question then becomes whether section 137(1) of the 1980 Act can be read and given effect in a way which is compatible with the Convention rights. Since that provision refers for material purposes to obstruction of the highway taking place "without lawful . . . excuse", in our judgment, it is perfectly possible to give that provision an interpretation which is compatible with the rights in articles 10 and 11.

62 The way in which the two provisions can be read together harmoniously is that, in circumstances where there would be a breach of articles 10 or 11, such that an interference would be unlawful under section 6(1) of the HRA, a person will by definition have "lawful excuse". Conversely, if on the facts there is or would be no violation of the Convention rights, the person will not have the relevant lawful excuse and will be guilty (subject to any other possible defences) of the offence in section 137(1).

63 That then calls for the usual inquiry which needs to be conducted under the HRA. It requires consideration of the following questions:

(1) Is what the defendant did in exercise of one of the rights in articles 10 or 11?

(2) If so, is there an interference by a public authority with that right?

(3) If there is an interference, is it "prescribed by law"?

(4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph 2 of article 10 or article 11, for example the protection of the rights of others?

(5) If so, is the interference "necessary in a democratic society" to achieve that legitimate aim?

64 That last question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate:

(1) Is the aim sufficiently important to justify interference with a fundamental right?

(2) Is there a rational connection between the means chosen and the aim in view?

(3) Are there less restrictive alternative means available to achieve that aim?

(4) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

65 In practice, in cases of this kind, we anticipate that it will be the last of those questions which will be of crucial importance: a fair balance must be struck between the different rights and interests at stake. This is inherently a fact-specific inquiry.

The pre-HRA case law

66 In this judgment we have sought to clarify the relationship between the terms of section 137 of the 1980 Act and the rights to freedom of expression and assembly in the ECHR, in particular applying the strong obligation of interpretation contained in section 3 of the HRA. For that reason, cases decided before the HRA came into full force on 2 October 2000 should be treated with caution in cases involving the exercise of article 10 and 11 rights on the highway. We do not consider anything we have said in the above analysis to be inconsistent with that earlier case law. In future it may well be unnecessary, in cases such as these, to refer to the pre-HRA case law in view of the guidance we have sought to give above but it should certainly be read in the light of that guidance.

67 In *Nagy v Weston* [1965] 1 WLR 280 Lord Parker CJ, giving the only substantive judgment in the Divisional Court, considered that (in relation to section 121(1) of the Highways Act 1959, which was materially identical to section 137 of the 1980 Act) the term "lawful excuse" encompasses "reasonableness". At p 284 he said that, after proving obstruction and wilfulness:

> "two further elements must be proved: first, that the defendant had no lawful authority or excuse, and secondly that the user to which he was putting the highway was an unreasonable user. For my part I think that excuse and reasonableness are really the same ground, but it is quite true that it has to be proved that there was no lawful authority."

68 He continued:

> "there must be proof that the use in question was an unreasonable use. Whether or not the user amounting to an obstruction is or is not an unreasonable use of the highway is a question of fact. It depends upon all the circumstances, including the length of time the obstruction continues, the place where it occurs, the purpose for which it is done, and of course whether it does in fact cause an actual obstruction as opposed to a potential obstruction."

69 In the light of our earlier analysis of the legal position under the HRA, those passages should now be understood in the following way. In

essence, the lawful exercise of Convention rights in articles 10 and 11 will mean that the prosecution have failed to prove that the defendant's use of the highway was "unreasonable". For that reason the defendant will have "lawful excuse" for an obstruction of the highway. It will therefore not be a criminal offence.

70 In a case which concerned freedom to protest, *Hirst v Chief Constable of West Yorkshire* (1986) 85 Cr App R 143, 151, Glidewell LJ, giving the main judgment in the Divisional Court, said:

> "I suggest that the correct approach for justices who are dealing with the issues which arose and arise in the present case is as follows. First, they should consider: is there an obstruction? Unless the obstruction is so small that one can consider it comes within the rubric de minimis, any stopping on the highway, whether it be on the carriageway or on the footway, is prima facie an obstruction. To quote Lord Parker: 'Any occupation of part of a road thus interfering with people having the use of the whole of the road is an obstruction.'
>
> "The second question then will arise: was it wilful, that is to say, deliberate? Clearly, in many cases a pedestrian or a motorist has to stop because the traffic lights are against the motorist or there are other people in the way, not because he wishes to do so. Such stopping is not wilful. But if the stopping is deliberate, then there is wilful obstruction.
>
> "Then there arises the third question: have the prosecution proved that the obstruction was without lawful authority or excuse? Lawful authority includes permits and licences granted under statutory provision, as I have already said, such as for market and street traders and, no doubt, for those collecting for charitable causes on Saturday mornings. Lawful excuse embraces activities otherwise lawful in themselves which may or may not be reasonable in all the circumstances mentioned by Lord Parker in *Nagy v Weston*."

71 Otton J, concurring with Glidewell LJ, had regard to the balance between the right to demonstrate and the need for peace and good order when he said at p 152:

> "On the analysis of the law given by Glidewell LJ and his suggested approach with which I totally agree, I consider that this balance would be properly struck and that the 'freedom of protest on issues of public concern' would be given the recognition it deserves."

72 In *Birch v Director of Public Prosecutions* [2000] Crim LR 301, para 30 Rose LJ said:

> "In my judgment it is apparent from the authorities to which we have been referred that no one may unreasonably obstruct the highway. There is no right to demonstrate in a way which obstructs the highway. There may be a lawful excuse for an obstruction which occurs in the highway and *Hirst* provides a good example of that."

73 In that passage, Rose LJ recognised, as the citation of *Hirst* makes clear, that it is only unreasonable obstructions of the highway that are unlawful and that, even before the HRA came into force, it was possible for someone to succeed in the defence that they were exercising a lawful right to protest and therefore had lawful excuse.

A 74 Earlier, at para 8, Rose LJ had said: "deliberately lying down in the road so as to obstruct the highway and traffic flowing along it was not, on its face, a lawful activity."

75 Quite apart from the fact that, even on its own terms, that passage does not suggest that such acts could never be lawful (Rose LJ said "on its face") as we have already indicated, such case law now needs to be read in the light of the "constitutional shift" effected by the HRA.

B 76 We would respectfully suggest that even the decision of the House of Lords in *Director of Public Prosecutions v Jones (Margaret)* [1999] 2 AC 240 now needs to be treated with some caution. First, it should be recalled that the case itself was not concerned with the offence of obstruction of a highway in section 137 of the 1980 Act. It was concerned with a different provision: section 14A of the Public Order Act 1986, which prohibited the C holding of trespassory assemblies. Secondly, in any event, as we have noted, the decision was given in 1999, before the coming into force of the HRA.

77 In *Jones* the House of Lords was divided. The majority allowed the appeal from the Divisional Court by the defendants in that case. The minority (Lord Slynn of Hadley and Lord Hope of Craighead) would have dismissed their appeal. In the course of giving the main opinion for the majority (which also included Lord Clyde and Lord Hutton), it is true that D Lord Irvine of Lairg LC did express more general views about the public's rights on the highway. Nevertheless, as we have indicated, those dicta now need to be read in the light of the fact that the HRA has been in force since 2000.

78 In a section headed "The position at common law", at pp 253–258, Lord Irvine LC surveyed the case law from the nineteenth century, including E *Harrison v Duke of Rutland* [1893] 1 QB 142. He was doubtful that what he called the "rigid approach of Lopes and Kay LJJ" in that case could be correct. Lord Irvine LC said, at p 254:

> "It would entail that two friends who meet in the street and stop to talk are committing a trespass; so too a group of children playing on the pavement outside their homes; so too charity workers collecting F donations; or political activists handing out leaflets; and so too a group of members of the Salvation Army singing hymns and addressing those who gather to listen."

79 Lord Irvine LC continued:

> "The question to which this appeal gives rise is whether the law today should recognise that the public highway is a public place, on which all G manner of reasonable activities may go on. For the reasons I set out below in my judgment it should. Provided these activities are reasonable, do not involve the commission of a public or private nuisance, and do not amount to an obstruction of the highway unreasonably impeding the primary right of the general public to pass and repass, they should not constitute a trespass. Subject to these qualifications, therefore, there H would be a public right of peaceful assembly on the public highway."

80 In our judgment, there is no conflict between what we say in the present case and what Lord Irvine LC said in that case. He was referring to an obstruction of the highway which "unreasonably" impedes the right of the general public to pass and repass. So long as it is understood, as we have

sought to explain in this judgment, that the lawful exercise of Convention rights under the HRA will not be "unreasonable" and therefore will give rise to a "lawful excuse", there will be no difficulty. What Lord Irvine LC said in his section headed "Wilful obstruction of the highway", at pp 258–259, should now be understood in the light of the HRA. We are comforted in that approach by the fact that, at p 259, Lord Irvine LC expressly referred to article 11 of the ECHR and expressed the view that, if it were necessary to do so, he would invoke article 11 "to clarify or develop the common law in the terms which I have held it to be", in other words that the starting point of the analysis is that there is a right to freedom of assembly on the public highway. This may then be subject to lawful and proportionate restrictions under paragraph 2 of articles 10 and 11.

81 The statements by other members of the majority in the House of Lords also need to be understood in the same light: see Lord Clyde at pp 280–281 and Lord Hutton at pp 287–294, where his discussion included reference to *Harrison v Duke of Rutland* and section 137 of the 1980 Act and the case law upon it at that time.

The post-HRA case law

82 The analysis we have set out above is, in our view, consistent with what has been said in other cases decided since the HRA came into force, even if the analysis has not previously been expressed in that way.

83 In *Westminster City Council v Haw* [2002] EWHC 2073 at [24], Gray J stated:

> "I certainly do not accept that article 10 is a trump card entitling any political protestor to circumvent regulations relating to planning and the use of highways and the like, but in my judgment the existence of the right to freedom of expression conferred by article 10 is a significant consideration when assessing the reasonableness of any obstruction to which the protest gives rise."

84 At para 25 Gray J considered the question of reasonableness under section 137 by "taking account of the duration, place, purpose and effect of the obstruction, as well as the fact that the defendant is exercising his Convention right". He said that it may, therefore, be necessary to look at Convention rights when examining the question of reasonableness. We agree that the Convention rights do not give defendants a "trump card". However, we would respectfully go further than Gray J did and suggest that the Convention rights are not merely a significant consideration but that any interference with them must be shown to be proportionate.

85 The decision of the Divisional Court in *James v Director of Public Prosecutions* [2016] 1 WLR 2118 needs to be understood in its proper context. That case concerned a prosecution under section 14 of the Public Order Act 1986. The defendant's appeal by way of case stated was dismissed by the court. In giving the main judgment for the court, Ouseley J said that it is no part of the function of a criminal trial court to rule upon a contention by reference to articles 10 and 11 of the ECHR that a decision to prosecute was disproportionate, unless it was contended by the defendant that the decision to prosecute was an abuse of the court's process, itself an exceptional and limited remedy.

A 86 However, that is not the contention advanced on behalf of the defendants in the present context. The present case relates to a different statutory provision, section 137 of the 1980 Act, and its correct interpretation. As we have indicated in this judgment, that provision, when correctly interpreted in accordance with the obligation in section 3 of the HRA, can be perfectly properly read as meaning that, in circumstances where a person is lawfully exercising the Convention rights in articles 10 and 11, they are B acting reasonably and therefore with "lawful excuse" for the purpose of section 137. Any obstruction of the highway is therefore lawful.

87 It is necessary at this juncture to consider some passages in the judgment of Ouseley J in more detail.

88 First, we would respectfully agree with Ouseley J's analysis of the relationship between the rights in articles 10 and 11 and domestic criminal C law offences, at paras 33–34 of his judgment:

> "33. The fact that the proportionality of a decision to prosecute in relation to articles 10 and 11 cannot be raised before trial courts, otherwise than as an abuse of process argument, does not mean that articles 10 and 11 cannot play their proper role in the trial.
>
> "34. For some [Public Order Act 1986] offences, the position has been D clear for some time. *Norwood v Director of Public Prosecutions* [2003] EWHC 1564 (Admin); [2003] Crim LR 888 and *Hammond v Director of Public Prosecutions* [2004] EWHC 69 (Admin); 168 JP 601 show that these rights and the qualifications to them, and thus the proportionality of the prohibitions or restraints on expression and assembly, form part of the statutory defence that the accused's conduct was reasonable. That is also what should have been decided in *Dehal v Crown Prosecution* E *Service* [2005] EWHC 2154 (Admin); 169 JP 581. It is the point on which the issue in *Abdul v Director of Public Prosecutions* [2011] EWHC 247 (Admin); 175 JP 190 turned in substance, and where the focus of the legal analysis should have been."

89 That in substance coincides with the analysis we have set out above, since "the proportionality of the prohibitions or restraints on expression and F assembly" will "form part of the statutory defence that the accused's conduct was reasonable".

90 At para 36, Ouseley J said:

> "The relationship between the offence of obstruction of the highway under section 137 of the Highways Act 1980 and common law rights to freedom of speech and assembly is dealt with by interpreting the words G 'without lawful authority or excuse in any way wilfully obstructs . . . free passage' as not prohibiting those acts which involved wilful obstruction of the highway but which were not otherwise of themselves unlawful and which might or might not be reasonable in the circumstances. The focus therefore was on what was reasonable in all the circumstances: *Hirst v Chief Constable of West Yorkshire* (1986) 85 Cr App R 143."

H 91 Although Ouseley J was at this particular point in his judgment summarising the pre-HRA position in relation to freedom of speech and assembly, the courts must give effect to the statutory rights created by the HRA. That was indeed the starting point of Davis LJ who was the other member of the court in *James* (para 51). Furthermore, as we have said in this

judgment, it is important not to lose sight of the strong obligation of interpretation in section 3 of the HRA, which applies to all legislation, including the terms of section 137 of the 1980 Act.

92 We would respectfully disagree that the "focus" must be "on what was reasonable in all the circumstances". As we have explained earlier in this judgment, the question under the HRA has become whether an interference with the rights in articles 10 and 11 is proportionate. If it is not, then the defendant will have been acting reasonably and will therefore have lawful excuse under section 137 of the 1980 Act. If, however, the interference would be proportionate, the defendant will have been acting unreasonably in all the circumstances and will not have that lawful excuse by way of defence.

93 In *Buchanan v Crown Prosecution Service* [2018] LLR 668, para 20 Hickinbottom LJ said, after citing pre-HRA cases on section 137 such as *Nagy v Weston* [1965] 1 WLR 280 and *Hirst* 85 Cr App R 143, that the rights in articles 10 and 11 of the ECHR may be engaged and, "if they are engaged" they are "a significant consideration when assessing the reasonableness of any activity on a highway". Earlier in the same paragraph, Hickinbottom LJ also observed that those rights

> "of course . . . do not comprise a 'trump card'—they are not absolute rights, but freedoms the exercise of which carries duties and responsibilities, and they may be the subject of such limitations as are prescribed by law and are necessary in a democratic society, for example the interests of public safety or for the protection of the rights and interests of others."

94 All of that is, with respect, correct, reflecting as it does the terms of paragraph 2 of articles 10 and 11. However, we would observe that the decision was an unreserved one and that the appellant appeared in person. It would appear therefore that the Divisional Court did not have the advantage that we have had of fuller legal argument. We would respectfully suggest that, although the Convention rights are not "trump cards", since they are qualified rights and not absolute ones, they must be regarded as more than simply "a significant consideration". This is because, if otherwise there would be a breach of the Convention rights, then section 3 of the HRA requires an interpretation to be given to section 137, so far as possible, which is compatible with those rights. We have explained in this judgment how a compatible construction can indeed be given to section 137. This is by considering there to be reasonable behaviour and therefore lawful excuse when a person is lawfully exercising their Convention rights. That does not mean that those rights will always prevail. The focus of the enquiry will be, as Hickinbottom LJ observed, on whether restrictions have been lawfully placed on the Convention rights under paragraph 2 of articles 10 and 11, in particular on the assessment of proportionality.

95 Our view, intended by way of clarification, should not in any way be taken to criticise the actual decision of the Divisional Court in *Buchanan*. It was no doubt correctly decided on its facts: see in particular the circumstances described by Hickinbottom LJ at para 29(ii), where it is clear that the defendant in that case had put both himself and others at risk of injury and/or risked damage to property.

A **96** Assistance can also be found in the judgment of the Court of Appeal in *City of London Corpn v Samede* [2012] PTSR 1624, paras 39–41, where Lord Neuberger of Abbotsbury MR said:

"39. As the judge recognised, the answer to the question which he identified at the start of his judgment is inevitably fact sensitive, and will normally depend on a number of factors. In our view, those factors B include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public.

C "40. The defendants argue that the importance of the issues with which the Occupy Movement is concerned is also of considerable relevance. That raises a potentially controversial point, because as the judge said, at para 155: 'it is not for the court to venture views of its own on the substance of the protest itself, or to gauge how effective it has been in bringing the protestors' views to the fore. The Convention rights in play are neither strengthened nor weakened by a subjective response to the D aims of the protest itself or by the level of support it seems to command . . . the court cannot—indeed, must not—attempt to adjudicate on the merits of the protest. To do that would go against the very spirit of articles 10 and 11 of the Convention . . . the right to protest is the right to protest right or wrong, misguidedly or obviously correctly, for morally dubious aims or for aims that are wholly virtuous.'

E "41. Having said that, we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom. In this case the judge accepted that the topics of concern to the Occupy Movement were 'of very great political importance': para 155. In our view, that was something which could fairly F be taken into account. However, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important, or with which they agree. As the Strasbourg court said in *Sergey Kuznetsov v Russia* CE:ECHR:2008:1023 JUD001087704, para 45: 'any measures interfering with the freedom of G assembly and expression other than in cases of incitement to violence or rejection of democratic principles—however shocking and unacceptable certain views or words used may appear to the authorities—do a disservice to democracy and often even endanger it. In a democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means . . .' The judge took into H account the fact that the defendants were expressing views on very important issues, views which many would see as being of considerable breadth, depth and relevance, and that the defendants strongly believed in the views they were expressing. Any further analysis of those views and issues would have been unhelpful, indeed inappropriate."

97 That passage in the judgment of Lord Neuberger MR helpfully sets out that, although the inquiry under paragraph 2 of articles 10 and 11 is "inevitably fact sensitive", it will normally depend on a number of factors which are then summarised in para 39.

98 However, we would respectfully observe that what was said by Lord Neuberger MR at paras 40–41 was not intended to, and does not have the effect of, entitling a court to enter into expressing approval or disapproval of a particular viewpoint. Rather, when read fairly and as a whole, what Lord Neuberger MR was saying is the same as what we have said in this judgment, namely that the *content* of expression (for example political speech) may well require it to be given greater weight but the particular *viewpoint* being expressed is not something on which it is permissible for a court to express its own view by way of approval or disapproval.

The approach to be taken by an appellate court

99 The next issue of law which arises in this case is whether the assessment of proportionality by a first instance court is a question of fact. The written submissions on behalf of both the DPP and the defendants appeared to suggest that it is. This is why it was submitted on behalf of the DPP that the conclusion which the District Judge reached was one which no reasonable court could have reached on the undisputed facts before him.

100 We do not consider that the assessment of proportionality is in truth a question of fact. It is better described as an "evaluative assessment", a phrase used by Lord Neuberger of Abbotsbury PSC in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911. At paras 91–94 of his judgment, Lord Neuberger PSC laid out the approach to be taken by an appellate court when examining a lower court's decision on proportionality. He said:

> "91. That conclusion leaves open the standard which an appellate court should apply when determining whether the trial judge was entitled to reach his conclusion on proportionality, once the appellate court is satisfied that the conclusion was based on justifiable primary facts and assessments. In my view, an appellate court should not interfere with the trial judge's conclusion on proportionality in such a case, unless it decides that that conclusion was wrong. I do not agree with the view that the appellate court has to consider that judge's conclusion was 'plainly' wrong on the issue of proportionality before it can be varied or reversed. As Lord Wilson JSC says in para 44, either 'plainly' adds nothing, in which case it should be abandoned as it will cause confusion, or it means that an appellate court cannot vary or reverse a judge's conclusion on proportionality [if] it considers it to have been 'merely' wrong. Whatever view the Strasbourg court may take of such a notion, I cannot accept it, as it appears to me to undermine the role of judges in the field of human rights.
>
> "92. I appreciate that the attachment of adverbs to 'wrong' was impliedly approved by Lord Fraser in the passage cited from *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, 652, by Lord Wilson JSC at para 38, and has something of a pedigree: see e g per Ward LJ in *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2003] 1 WLR 577, para 195 (although aspects of his approach

A have been disapproved: see *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] 1 WLR 1325, para 46). However, at least where Convention questions such as proportionality are being considered on an appeal, I consider that, if after reviewing the trial judge's decision, an appeal court considers that he was wrong, then the appeal should be allowed. Thus, a finding that he was wrong is a sufficient condition for allowing an appeal against the trial judge's conclusion on proportionality, B and, indeed, it is a necessary condition (save, conceivably, in very rare cases).

"93. There is a danger in over-analysis, but I would add this. An appellate judge may conclude that the trial judge's conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance C considers was right, (iv) a view which she cannot say was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong, or (vii) a view which is unsupportable. The appeal must be dismissed if the appellate judge's view is in category (i) to (iv) and allowed if it is in category (vi) or (vii).

"94. As to category (iv), there will be a number of cases where an appellate court may think that there is no right answer, in the sense that D reasonable judges could differ in their conclusions. As with many evaluative assessments, cases raising an issue on proportionality will include those where the answer is in a grey area, as well as those where the answer is in a black or a white area. An appellate court is much less likely to conclude that category (iv) applies in cases where the trial judge's decision was not based on his assessment of the witnesses' reliability or E likely future conduct. So far as category (v) is concerned, the appellate judge should think very carefully about the benefit the trial judge had in seeing the witnesses and hearing the evidence, which are factors whose significance depends on the particular case. However, if, after such anxious consideration, an appellate judge adheres to her view that the trial judge's decision was wrong, then I think that she should allow the F appeal."

101 At the hearing before this court it was suggested by Mr Blaxland on behalf of the defendants, although only faintly as we understood his submission, that the approach recommended in *In re B* was not applicable in the context of criminal proceedings. However, it is clear that that approach has been applied in contexts outside the field of family law, in particular in G the context of extradition proceedings.

102 A recent example of an extradition case in which *In re B* was applied is to be found in *Love v Government of the United States of America (Liberty intervening)* [2018] 1 WLR 2889, in which the Divisional Court comprised Lord Burnett of Maldon CJ and Ouseley J. After citing Lord Neuberger PSC's judgment in *In re B* at para 23, the court stated at para 26:

H "The true approach [to evaluating the section 83A Extradition Act 2003 factors] is more simply expressed by requiring the appellate court to decide whether the decision of the district judge was wrong. What was said in the *Polish Judicial Authority v Celinski (Practice Note)* [2016] 1 WLR 551 and *In re B (A Child)* are apposite, even if decided in the context of article 8. In effect, the test is the same here. The appellate

court is entitled to stand back and say that a question ought to have been decided differently because the overall evaluation was wrong: crucial factors should have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed."

103 We can see no principled basis for confining the approach in *In re B* to family law cases or not applying it to the criminal context. This is because the issue of principle discussed by Lord Neuberger PSC in that case related to the approach to be taken by an appellate court to the assessment by a lower court or tribunal of proportionality under the HRA. That is a general question of principle and does not arise only in a particular field of law.

104 Accordingly we conclude that the test to be applied by an appellate court is not whether the first instance court's conclusion was one which no reasonable court could have reached but whether that court's assessment as to proportionality was "wrong".

Application of the above principles to the facts of this case

105 Against that legal background we now turn to apply the relevant principles to the facts of the present cases. In particular we will analyse the reasoning which the District Judge set out at para 38 of the case stated, which reflects what he had earlier said in his judgment in *Ziegler*, at para 41. Although the case was not presented in precisely the form that it is now apparent such cases should be, in substance the District Judge engaged in an assessment of proportionality in that passage.

106 We do not accept the first three grounds of appeal advanced by Mr McGuinness.

107 The first ground of appeal is that the conduct of the defendants was not lawful in itself and therefore was incapable of giving rise to a lawful excuse for the purpose of section 137 of the 1980 Act. In our judgment, for the reasons we have given earlier, that is incorrect. The acts in question were done in exercise of the rights in articles 10 and 11 and were capable of giving rise to a lawful excuse. The crucial question was whether any interference with those rights would satisfy the principle of proportionality.

108 The second ground of appeal is that the public have "the primary right" to use the highway for the purposes of free passage and re-passage; and that the District Judge erred in relegating that primary right to a secondary status, behind the defendants' article 10 and 11 rights. We do not accept that submission. According to the analysis which we consider to be correct under the HRA, it is not helpful to refer to either right as being the "primary right". Rather the exercise which has to be performed is to assess the proportionality of any interference with the Convention rights and, in particular, whether a fair balance has been struck between the different rights and interests at stake.

109 The third ground of appeal is that the District Judge did not take sufficient account of the qualifications to the Convention rights which are to be found in paragraph 2 of articles 10 and 11. It is further submitted that the District Judge erred in treating the Convention rights as being a "trump card". We do not accept those submissions. In our view, although the arguments were not presented to the District Judge in exactly the way that they have been to this court, as a matter of substance the District Judge was

A well aware that the rights in articles 10 and 11 are qualified and not absolute. He expressly directed himself that they should not be treated as a "trump card". In our view, the reasoning which he set out at para 41 in his judgment in *Ziegler* did as a matter of substance seek to grapple with the questions which he had to decide in assessing the proportionality of the interference with the defendants' Convention rights.

B **110** We see greater force in the fourth and fifth grounds of appeal, although, as we have said, the question for this court is not whether the decision reached by the District Judge was one that was reasonably open to him but whether it was at the end of the day "wrong".

111 We therefore turn to the heart of the District Judge's reasoning, which is set out at para 38 of the case stated. We can take the first three points together. At para 38(a) the District Judge said that the actions were C entirely peaceful. At para 38(b) he said that those actions did not give rise either directly or indirectly to any form of disorder. At para 38(c) he said that the defendants' behaviour did not involve the commission of any criminal offence beyond the alleged offence of obstruction of the highway. There was no disorder, no obstruction of and no assault on police officers. There was no abuse offered. None of that, in our view, prevents the offence of obstruction of the highway being committed in a case such as this.

D **112** At para 38(d) the District Judge said that the defendants' actions were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair. However, the fact is that the ability of other members of the public to go about their lawful business, in particular by passing along the highway to and from the Excel Centre was completely obstructed. In our view, that is highly relevant in any assessment of proportionality. This is not E a case where, as commonly occurs, some part of the highway (which of course includes the pavement, where pedestrians may walk) is temporarily obstructed by virtue of the fact that protestors are located there. That is a common feature of life in a modern democratic society. For example, courts are well used to such protests taking place on the highway outside their own precincts. However, there is a fundamental difference between that situation, where it may be said (depending on the facts) that a "fair balance" F is being struck between the different rights and interests at stake, and the present cases. In these two cases the highway was completely obstructed and some members of the public were completely prevented from doing what they had the lawful right to do, namely use the highway for passage to get to the Excel Centre and this occurred for a significant period of time.

113 At para 38(e) the District Judge said that the action clearly related G to a matter of general concern, namely the legitimacy of the arms fair and whether it involved the marketing and sale of potentially unlawful items. That was relevant in so far as it emphasised that the subject matter of the protests in the present cases was a matter of legitimate public interest. As Mr Blaxland submitted before us, the content of the expression in this case was political and therefore falls at the end of the spectrum at which greatest weight is attached to the kind of expression involved.

H **114** At para 38(f) the District Judge said that the action was limited in duration. Although it could be said that the obstruction was only for a few minutes, before the defendants were arrested, he did not find it necessary to make a clear determination on this point as, even on the Crown's case, the obstruction in *Ziegler* lasted only about 90–100 minutes and in *Cooper* less

than 80 minutes. In our view, that analysis displays an erroneous approach. The reason why the obstruction did not last longer was precisely because the police intervened to make arrests and to remove the defendants from the site. If they were exercising lawful rights, they should not have been arrested or removed. They might well have remained at the site for much longer. On any view, as was common ground, the duration of the obstruction of the highway was not de minimis. Accordingly, the fact is that there was a complete obstruction of the highway for a not insignificant amount of time. That is highly significant, in our view, to the proper evaluative assessment which is required when applying the principle of proportionality.

115 At para 38(g) the District Judge said that there had been no evidence that anyone had actually complained. In our view, that is of little if any relevance to the assessment of proportionality. The fact is that the obstruction did take place. The fact that the police acted, as the District Judge put it, "on their own initiative" was only to be expected in the circumstances of a case such as this.

116 At para 38(h) the District Judge said, although he regarded this as a "relatively minor issue", he noted the long-standing commitment of the defendants to opposing the arms trade. For most of them this stemmed, at least in part, from their Christian faith. They had also all been involved in other entirely peaceful activities aimed at trying to halt the DSEI arms fair. This was not a group of people who randomly chose to attend this event hoping to cause trouble. In our view, this factor had no relevance to the assessment which the court was required to carry out when applying the principle of proportionality. It came perilously close to expressing approval of the viewpoint of the defendants, something which (as we have already said above) is not appropriate for a neutral court to do in a democratic society.

117 In all the circumstances of these cases, we have come to the conclusion that the District Judge did fall into error in a number of respects in his approach to the assessment of proportionality, as we have indicated in going through his individual reasons. Further and in any event, we have come to the overall conclusion that, standing back from those individual features of the cases, his overall assessment of proportionality was at the end of the day "wrong". This is for the fundamental reason that there was no "fair balance" struck in these cases between the rights of the individuals to protest and the general interest of the community, including the rights of other members of the public to pass along the highway. Rather the ability of other members of the public to go about their lawful business was completely prevented by the physical conduct of these defendants for a significant period of time. That did not strike a fair balance between the different rights and interests at stake.

118 For those reasons we conclude that, apart from the issue of jurisdiction which arises only in the cases of the fifth to eighth defendants, the DPP's appeal to this court must be allowed. We now turn to the issue of jurisdiction that arises in the cases of the fifth to eighth defendants.

Jurisdiction: the separate ground of appeal raised by the fifth to eighth defendants

119 The charges against the fifth to eighth defendants were dismissed on 8 February 2018. The DPP's application to state a case to the High Court

A in relation to these defendants was not made to the District Judge until 12 March 2018. Mr Blaxland submitted that the application was therefore out of time because it was made outside the 21-day period set down by section 111(2) of the Magistrates' Courts Act 1980. As the application to the District Judge was late, he had had no jurisdiction to state a case in relation to these defendants.

B **120** Mr McGuinness in his skeleton argument took the position that the application in relation to all the defendants was in time. However, having had sight of Mr Blaxland's skeleton argument, he accepted in oral submissions that the DPP's application was out of time in relation to the fifth to eighth defendants. It was therefore not in dispute by the time of the hearing before us that the appeal in relation these defendants should be dismissed on jurisdictional grounds. Given the importance of the point, it is C nevertheless right that we set out our view of the relevant provisions.

121 Section 111(1) of the Magistrates' Courts Act 1980 provides (so far as material) that a party to a proceeding before a magistrates' court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the court to state a case for the opinion of the High Court. An application to state a case "shall be made within 21 days D after the day on which the decision of the magistrates' court was given": section 111(2). Where the court has adjourned the trial of an information after conviction, the day on which the decision is given is the day on which the court sentences or otherwise deals with the offender: section 111(3). The statute does not make provision as to how to determine the day of the decision in other circumstances.

122 The District Judge dismissed the charges on 8 February but reserved E his written reasons which he handed down on 20 February 2018. His written judgment was indorsed: "Time for appeal runs from 20 February 2018". However, the question of when time starts to run is a question of law to be determined by reference to the statute. There is no discretion under section 111(2) to extend the time limit which Parliament has imposed: *R (Mishra) v Colchester Magistrates' Court* [2018] 1 WLR 1351. The F District Judge's indication that time started to run on 20 February was legally irrelevant.

123 In our judgment, the decision of the District Judge which started the clock under section 111(2) was the decision to dismiss charges on 8 February. Verdicts of not guilty were entered on the same day. The dismissal of the charges and the verdicts became fixed when they were pronounced. Thereafter the District Judge was not free to change his mind. G Nothing that he said by way of subsequent reasons could change the outcome that the defendants had been acquitted. By handing down written reasons at some later date, the District Judge was not adjourning his decision but supplying reasons for the decision to dismiss the prosecution case.

124 Such an interpretation has a number of advantages. It means that time starts to run from the dismissal and verdict pronounced publicly in H court. Public pronouncement provides clarity and certainty. The verdict, together with the decision to dismiss charges, will thereafter be recorded in the court register which is an authoritative record leaving no room for doubt as to the nature of the decision or when it was taken.

125 The advantage of appeal rights starting from the date of a public procedure which is authoritatively recorded may be illustrated by the facts

of the present case. The written judgment was handed down in the absence of the defendants and, owing to error, was not sent to their lawyers. It would not have been fair for time to start running in relation to an outcome, or from a date, which the defendants may not have known about.

126 We also accept Mr Blaxland's submission that the particular need for a defendant to have finality in criminal proceedings applies to appeals of this sort. In *R v Weir* [2001] 1 WLR 421 the House of Lords held in relation to rights of appeal by the Crown under section 34(1) of the Criminal Appeal Act 1968 that a defendant should be entitled to know definitely, at the expiry of the period fixed by Parliament in the statute, whether a decision in his or her favour is to be challenged or not. In our judgment, similar considerations apply here. The way for defendants to know with certainty the date from which the DPP will not be able to ask a magistrates' court to state a case is by counting forward from the day when charges were dismissed.

Conclusions

127 We can express our conclusions briefly.

128 Since (as is now common ground) the court lacks jurisdiction to consider the DPP's appeal in relation to the fifth to eighth defendants we dismiss that appeal.

129 We allow the appeal in relation to the first to fourth defendants on the ground that the assessment as to proportionality by the District Judge was in all the circumstances wrong. This is because (i) he took into account certain considerations which were irrelevant; and (ii) the overall conclusion was one that was not sustainable on the undisputed facts before him, in particular that the carriageway to the Excel Centre was completely blocked and that this was so for significant periods of time, between approximately 80 and 100 minutes.

130 What the answer might be in other cases where there was no complete obstruction of the highway or, if there was, it was for a very brief period of time, will turn on their particular facts.

Disposal

131 In the light of what we have said above it is unnecessary to say any more about the cases of the fifth to eighth defendants: the DPP's appeal is dismissed in those cases.

132 After receiving the court's judgment in draft on confidential terms in the usual way, counsel made written submissions as to the disposal of the cases of the first to fourth defendants. It is common ground that the DPP's appeal should be allowed but the parties disagree about what should follow.

133 On behalf of the defendants it is submitted that the normal course should not be followed. It is suggested that, although the acquittals should be quashed, there should be no remittal for a retrial nor should convictions be entered. Reliance is placed on the decision of the Divisional Court in *R (Director of Public Prosecutions) v Stratford Magistrates' Court* [2018] 4 WLR 47, in particular at paras 52–55. However, each case must turn on its own facts. In that case, as is clear from para 53 in the judgment of Simon LJ, there were a cumulative set of "special circumstances" which made it inappropriate to follow the normal course.

A **134** In the present case it is submitted on behalf of the defendants that it would be just not to make the normal order because there were a number of other trials for offences arising from the protests at DSEI in 2017. It is observed that there were acquittals in other cases where the DPP did not appeal. A number of other cases were discontinued. Several Crown Court appeals were brought which were unopposed by the CPS. It is acknowledged by the defendants that some of those cases raised separate B factual defences but it is submitted that that was not the case for all of them.

135 It is also submitted that the reason why the DPP appealed in the present cases was primarily because of the important issues of human rights which they raised and not because of matters specific to the individual defendants.

136 We do not accept those submissions. We prefer the submissions for C the DPP. First, we do not know the precise facts of other cases. The logical conclusion from the judgment we have given in these cases is that the first to fourth defendants had no defence to the charges against them. It must follow that convictions should be entered. Any suggested disparity with other cases can be raised in the course of the sentencing process. Furthermore, although the DPP's primary purpose in bringing these appeals may have been because of the issues of general importance, that was not the only reason.

D **137** Accordingly in the case of the first to fourth defendants, convictions will be entered and the cases will be remitted for the purpose of sentencing.

Order accordingly.

3 December 2019. The Supreme Court (Lord Kerr of Tonaghmore, Lord E Hodge and Lady Arden JJSC) allowed an application by the defendants for permission to appeal.

PHILIP ABRAMSON, Barrister

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Court of Appeal

Regina (Holmcroft Properties Ltd) *v* KPMG llp

[2018] EWCA Civ 2093

B 2018 May 22, 23; Sept 28

Arden, Newey, Coulson LJJ

Judicial review — Jurisdiction — Financial compensation scheme — Bank establishing scheme to provide redress to customers mis-sold financial products — Bank undertaking to refer offers of compensation to independent reviewer — Claimant alleging reviewer approving inappropriate offer — Whether reviewer's decision amenable to judicial review — Whether redress offer adequately reasoned — Financial Services and Markets Act 2000 (c 8), s 166

C

A bank voluntarily entered into an undertaking with its regulator to review and provide redress in relation to certain interest rate hedging products which had been D mis-sold to customers. Each offer of redress would be independently reviewed by a skilled person, appointed by the bank and approved by the regulator pursuant to the exercise of its powers under section 166 of the Financial Services and Markets Act 2000[1]. As part of its role, the skilled person had to confirm whether the redress offered to customers was appropriate, fair and reasonable. The bank appointed the defendant to act as the skilled person. By the terms of the contract of appointment, the defendant undertook to act only for the bank and was expressly stated not to E owe any obligations towards the bank's customers. The bank made an offer of redress to the claimant, who had entered into interest rate hedging products to support its lending with the bank. The defendant approved that offer as fair, reasonable and appropriate. Dissatisfied with the bank's offer, which did not include compensation for consequential loss, the claimant sought to challenge the defendant's assessment of the appropriateness of the offer by way of a claim for judicial review. The Divisional F Court of the Queen's Bench Division dismissed the claim, holding that in assessing the level of appropriate compensation the defendant was not exercising a public function so that its decisions were not amenable to judicial review.

On the claimant's appeal—

Held, dismissing the appeal, that in determining whether the actions of a private body acting at the behest of a public body were subject to public law principles and so amenable to judicial review, regard was to be had not only to the source of the G power being exercised, but also to the wider circumstances relating to the nature and function of that power; that where a skilled person to whom section 166 of the Financial Services and Markets Act 2000 applied had been appointed at the request of the regulator to review the approach and methodology of a redress scheme operated by a bank, those wider circumstances included the overall regulatory scheme and the individual factual context of the particular case; that in the present case the obligation on the banks to grant redress and to engage a skilled person to opine on whether H the compensation offered was appropriate, fair and reasonable had been imposed by the regulator and so, to that extent, could be said to fall within the statutory scheme of regulation; but that the essential nature of the redress scheme was to allow the customers affected to pursue private rights since (i) although the regulator

[1] Financial Services and Markets Act 2000, s 166: see post, Appendix.

policed the commitment to offer redress by a high-level review conducted on its behalf by the skilled person, it was not itself involved in negotiating individual levels of compensation, (ii) nothing in the scheme indicated an intention that a dissatisfied customer should have recourse to a public law challenge to an assessment of the skilled person, (iii) the compensation was to be negotiated in accordance with private law principles, and (iv) any agreement as to compensation was to be enforceable through the courts; that on a true analysis of the scheme, the claimant's bringing of a complaint against the defendant was ancillary to pursuing a private law claim, and the requirements of the regulator merely overlaid, or sat alongside, a private dispute, without changing the character of that private dispute; and that, accordingly, the decision of the defendant as to the proper level of compensation payable to the claimant was not amenable to judicial review (post, paras 38, 40, 47–54, 57, 63, 64, 65).

R v Panel on Take-overs and Mergers, Ex p Datafin plc [1987] QB 815, CA, *R v Disciplinary Committee of the Jockey Club, Ex p Aga Khan* [1993] 1 WLR 909, CA and *R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd* [2004] 1 WLR 233, CA considered.

Decision of the Divisional Court of the Queen's Bench Division [2016] EWHC 323 (Admin); [2017] Bus LR 932; [2016] 2 BCLC 545 affirmed.

The following cases are referred to in the judgment of Arden LJ:

R v Disciplinary Committee of the Jockey Club, Ex p Aga Khan [1993] 1 WLR 909; [1993] 2 All ER 853, CA

R v Insurance Ombudsman Bureau, Ex p Aegon Life Assurance Ltd [1994] CLC 88; [1995] LRLR 101, DC

R v Lloyd's of London, Ex p Briggs [1993] 1 Lloyd's Rep 176, DC

R v Panel on Take-overs and Mergers, Ex p Datafin plc [1987] QB 815; [1987] 2 WLR 699; [1987] 1 All ER 564, CA

R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Markets Ltd [2003] EWCA Civ 1056; [2004] 1 WLR 233, CA

YL v Birmingham City Council (Secretary of State for Constitutional Affairs intervening) [2007] UKHL 27; [2008] AC 95; [2007] 3 WLR 112; [2007] 3 All ER 957; [2008] LGR 273, HL(E)

The following additional cases were cited in argument or referred to in the skeleton arguments:

Aldi Stores Ltd v WSP Group plc [2007] EWCA Civ 1260; [2008] 1 WLR 748, CA

Bushell v Secretary of State for the Environment [1981] AC 75; [1980] 3 WLR 22; [1980] 2 All ER 608; 78 LGR 269, HL(E)

CGL Group Ltd v Royal Bank of Scotland plc [2017] EWCA Civ 1073; [2018] 1 WLR 2137, CA

EI Dupont de Nemours & Co v ST Dupont (Note) [2003] EWCA Civ 1368; [2006] 1 WLR 2793, CA

Interbrew SA v Competition Commission [2001] EWHC Admin 367; [2001] UKCLR 954

JR17 for Judicial Review, In re [2010] UKSC 27; [2010] HRLR 27, SC(NI)

Kanda v Govt of Malaya [1962] AC 322; [1962] 2 WLR 1153, PC

Kay v Lambeth London Borough Council [2006] UKHL 10; [2006] 2 AC 465; [2006] 2 WLR 570; [2006] 4 All ER 128; [2006] LGR 323, HL(E)

Leech v Deputy Governor of Parkhurst Prison [1988] AC 533; [1988] 2 WLR 290; [1988] 1 All ER 485, HL(E)

O'Reilly v Mackman [1983] 2 AC 237; [1982] 3 WLR 1096; [1982] 3 All ER 1124, HL(E)

R v Chief Constable of the Thames Valley Police, Ex p Cotton [1990] IRLR 344, CA

A *R v Life Assurance Unit Trust Regulatory Organisation Ltd, Ex p Ross* [1993] QB 17; [1992] 3 WLR 549; [1993] 1 All ER 545; [1993] BCLC 509, CA
R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531; [1993] 3 WLR 154; [1993] 3 All ER 92, HL(E)
R v Secretary of State for the Home Department, Ex p Harry [1998] 1 WLR 1737; [1998] 3 All ER 360
R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service [2008] EWCA
B Civ 642; [2008] Bus LR 1486, CA
R (Mooyer) v Personal Investment Authority Ombudsman Bureau Ltd [2001] EWHC Admin 247; [2002] Lloyd's Rep IR 45
R (Primary Health Investment Properties Ltd) v Secretary of State for Health [2009] EWHC 519 (Admin); [2009] PTSR 1563
R (West) v Lloyd's of London [2004] EWCA Civ 506; [2004] 3 All ER 251; [2004] 2 All ER (Comm) 1; [2004] Lloyd's Rep IR 755, CA
C *Subesh v Secretary of State for the Home Department* [2004] EWCA Civ 56; [2004] Imm AR 112, CA

APPEAL from the Divisional Court of the Queen's Bench Division

By a claim form dated 5 December 2014 and pursuant to permission granted by Kenneth Parker J [2015] EWHC 1888 (Admin) on 24 April 2015 the claimant, Holmcroft Properties Ltd, sought judicial review of the
D decision of the defendant, KPMG llp, in its role as independent reviewer of a redress scheme, relating to mis-sold interest rate hedging products, voluntarily entered into between the interested parties, the Financial Conduct Authority and Barclays Bank plc, approving the decision of the bank to reject the claimant's claim in respect of alleged consequential losses and finding that the redress offered was appropriate, fair and reasonable. By an order
E dated 6 March 2016 the Divisional Court of the Queen's Bench Division (Elias LJ and Mitting J) [2017] Bus LR 932 dismissed the claim holding that the defendant was not amenable to judicial review.

By an appellant's notice the claimant appealed on the grounds that the Divisional Court had erred by failing to conclude that: (1) the defendant was amenable to judicial review in respect of the making of the appropriate, fair and reasonable assessment in the claimant's case (the making of that
F assessment being a "public function" within the meaning of CPR 54.1(2)(a)), and (b) the assessment was reached following a procedurally unfair process, with the consequence that the adequacy of the redress offered for the consequential loss it had suffered had not properly been assessed.

The facts are stated in the judgment of Arden LJ, post, paras 5–17.

G *Richard Gordon QC* and *Malcolm Birdling* (instructed by *Mackrell Turner Garrett*) for the claimant.

Javan Herberg QC and *Hanif Mussa* (instructed by *Herbert Smith Freehills llp*) for the defendant.

Richard Coleman QC and *Kerenza Davis* (instructed by *Baker McKenzie* for the first interested party.

H *Dinah Rose QC* and *Ben Jaffey QC* (instructed by *Linklaters llp*) for the second interested party.

The court took time for consideration.

28 September 2018. The following judgments were handed down.

ARDEN LJ

1. Independent reviewer in customer redress scheme: Amenability to judicial review and fairness

1 These proceedings arise out of customer redress arrangements set up by the Financial Services Authority ("the FSA") (now the Financial Conduct Authority ("FCA")) with Barclays Bank plc ("Barclays"). In common with other banks, Barclays had mis-sold interest rate hedging products ("IRHPs") to customers for whom they were not appropriate. The FSA was until 1 April 2013 the regulator with statutory powers of the UK financial services industry.

2 As part of these redress arrangements, Barclays voluntarily agreed with the FSA that it would provide fair compensation to customers affected by the mis-selling. In addition, it also agreed with the FSA to appoint a "skilled person" to whom section 166 of the Financial Services and Markets Act 2000 ("FSMA") as then in force (which is set out in the Appendix to this judgment) would apply. Barclays chose to appoint the respondent firm of accountants ("KPMG") for this purpose. The FSA exercised its own statutory powers under section 166 to approve the appointment and to require the "skilled person" to make a report to it on the operation of the redress arrangements. Barclays also undertook to engage and obtain an opinion (an "AFR assessment") from the skilled person as independent reviewer in each case in which an offer of redress was made as to whether the compensation was appropriate, fair and reasonable.

3 The appellant ("Holmcroft") was a customer of Barclays to which IRHPs were mis-sold. Barclays offered Holmcroft compensation under the redress arrangements but the offer did not include compensation for certain consequential loss to which Holmcroft considers it is entitled. KPMG as independent reviewer made an AFR assessment approving the offer. Holmcroft then sought judicial review of KPMG's decision to approve Barclays's offer on the basis that it had failed to discharge its public law duties of fairness.

4 By order dated 6 March 2016 the Divisional Court of the Queen's Bench Division (Elias LJ and Mitting J) [2017] Bus LR 932 dismissed the proceedings, first on the ground that the decision of a skilled person with respect to an AFR assessment was not amenable to judicial review, and, secondly on the ground that in any event the AFR assessment in this case was not, as Holmcroft alleged, unlawful. Holmcroft contended before the Divisional Court that in breach of its public law duties KPMG had failed to ensure that Holmcroft was provided with the bank records on which Barclays relied in making its decision declining to make the offer sought in relation to consequential loss. Holmcroft argued that the result of KPMG's actions was that it was unable to make effective representations to Barclays. On this appeal, Holmcroft contends that the Divisional Court was wrong on both grounds, but the second ground arises only if Holmcroft is correct on the first ground.

2. IRHP compensation arrangements and Holmcroft's claim

5 In March 2005, Holmcroft and its subsidiary, Holmwood Nursing Home Ltd ("HNHL"), borrowed some £2m and £400,000 respectively from

A Barclays to acquire property. In April 2005, Holmcroft purchased an IRHP from Barclays. Both loans were restructured on 21 March 2007 as a 20-year repayment loan of £2·4m. On 10 April 2008, Holmcroft purchased a second IRHP. Barclays also provided Holmcroft with current account facilities.

6 Holmcroft subsequently suffered serious financial difficulty. In May 2011, Barclays appointed receivers of Holmcroft's properties. Holmcroft contended that the IRHPs had exacerbated its financial position, and caused B it consequential loss. Barclays's own perception of the affairs of Holmcroft and HNHL was different, and drew on its internal records, known as Zeus records, which are relevant to the second ground.

7 In 2012, the FSA identified serious failings in the selling of IRHPs. The FSA reached voluntary settlements with several banks, including Barclays. As part of its settlement, Barclays undertook with the FSA that it would C carry out an assessment of whether it was appropriate to provide redress to customers wrongly sold IRHPs, and if so, to determine what redress would be appropriate, fair and reasonable in the circumstances. Each offer of compensation would be reviewed by a skilled person appointed by Barclays and approved by the FSA pursuant to the exercise of its powers under section 166 of FSMA. As part of its role, the skilled person had to D confirm whether the redress offered to customers was appropriate, fair and reasonable.

8 Following review, on 28 March 2014 Barclays made redress offers of £243,821·43 and £197,003·37 to Holmcroft in respect of its IRHPs, plus an offer of 8% simple interest by way of compensation for consequential losses. By a response dated 22 July 2014, Holmcroft claimed further consequential losses of approximately £5·2m. Barclays rejected Holmcroft's E claim on 5 September 2014. KPMG as the independent reviewer confirmed the appropriateness of the offer of redress in their possession. Following a failure to submit further evidence in accordance with a deadline imposed by Barclays, Barclays treated Holmcroft's case as closed. The limitation periods for Holmcroft to bring civil claims against Barclays regarding the mis-selling of the IRHPs expired in April 2011 and April 2014 respectively.

F **9** On 5 December 2014, Holmcroft issued an application for permission for a judicial review against KPMG.

3. Judgment of the Divisional Court

10 The Divisional Court accepted that the role of the independent reviewer was "woven into the fabric" of the FSA's regulatory function. The G independent reviewer could veto an offer of compensation. It assisted the FSA in performing its regulatory function. However, on weighing up the relevant factors both ways the Divisional Court concluded that the role of the independent reviewer did not have sufficient "public law flavour" to make KPMG amenable to judicial review.

11 The Divisional Court gave five specific reasons, which I will summarise before setting out the relevant passage from the judgment. First, Barclays's H implementation of the redress scheme was essentially voluntary. The Divisional Court considered that the FSA could not have imposed the role of the independent reviewer on Barclays. Moreover, Barclays decided what offer to make to affected customers.

12 Second, the arrangement between Barclays and KPMG was contractual and the customer was not a party to it. The mere fact that the

FSA required the engagement of a skilled person was not sufficient to make KPMG amenable to judicial review. A

13 Third, likewise, the fact that KPMG's role promoted the objectives of the regulator was not sufficient to make KPMG amenable to judicial review.

14 Fourth, the FSA had no statutory obligation, and probably not the resources, to carry out the role of the independent reviewer itself.

15 Fifth, the FSA could have taken other regulatory steps to sanction Barclays's mis-selling, and it might be amenable to judicial review if it did so, but that did not affect KPMG's position. B

16 The following extract from the judgment of the Divisional Court contains the relevant passage:

> "38. We have not found this question to be easy to resolve but ultimately we consider that KPMG's duties do not have sufficient public law flavour to render it amenable to judicial review. We reach this conclusion for a number of interrelated reasons, although there are certainly pointers in favour of amenability. C
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> "39. We accept that KPMG was clearly 'woven into' the regulatory function, to use the expression of Rose LJ in *R v Insurance Ombudsman Bureau, Ex p Aegon Life* [1994] CLC 88. Its function in approving D the terms of any offers was critical in achieving the twin aims of objectivity and acceptability. As a matter of substance it could veto any offer which it did not approve and effectively compel Barclays to tailor its offer accordingly. Whether that was the contractual effect of the arrangements or not is of little moment; it was certainly the commercial reality. In our view there is some artificiality in treating KPMG as E merely assisting Barclays in its compliance obligations, as occasionally happens in the ordinary course of affairs. This was more than a mere private arrangement and the bank would never have conferred the veto power upon KPMG unless required to do so by the FCA as part of its regulatory functions. Moreover, Barclays did not have a free hand in the appointment; it had to be approved by the regulator. The voluntary arrangement was coupled with the reporting requirements which were F imposed by statute. KPMG was undertaking its duties both for Barclays and for the FCA so as to assist the latter in the effective performance of its regulatory functions.
>
> "40. Moreover, there was a clear public connection between its function and the regulatory duties carried out by the FCA. But as the authorities show, that does not of itself suffice to render it amenable to G judicial review.
>
> "41. Notwithstanding these powerful pointers in favour of amenability, we have finally concluded, not without some hesitation, that the public element is not sufficiently strong for the following reasons.
>
> "42. First, although the FCA had a number of more draconian powers it could have exercised, it none the less chose to adopt an H essentially voluntary scheme of redress. Barclays was left to remedy its own errors and to identify, and where necessary provide redress for, unsophisticated customers who had been sold these products improperly. At this stage the FCA simply reserved the right to use more draconian statutory powers should the need arise. No doubt one of

A the circumstances where it might do so is if the report from KPMG which Barclays had to secure pursuant to a section 166 requirement concerning the redress scheme suggested that the scheme had not operated satisfactorily. For the purpose of obtaining that report, it did need to employ its statutory powers. But KPMG's role in the individual case, as vital as it was, could not have been imposed upon Barclays by the FCA in the exercise of its regulatory powers.

B "43. Second, the fact that KPMG's powers were conferred by contract is important, albeit not determinative, and in that context it is relevant that KPMG had no relationship with the customers at all. Also relevant is the fact that KPMG was not actually appointed by the FCA to do anything at all. All the regulator did was to approve their appointment as someone who had the skills and experience to carry out

C the functions which Barclays had to secure, pursuant to their voluntary undertaking. That approval of the appointment itself cannot suffice to attract public law duties, as the claimant conceded.

"44. Third, the authorities, in particular *Ex p Aegon Life* and *YL v Birmingham City Council (Secretary of State for Constitutional Affairs intervening)* [2008] 1 AC 95 , show that the fact that private

D arrangements are used to secure public law objectives does not bring those arrangements into the public domain sufficient to attract public law principles. Those cases were admittedly concerned with factually dissimilar considerations, as Mr Gordon stresses, but they do suggest that the courts are reluctant to find amenability to judicial review merely because a private body is carrying out functions at the behest of a public body which, if performed by that public body, would be subject to public

E law principles. The fact that KPMG in reviewing offers was assisting in the achievement of public law objectives is not enough to subject it to judicial review.

"45. Fourth, the FCA had no regulatory obligation to carry out the role which KPMG played had there been no willing skilled adviser. Indeed, it is highly unlikely that it would have had the resources to

F act in that way. It would have had to use other statutory means of securing appropriate redress. This reinforces the first point, that the arrangements were voluntary albeit under the cloud of more drastic statutory sanctions; and moreover, that they only directly engaged Barclays who could have kept KPMG out of the picture by choosing a different skilled person.

"46. Finally, it is of some relevance that the FCA was not disqualified

G by the arrangements from taking a more active role in particular cases. It is obvious that one of the purposes underlying the scheme was that the FCA should not have to become involved in particular cases, and no doubt it would in almost all cases refer any complaints back to Barclays and KPMG. But if a claimant alleged that they were being treated unfairly by both Barclays and KPMG, the FCA would need to

H explore that complaint, even if only cursorily, to satisfy itself that there was no obvious failure in the operation of the arrangements which it had set up to provide redress. The FCA would potentially be subject to judicial review if it failed to regulate in an appropriate manner, although we do not underestimate the difficulty of establishing a breach in any particular case.

"47. In short, there was no direct public law element in KPMG's role; and although it played an important part in the redress scheme, that of itself was also voluntarily undertaken albeit under threat of potentially more onerous statutory sanctions.

"48. We recognise that it may be said that without some recourse to public law proceedings against KPMG, there is no effective redress to ensure that fair and reasonable offers are made. But that was also true in *Ex p Aegon Life* [1994] CLC 88. Moreover, any public law remedy is a limited one. There would be no damages against KPMG absent a civil cause of action. The only relief would be to set aside the approval of the unfair offer and Barclays would have to consider the matter again. In this context it is not so surprising that there may be no effective redress—save perhaps exceptionally against the FCA itself—where both Barclays acts unfairly and KPMG does not identify the unfairness. The aim of the scheme is to remedy a pattern of improper selling. The broad regulatory objective is met if the banks adopt schemes to put the matter right and thereafter seek to implement them in good faith with close supervision from an objective and independent party. It does not guarantee a fair outcome in each and every case, but there is still the availability of civil actions, or possibly recourse to the Ombudsman, for those cases where the scheme does not allegedly work as it should."

17 In the final paragraph of this extract, the Divisional Court considered the point that the customer might as a result of its conclusion on amenability to judicial review have no remedy if Barclays failed to make an offer which was fair and reasonable or if an offer which was not fair was mistakenly accepted. But it considered that this consequence was not fatal. Counsel had invited the Divisional Court to assume that the customer would have no contractual remedy if Barclays did not comply with the obligations which it had undertaken to the FSA. If there were such remedies, then there would clearly be no grounds for judicial review because there would be a more appropriate, alternative remedy.

4. Issue 1: KPMG's amenability to judicial review

(a) Submissions for Holmcroft

18 Mr Richard Gordon QC, for Holmcroft, submits that the Divisional Court elevated form over substance, as, for example, with its assessment of Barclays's implementation of the redress scheme as "voluntary". The voluntary settlement agreed between Barclays and the FSA was a "deal" to avoid more stringent action. The reality was that the redress arrangements formed part of the FSA's single regulatory exercise so that, while assisting Barclays, the skilled person approved by the FSA could veto a claim. The Divisional Court found in Holmcroft's favour on that point.

19 The redress arrangements constituted a compulsory system which moved the skilled person into the system of control. One of the terms of the settlement between the FSA and Barclays was that Barclays had to produce a provisional redress determination for each customer and provide for speedy redress. It also undertook to treat affected customers fairly. The FSA was exercising a regulatory function when it appointed a skilled person. Barclays undertook to assist the regulator's performance of its regulatory duties. The FSA did not have the resources to complete the process itself.

20 Mr Gordon submits that the method of appointment of the independent reviewer was not the proper focus: see *R v Panel on Take-overs and Mergers, Ex p Datafin plc* [1987] QB 815, 838, 847 and 859, and *R (Beer (trading as Hammer Trout Farm)) v Hampshire Farmers' Market Ltd* [2004] 1 WLR 233, para 16. So, it was not enough that the FSA had approved the appointment of KPMG as the skilled person under its statutory powers. Rather, the question whether KPMG was amenable to judicial review depended on the nature of its function. Mr Gordon therefore emphasised the particular features of KPMG's involvement which Holmcroft considered critical.

21 The terms of KPMG's engagement were important. They recognised the inherent risk of conflict in the independent reviewer's position as between Barclays and the customer by distancing the independent reviewer from the customer:

> "Our work will be performed to enable the Firm to comply with the draft Requirement Notice by commissioning a Skilled Person's review and to facilitate the discharge by the FSA of its statutory duties, including its regulatory and enforcement functions in respect of the Firm. *Our work will not therefore be performed for the benefit of Customers who are seeking or who obtain redress.* Despite the inherent conflict, or the perception of conflict between the Firm's interests and the interests of affected Customers and our acceptance of duties and responsibilities to the Firm and the FSA (in connection with the discharge of its statutory duties) alone, there is a risk that some Customers may seek to place reliance on our work and may feel aggrieved at the outcome for their own case or cases. Accordingly, to the fullest extent permitted by law, the Firm agrees to indemnify and hold harmless this firm, its partners and employees, against all actions, proceedings and claims brought or threatened against them or any of them, and all loss, damage and expense (including legal expenses) relating thereto, where the action, proceeding or claim is (i) brought or threatened by any Customer of the Firm and (ii) in any way relates to or concerns or is connected with the performance of the Skilled Person's review pursuant to this Engagement Letter." (Emphasis added.)

22 No argument was addressed to the effect of the words italicised so far as customers were concerned. Mr Gordon simply placed reliance on their existence.

23 Mr Gordon submits that the skilled person is given a measure of control over Barclays. The assessment of the Divisional Court that KPMG was "woven into" the fabric of regulation (judgment, para 39, set out in para 16 of this judgment) is not appealed. KPMG had a pivotal role in the redress scheme which the FSA had created. This was reinforced by the evidence of Peter Fox, on behalf of the FCA, who said that the involvement of the skilled person was considered by the FCA to be essential because of a perceived lack of trust on the part of the customers that the banks would conduct the review objectively, concerns relating to their past conduct in selling IRHPs, and a recognition that the FSA did not have the resources to deal with each case itself. Simone Ferreira, Head of Department in the FCA's event supervision department, stated in her witness statement that the FSA's

response was that all the substantive disagreements between the bank and the skilled person had to be reported to enable the FSA to have some insight into how the process was operating. The FSA had made it clear to banks that in general the skilled person's view should prevail over that of the banks. However, the skilled person could not require the bank to accept its position and, if it refused to do so, the FSA would have to consider its powers in order to require the bank to take the steps deemed necessary to provide the customer with suitable redress. The FSA would have to be satisfied that the skilled person had reached the right conclusion.

24 Mr Gordon further submits that it does not matter that the skilled person is not in a contractual relationship with the customer and cannot compel Barclays to make an offer of compensation. It is a "but for" test. An AFR assessment by KPMG was effectively decisive as to whether the customer would take the benefit. It was only if KPMG considered that it was appropriate, fair and reasonable that compensation would be paid.

25 Moreover, contrary to the Divisional Court's second reason Mr Gordon argues, the contractual position was not relevant unless it diminished the force of regulatory control, which was not the case here. The fact that the powers of the skilled person derived from contract was entirely neutral in this case because of the public law character.

26 The FCA relies on *YL v Birmingham City Council (Secretary of State for Constitutional Affairs)* [2008] AC 95, but the provision of redress in this case was inherently a public function. Neither that case nor *R v Insurance Ombudsman Bureau, Ex p Aegon Life Assurance Ltd* [1994] CLC 88 assisted.

27 The submissions already summarised constitute Mr Gordon's criticism of the Divisional Court's first three reasons. Mr Gordon submits that the fourth reason of the Divisional Court is undermined by the fact that the FSA reserved power to impose further sanctions. The fifth reason pointed towards amenability to judicial review.

28 Moreover, amenability to judicial review was a point of principle, and the Divisional Court were wrong to approach it as one of balancing the various factors.

(b) Submissions on behalf of KPMG

29 Mr Javan Herberg QC, for KPMG, seeks to uphold the decision of the Divisional Court for the reasons that it gave.

30 Mr Herberg submits that Holmcroft's judicial review claim is really a contractual challenge to Barclays's decision not to award it compensation for the consequential loss that it claims to have suffered due to the mis-selling. The source of the power was purely contractual. The skilled person contracted its services because of Barclays's own promise to the FSA. The reporting role could not confer on KPMG a public law framework. The skilled person did not supplant the FSA's role. This is not a species of public law decision-making. There was a suite of other powers available to the FSA some of which included customer redress. It is impossible to say that because those might lead to public law remedies, this process must also do so. The case law pointed against amenability to judicial review in this situation.

31 In conclusion, the source of KPMG's power to make AFR assessments was purely contractual, derived from a contract to provide services for reward to assist in making offers to customers. AFR assessments had no

A effect on customers' rights. The FSA could not have required Barclays to offer redress but Barclays gave an undertaking to do so. It is not enough to show that, if it had not done so, the FSA might have imposed some other sanction.

(c) Submissions on behalf of the FCA

32 Mr Richard Coleman QC, for the FCA, also seeks to uphold the B decision of the Divisional Court for the reasons that it gave.

33 Mr Coleman submits that the question which the Divisional Court had to decide was one of fact and degree, evaluation, applying the law to the facts, and that an appellate court is restricted to considering whether a relevant factor was wrongly left out of account or whether an irrelevant factor was taken into account.

C **34** In addition, Mr Coleman makes two broad submissions: (1) by analogy with decided cases, KPMG was not amenable to judicial review; and (2) KPMG was not doing anything that could be described as a governmental function.

35 Mr Coleman submits that Holmcroft does not refer to any case where the commercial entity is carrying on for profit an activity under a commercial contract which it was under no public duty to carry out. This D case is analogous to *R v Disciplinary Committee of the Jockey Club, Ex p Aga Khan* [1993] 1 WLR 909, where this court held that a decision of the Jockey Club was not amenable to judicial review at the instance of a member. (The reference to a body being "woven into" a system of regulation is derived from the judgment of Sir Thomas Bingham MR in this case.)

36 Mr Coleman, in a written submission signed also by Ms Kerenza E Davis, relies on *YL* [2008] AC 95 for the following propositions:

(i) The fact that a service is for the public benefit does not mean providing the service is a public function (per Lord Mance, para 120, Lord Neuberger of Abbotsbury, para 135; see also para 36 of the judgment of the Divisional Court).

(ii) The fact that a function has a public connection with a statutory duty of a public body does not necessarily mean that the function is itself public F (per Lord Neuberger, para 140; and see also paras 36 and 40 of the judgment of the Divisional Court).

(iii) The fact that a public authority could have performed the function (Lord Neuberger, paras 149, 160 and 162) does not mean that the function is a public one if it is done by a private body (Lord Scott of Foscote, paras 29–31; Lord Neuberger, paras 144 and 146; and see paras 36 and 44 of the G judgment of the Divisional Court).

(iv) The private profit-earning motivation behind a private body's operations points against treating it as a person with a function of a public nature (per Lord Mance, paras 116).

(v) Functions of a public character are essentially governmental functions (Lord Mance, para 115; Lord Neuberger, paras 159, 160 and 162).

H *(d) Submissions on behalf of Barclays*

37 Ms Dinah Rose QC, for Barclays, made short submissions on this point, but they are covered above. Her more detailed submissions on this appeal were focused on the fairness issue, which is the second issue on this appeal.

(e) My conclusions on KPMG's amenability to judicial review

38 Having considered the parties' submissions, I conclude for the reasons given below that the Divisional Court was right in the conclusion that it reached for holding that KPMG was not amenable to judicial review. At the same time, I consider that the Divisional Court may be said to have focused too narrowly on the source of the independent reviewer's power and that, as I explain below, it should have taken a wider view of the regulatory position and factual context.

39 I shall consider first the authorities which have been cited, then the regulatory position and then the factual context.

40 The authorities cited demonstrate, as the Divisional Court pointed out, that the fact that the decision emanates from contractual arrangements does not mean that public law principles are inapplicable. The question is whether the body is carrying out a public law function: see *Ex p Datafin* [1987] QB 815, *Beer* [2004] 1 WLR 233 and *Ex p Aegon Life* [1994] CLC 88.

41 In the leading case of *Ex p Datafin*, the decision sought to be reviewed was that of the Panel on Takeovers and Mergers ("the Panel"). The applicant was bidding in competition with another company for a controlling interest in a third company. Datafin considered that the other company was acting in breach of the rules of the Panel on takeovers, but the Panel ruled against it. Datafin then sought judicial review of the decision of the Panel and this court had to consider whether the Panel was amenable to judicial review. Sir John Donaldson MR held, at pp 838–839:

> "[The Panel] is without doubt performing a public duty and an important one. This is clear from the expressed willingness of the Secretary of State for Trade and Industry to limit legislation in the field of take-overs and to use the Panel as the centrepiece of his Regulation of that market. The rights of citizens are indirectly affected by its decisions, some, but by no means all of whom, may in a technical sense be said to have assented to this situation, eg the members of the Stock Exchange … Its source of power is only partly based on moral persuasion and the assent of institutions and their members, the bottom line being the statutory powers exercised by the Department of Trade and Industry and the Bank of England. In this context I should be very disappointed if the courts could not recognise the realities of executive power and allowed their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted."

42 Despite the fact that the legal source of the Panel's power was merely contractual and private, and that its functions were hybrid, partly public and partly private, this court held that the Panel was amenable to judicial review. In reaching this conclusion, this court looked beyond the mere source of the Panel's power and the manner in which it had been appointed: see in particular per Lloyd LJ, at p 847, and per Nicholls LJ, at p 850.

43 Unlike *Ex p Datafin*, *Ex p Aegon Life* concerned a compensation scheme administered by the Insurance Ombudsman Bureau ("the IOB"). This scheme had some statutory recognition under the Financial Services Act 1986 ("the 1986 Act"), but it was originally set up before that Act. By 1993, it was supported by some 350 insurers representing some 90% of the insurers eligible to participate in it. If the IOB did not deal with

A customer complaints, they would have to be dealt with under the rules of a self-regulatory organisation recognised under the 1986 Act. Rose LJ, sitting in the Divisional Court, with whom McKinnon J agreed, held that the IOB was not amenable to judicial review. He derived certain principles from *Ex p Aga Khan* [1993] 1 WLR 909, including the following principle which makes it clear that a body whose powers are derived from contract may be amenable to judicial review [1994] CLC 88, 93:

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> "A body whose birth and constitution owed nothing to any exercise of governmental power *may* be subject to judicial review if it has been woven into the fabric of public Regulation or into a system of governmental control (per Sir Thomas Bingham MR, at p 921 and 923) or is integrated into a system of statutory Regulation (per Hoffmann LJ, at p 932) or is a surrogate organ of government (per Hoffmann LJ , at p 932) or but for its existence a governmental body would assume control (per Farquharson LJ, at p 930, and Hoffmann LJ, at p 932) …"

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44 Rose LJ also relied on a passage from the judgment of Leggatt LJ in *R v Lloyd's of London, Ex p Briggs* [1993] 1 Lloyd's Rep 176, 185 where Leggatt LJ held that Lloyd's was not amenable to judicial review at the instance of a name (an underwriting member of the Society of Lloyd's) who had agreed to its rules containing powers to perform the act which the name sought to judicially review:

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> "The fact is that even if the Corporation of Lloyd's does perform public functions, for example, for the protection of policy holders, the rights relied on in these proceedings relate exclusively to the contract governing the relationship between Names and their members' agents and, in some instances, their managing agents. We do not consider that that involves public law. This is consonant with Mr Justice Saville's conclusion that a Name was not entitled to disregard a cash call made in good faith by the members' agents. We accordingly endorse Mr Pollock's submission that 'all of the powers which are subject of complaint in the present application are exercised by Lloyd's over its members solely by virtue of the contractual agreement of the members of the Society to be bound by the decisions and directions of the Council and those acting on its behalf'.
>
> "Lloyd's is not a public law body which regulates the insurance market. As Mr Pollock remarked, the Department of Trade and Industry does that. Lloyd's operates within one section of the market. Its powers are derived from a private Act which does not extend to any persons in the insurance business other than those who wish to operate in the section of the market governed by Lloyd's and who, in order to do so, have to commit themselves by entering into the uniform contract prescribed by Lloyd's. In our judgment, neither the evidence nor the submissions in this case suggest that there is such a public law element about the relationship between Lloyd's and the Names as places it within the public domain and so renders it susceptible to judicial review."

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45 The facts of *Ex p Aegon Life* [1994] CLC 88 make it the closest to this case of all the authorities cited to us. As explained, there was a pre-existing voluntary arrangement for customer redress. On the other hand, there are important differences between the facts of the present case and the facts of

that case, as Mr Gordon pointed out. In particular, in this case there was a requirement by the FSA. As the Divisional Court held, the independent reviewer had a key role in the scheme (judgment, para 28).

46 *YL* [2008] AC 95 concerned a different issue. The question was whether a private company, in providing accommodation and care for the claimant, was exercising a public law function for the purposes of section 6(3)(b) of the Human Rights Act 1998. The majority considered that the actual provision of care was not a public function. Mr Gordon submits that this case is not analogous. The present case, he submits, was closer to determining eligibility for care. I do not consider that this is a valid argument because there was no policy element in the work of KPMG in making AFR assessments. The list of propositions from *YL* put forward by Mr Coleman and Ms Davis is helpful but does not take matters much further than the authorities cited above.

47 In my judgment the passage from the judgment of Dyson LJ in *Beer* [2004] 1 WLR 233, para 16 cited by the Divisional Court at para 26 of its judgment is important because it summarises the jurisprudence on amenability and makes it clear that all the circumstances relating to the nature and function of the power are relevant. That passage reads:

> "the law has now been developed to the point where, unless the source of power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law. It may be said with some justification that this criterion for amenability is very broad, not to say question-begging. But it provides the framework for the investigation that has to be conducted."

48 The point that all the circumstances should be considered is relevant to this case. In my judgment, the first four reasons given by the Divisional Court disclose a concern with the source of KPMG's power as independent reviewer. Thus, the first and second reasons relate to the origin of the arrangements and the source of the power to make an AFR assessment. The independent reviewer had no statutory power to make AFR assessments. Its power to make those assessments derived from its engagement by contract by Barclays, though Barclays was of course acting under a requirement made by the FSA and the redress arrangements undoubtedly in general promoted the objectives of statutory regulation. The third reason was largely an analysis of the authorities on the consequence flowing from the source of the power. In its fourth reason, the Divisional Court emphasised that the FSA could not itself have done what the skilled person was engaged by Barclays to do, again a point about the source of the power. That brings me to the second area I wish to consider, namely the regulatory position.

49 As to the regulatory powers, consistently with the Divisional Court's fourth reason, the parties stressed in argument that the powers to appoint a skilled person went no further than to require him to investigate and report to the FSA. The rest of his role in relation to the AFR assessments was grafted on to that position.

50 I would analyse the position of the skilled person as part of a wider regulatory context. In my judgment, it is necessary to stand back and examine

A the function that the independent reviewer fulfilled in the overall scheme of things. The so-called voluntary settlement involved an investigation by the FSA into IRHPs and its conclusion that they had been mis-sold to non-sophisticated investors who ought to be compensated for any recoverable loss. It obtained the commitment of the banks which had been responsible for the mis-selling to provide fair, reasonable and appropriate compensation to their customers. It policed this commitment by a high-level review conducted B on its behalf by the skilled person, followed by detailed reporting to itself. The FSA did not seek to be involved in the negotiations with the individual customers, so the main activity for agreeing compensation rested with the bank and its customer and constituted the pursuit of private law rights. To say that the function of making AFR assessments was outside the scheme of statutory regulation in my judgment involves too narrow a view of the FSA's C statutory functions and what it was aiming to achieve. To this extent I would accept Mr Gordon's submission on this point.

51 Turning to the relevant factual context, I consider that this too can and should be viewed more widely. There are similarities between the scheme agreed between the banks and the FSA and other industry-wide redress schemes for consumers who were entitled to compensation. In this context, D "consumers" are those persons who under FSA rules were non-sophisticated investors for whom the IRHP was not a suitable product. There were two different features in this case: first the industry regulator, the FSA, imposed an obligation on the banks to grant redress and, second, the regulator required Barclays to engage the skilled person to opine on whether the compensation offered was appropriate, fair and reasonable.

52 Those features, however, do not alter the nature of the scheme which E is essentially for the pursuit of private rights. Thus, customers' legal rights were unaffected, although as a practical matter any refusal of the independent reviewer to make a favourable AFR assessment might lead to the customer receiving a better offer under the scheme. The FSA made no stipulation that there should be a process for dealing with a customer's complaint that the skilled person ought not to have given a confirmation, provided of course that F the confirmation qualified as a confirmation for the purposes of its settlement with the bank. There is nothing to suggest that it intended that there should be any challenge on public law grounds to the issue of the confirmation and therefore in my view a review of the AFR assessment was over and beyond the regulatory exercise performed by the FSA. The compensation was moreover to be negotiated on private law principles: limitation, heads of recoverable damage and causation. If compensation was agreed, that agreement would G be enforceable through the courts: the FSA imposed no system for this. The FSA did not aim to remove the role of the courts in enforcing civil claims, and its regulatory function did not extend to replacing the role of the court. Far from being neutral the fact that the engagement of the independent reviewer was contractual was all of a piece with the fact that it was not performing any public function.

H **53** The reality is that Holmcroft's bringing of a complaint against KPMG was ancillary to pursuing a private law claim. The requirements of the FSA merely overlaid, or sat alongside, a private dispute. They did not change the character of that dispute, which was fundamentally a private law matter.

54 Contrary to the submission of Mr Gordon, the possibility that regulatory sanctions might still be imposed if the FSA considered that that

was an appropriate step does not mean that actions of the independent reviewer are amenable to judicial review. Sanctions were a separate matter and only a possibility.

55 My conclusion exposes a gap in the protection which the FSA secured for customers of Barclays, and the question arises whether that undermines the conclusion. I do not consider that to be so. As the Divisional Court made clear at para 48 of its judgment, if an AFR assessment was not judicially reviewable, the customer would have no means of redress in public law where the offer was insufficient and the skilled person gave a confirmation incorrectly. However, the customer would be free to reject the offer and his legal remedies against the bank for the mis-selling would be unaffected. The protection intended by the AFR assessment is lost only if the customer is unaware of the defect. As to this, as the Divisional Court pointed out, the FSA did not confer on customers a guarantee that every customer will receive an offer which is appropriate, fair and reasonable. The regulatory objectives could still be met because the institution of the redress arrangements by the FSA made it likely that the customer would do so, and in addition would be likely to help restore confidence in the domestic banking system, which was one of the aims of the FSA: on this, see the evidence of Peter Fox, para 23 above.

56 Contrary to Mr Coleman's submission, the Divisional Court did not balance the factors in the way that leads to a judicial evaluation which should not be overturned on an appeal unless it is clearly wrong. Amenability to judicial review is a question of law.

57 As already explained, I consider that the conclusion of the Divisional Court was correct and that the decision of the independent reviewer is not amenable to judicial review, and that accordingly this ground of appeal fails.

5. Issue 2: Fairness in relation to access to Barclays's internal records

58 In the light of my conclusions on Issue 1, this issue does not arise.

59 I do not propose to deal with it for that reason and for the further reasons given below.

60 As Ms Rose, for Barclays, pointed out, Holmcroft has failed to identify any relevant point in support of its claims for consequential loss that it could not make because of the non-disclosure to it of the internal records of Barclays. This is so even though those records have now been disclosed to it. I also bear in mind that, after careful consideration of the material, the Divisional Court concluded that the summaries of the reasons which Barclays gave Holmcroft for its decision to reject the claim for consequential loss were accurate. It is not enough for Holmcroft to argue on this appeal that it might have been able to find a point if it had disclosure at the time.

61 In addition, again as Ms Rose points out, Holmcroft had remedies under the general law against Barclays which it could have pursued for the mis-selling of the IRHPs. By the time KPMG had made its AFR assessment, its claims had become statute-barred. However, Barclays had offered Holmcroft the possibility of a standstill on limitation while the process initiated by the FSA was being undertaken, but, for reasons that have not been explained, Holmcroft did not take this offer up. In any event, Holmcroft could have issued claims on a precautionary basis to protect its position in respect of those remedies.

A **62** In those circumstances, irrespective of its unfairness argument, Holmcroft's claims for judicial review would have been refused as a matter of discretion.

6. Conclusion

63 For the reasons given above, I would dismiss this appeal.

B

NEWEY LJ

64 I agree.

COULSON LJ

65 I also agree.

C

Appendix to judgment of Arden LJ

Section 166 Financial Services and Markets Act 2000 (as in force at the time of the events in these proceedings)

166 *Reports by skilled persons*

D (1) The Authority may, by notice in writing given to a person to whom subsection (2) applies, require him to provide the Authority with a report on any matter about which the Authority has required or could require the provision of information or production of documents under section 165.

(2) This subsection applies to— (a) an authorised person ("A"), (b) any other member of A's group, (c) a partnership of which A is a member, or (d) a

E person who has at any relevant time been a person falling within paragraph (a), (b) or (c), who is, or was at the relevant time, carrying on a business.

(3) The Authority may require the report to be in such form as may be specified in the notice.

(4) The person appointed to make a report required by subsection (1) must be a person— (a) nominated or approved by the Authority; and (b) appearing to the Authority to have the skills necessary to make a report on

F the matter concerned.

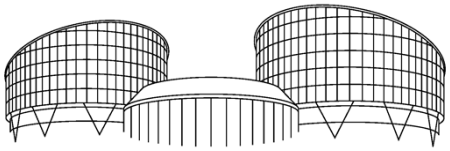
(5) It is the duty of any person who is providing (or who at any time has provided) services to a person to whom subsection (2) applies in relation to a matter on which a report is required under subsection (1) to give a person appointed to provide such a report all such assistance as the appointed person may reasonably require.

G (6) The obligation imposed by subsection (5) is enforceable, on the application of the Authority, by an injunction or, in Scotland, by an order for specific performance under section 45 of the Court of Session Act 1988.

Appeal dismissed.

GIOVANNI D'AVOLA, Barrister

H



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF OLGA KUDRINA v. RUSSIA

(Application no. 34313/06)

JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 (d) • Fair hearing • Refusal to summon to trial witnesses requested by defence, despite the relevance of their testimony, undermined overall fairness of the proceedings Art 10 • Freedom of expression • Sentence imposed on the applicant exceptionally severe and disproportionate to legitimate aim of protecting public order • Interference not necessary in a democratic society

STRASBOURG

6 April 2021

FINAL

06/07/2021

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Olga Kudrina v. Russia,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Paul Lemmens, *President,*
Georgios A. Serghides,
Dmitry Dedov,
Georges Ravarani,
Darian Pavli,
Anja Seibert-Fohr,
Peeter Roosma, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 34313/06) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Ms Olga Aleksandrovna Kudrina ("the applicant"), on 25 July 2006;

the decision to give notice to the Russian Government ("the Government") of the complaints concerning inability to examine witnesses on the applicant's behalf and interference with the applicant's right to freedom of expression;

the parties' observations;

Having deliberated in private on 16 March 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The main issues in the present case are whether the domestic courts' refusal to summon witnesses on the applicant's behalf breached her rights under Article 6 §§ 1 and 3 (d) of the Convention and whether the applicant's prosecution and conviction resulting from her participation in an anti-government protest action breached her rights under Article 10 of the Convention.

THE FACTS

2. The applicant was born in 1985 and lived in Moscow before her conviction. She was represented by Mr D.V. Agranovskiy, a lawyer practising in Moscow.

3. The Government were represented initially by Mr G. Matyushkin, the Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr M. Galperin.

4. The facts of the case may be summarised as follows.

I. EVENTS IN ISSUE

A. Protest at the Ministry of Health and Social Development

5. On 2 August 2004 a group of about thirty members of the National Bolshevik Party ("the NBP") gathered in front of the Ministry of Health and Social Development ("the Ministry") to protest against the introduction of a law transforming social benefits in kind (including free use of public transport, significant discounts on residential utilities, free local telephone service, free medication, free annual treatment at sanatoriums and health resorts, free prosthetic devices and wheelchairs for people with disabilities, guaranteed employment for people with disabilities, and a variety of other services) received by pensioners, war veterans, people with disabilities, victims of Soviet-era political repression, survivors of the Second World War siege of Leningrad, and Chernobyl clean-up workers (approximately 27 percent of the population) into monetary compensation ranging from 300 to 1,550 Russian roubles (RUB) a month (approximately 8 to 45 euros (EUR) at the 2004 exchange rate). The draft law had been prepared by the Ministry and was at that time being debated in the Russian Parliament.

6. The NBP members were dressed in emergency-services uniforms. They pushed the security guard out of their way and forced entry into the building of the Ministry, ran up to the second and third floors and occupied four offices, telling the employees who were working in them to leave because "emergency services training exercises" were taking place. They then nailed the doors shut from the inside using nail guns and blocked them with office furniture. They subsequently waved NBP flags out of the office windows, threw out leaflets and chanted slogans calling for the resignation of the Minister for Health at that time. They also set off firecrackers and threw a portrait of the President of Russia out of the window. The intruders stayed in the office for about an hour until the police broke through the doors and arrested them.

7. The applicant denied having taken part in that protest.

8. On 20 December 2004 the Tverskoy District Court ("the District Court") found seven participants in the protest (B., G., G.-M., K., Kl., T. and Ye.) guilty of a gross breach of public order committed by an organised group and involving the use of weapons, and intentional destruction and degradation of others' property in public places, offences under Article 213 § 2 and Article 167 § 2 of the Criminal Code respectively. Each of them was sentenced to five years' imprisonment. On 29 March 2005 the Moscow City Court upheld the conviction on appeal by the defendants. It did, however, commute the sentences of four of them to three years' imprisonment and the sentences of the three others to two years and six months' imprisonment.

B. Protest at the Rossiya Hotel in Moscow

9. On 4 May 2005 the applicant and L. climbed out of the window of their room at the Rossiya Hotel using rock-climbing equipment and hung an 11-metre poster saying "Go away Putin" on the outside wall of the hotel. They then started to wave around signal flares and throw leaflets, which contained the following demands:

> "1. To dissolve the State Duma and to organise free elections with the participation of all political forces without exception;
>
> 2. To investigate impartially the resonant crimes and tragic events of recent years: fraudulent electoral practices, assaults on and murders of the activists of opposition parties, explosions in housing blocks in Moscow and Volgodonsk and attempted explosions in Ryazan, the Nord-Ost and Beslan tragedies, repeated kidnappings in Ingushetia and ill-treatment of citizens in Bashkiria;
>
> 3. To free political prisoners and to declare a wide-ranging amnesty for all prisoners;
>
> 4. To abolish the detrimental Law no. 122 transforming social benefits in kind into monetary compensation;
>
> 5. To stop political censorship of television."

10. About forty minutes later, the police arrested the applicant and L., who offered no resistance.

II. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

11. On 18 May 2005 the applicant and L. were charged with a gross breach of public order committed by an organised group and involving the use of weapons, and with intentional destruction and degradation of others' property in public places, offences under Article 213 § 2 and Article 167 § 2 of the Criminal Code respectively, in connection with their protest at the Rossiya Hotel.

12. On 31 May 2005 the applicant was charged with the same offences in connection with the protest at the Ministry on 2 August 2004.

13. On an unspecified date the case was submitted for trial before the District Court.

14. The court read out the pre-trial statements of a security guard and V., another employee at the Ministry. According to the security guard's statement, he had been frightened when the protesters entered the building because he had thought that an armed siege of the building was taking place. V. described the protest and stated that he had demanded that the protesters leave the building. Six Ministry employees and police officers who had arrived at the scene were also questioned during the trial and described the protest and the participants' arrest. Two employees testified that the protesters had not been aggressive and that they had not been frightened by them or felt any danger. One employee reported having been frightened by

the sounds of shooting. Neither the employees nor police officers reported having been injured or having seen the applicant among the protesters at the Ministry. The representative of the Ministry stated that the damage caused to the Ministry's property had been compensated in full by the participants in the protest.

15. A pre-trial statement by G.-M., one of the participants in the protest at the Ministry, was read out at the prosecutor's request. G.-M. had stated in it that he had participated in the protest at the Ministry with the applicant. However, when questioned at the trial, G.-M. retracted his pre-trial statement, claiming that it had been made under duress from the officer of the Federal Security Service (FSB). He stated that the applicant had not taken part in the protest and that his pre-trial statement had been falsified and he had been forced to sign it.

16. The trial court also examined a police report dated 2 August 2004, according to which the applicant had been arrested on that day in connection with her participation in a protest at the Ministry. The police officer who was called to the Ministry testified that he had seen young women among the protesters at the Ministry and that all the protesters had been taken to the police station. According to his pre-trial statement read out at the hearing, the identities of the protesters had been established on the basis of their passports. The District Court also included, *inter alia*, the material of the administrative case against the applicant in connection with the protest action of 2 August 2004 and a copy of its judgment of 20 December 2004 as evidence in the applicant's case (see paragraph 8 above).

17. The applicant's lawyer requested the District Court to exclude G.-M.'s pre-trial statement as inadmissible evidence. He also submitted that somebody else had used the applicant's passport on 2 August 2004. The District Court found his arguments unsubstantiated and did not take them into consideration.

18. At the hearing of 14 April 2006, the applicant's lawyer submitted a written request to the District Court that stated as follows:

> "... Request to summon and examine witnesses
>
> In the bill of indictment the prosecution identified, as witnesses for the prosecution, the following persons who were eyewitnesses to the events in question: G., ... K., ... B., ... Ye., ... T., ... and Kl. [all convicted on 20 December 2004 – see paragraph 8 above].
>
> The prosecution decided not to summon these witnesses.
>
> Article 6 § 3 (d) of the European Convention provides that everyone charged with a criminal offence has a right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.
>
> Considering that all of the above persons were eyewitnesses to and participants of the events [under consideration], I request the court ... to secure the attendance and examination of G., K., B., Ye., T. and Kl. in court.

14 April 2006 [lawyer's signature]"

19. The trial transcript of 14 April 2006 stated as follows in respect of the lawyer's request:

"...

Prosecutor D.: I ask [the court] to refuse this request. If the defence considers it necessary to examine these witnesses, it should secure their attendance of its own motion. It is up to the prosecution what evidence to present.

Prosecutor Dr.: I would like to point out that the prosecution did not refuse to examine these witnesses but considered that sufficient evidence had already been presented to the court.

The District Court ruled: the request is refused. Evidence is to be presented by the parties, it is not for the prosecution to secure the attendance of these witnesses. Moreover, the court cannot refuse a request to examine a witness who attends the hearing at the parties' initiative.

..."

20. The relevant part of the trial transcript of 3 May 2006 stated as follows:

"... witnesses T., Kl., K., B., ... Ye. did not appear (for reasons unknown to the court).

The presiding judge enquired whether the participants of the hearing had any requests. No requests were submitted ..."

21. The District Court read out the pre-trial statements of three employees of the Rossiya Hotel. Two of them stated that they had seen the protesters from below and been afraid that they might fall and endanger others. The head of the hotel's fire-safety department was questioned in court. He reported that he had been alarmed by the use of signal flares by the protesters and testified that he had consulted with the rescue services about which lift to use. Four other employees of the Rossiya Hotel were also questioned and described the events of 4 May 2005. None of them reported having been injured. One of them stated that the damage to the hotel's property had been compensated in full by the defendants.

22. On 10 May 2006 the District Court found the applicant and L. guilty of a gross breach of public order committed by an organised group and involving the use of weapons, and intentional destruction and degradation of others' property in public places. It found it established on the basis of G.-M.'s statements at the pre-trial stage that the applicant had participated in the protest action at the Ministry. The District Court held that G.-M.'s statements had been given and recorded in accordance with the procedure prescribed by law and were therefore admissible in evidence. It further held as follows, in so far as relevant:

"... [The defendants] made a poster with a slogan offending the Head of State ...

[Having climbed out of the hotel room window using rock-climbing equipment, the defendants] threw leaflets containing anti-government slogans on [the persons below and] shouted out anti-government slogans. Intentionally breaching the applicable fire-safety regulations, [the defendants] lit red signal flares in close proximity to flammable objects, such as their poster and the curtains and soft furnishings in the hotel room. Subsequently, they started waving the signal flares, which had flames of 35-40 cm in length, from side to side, thus endangering hotel guests who were staying on the 11th and 10th floors.

... The defendants' guilt in committing the offence of disorderly acts has been proved during the trial. [They] ... seriously breached public order and significantly harmed the public interest by destabilising for an extended period of time the day-to-day work of the Ministry of Health and Social Development of the Russian Federation and of the Rossiya Hotel. They showed a manifest lack of respect for society and State authority by chanting anti-government slogans, forcing employees of the Ministry out of their offices and by hanging a poster with a slogan offensive to the Head of State on the wall of the Rossiya Hotel. They used nail guns in locked offices in disregard of the possibility that other persons might perceive this as a danger to their physical safety, brandished nail guns, threw firecrackers out of the windows and waved signal flares near flammable objects ... causing a risk of physical harm to the persons and cars in the street.

The defendants committed criminal acts as an organised criminal group which was highly structured, consisting of members and supporters of an unofficial National Bolshevik movement, who gathered together to commit these crimes having armed themselves with nail guns ... [and having] planned to a high degree and coordinated their actions.

The court finds it established that the defendants' actions caused significant damage. They destabilised for an extended period of time the normal work of [the Ministry], as well as the normal functioning of the Rossiya Hotel on the eve of the celebration of the sixtieth anniversary of the victory in the Great Patriotic War of 1941 to 1945.

[L.'s] argument that the furniture in the Rossiya Hotel's room was damaged by the police ... is unconvincing and has not been objectively substantiated.

The defence's argument that the defendants did not use any weapons is unconvincing. It has been established that in order to commit the criminal offences, the defendants used nail guns, firecrackers and signal flares ... Objects used to damage property or to make signals may be characterised as weapons."

23. The District Court found that there were mitigating circumstances in that the applicant and L. had positive references, were first-time offenders and that they had compensated the hotel in full for the damage. The court sentenced the applicant to three years and six months' imprisonment.

24. The applicant did not attend the hearing at which the conviction and sentence were pronounced, having fled the country to Ukraine, where she requested political asylum.

25. Counsel for the applicant appealed to the Moscow City Court against the conviction. He submitted, in particular, that the applicant's participation in the protest at the Ministry had not been proved. None of the witnesses questioned at the trial had testified to having seen her at the Ministry. G.-M. had retracted his pre-trial statements and stated that the applicant had not

participated in the protest action. In such circumstances it had been important to question the other eyewitnesses to the protest (B., G., K., Kl., T. and Ye.). The defence's request to have those witnesses questioned had, however, been rejected.

26. Counsel further complained that the applicant had been convicted for taking part in a peaceful protest against the abolition of social benefits in Russia. She had not shown a lack of respect for society. Nor had she used or threatened violence. The nail guns, firecrackers and signal flares could not be regarded as weapons, as they had been used to nail the doors shut and to attract the attention of the public rather than to injure or threaten people. The Ministry's property had been damaged by the police, not the applicant. In any event, the damage had not been significant. Finally, counsel complained about the severity of the penalty.

27. On 19 June 2006 the Moscow City Court upheld the conviction on appeal, finding that it had been lawful, well-reasoned and justified. In particular, it held that the evidence against the applicant had been duly examined and accepted by the District Court, that it had found no serious procedural breaches that would have justified vacating the conviction, and that there had been no grounds for mitigating the applicant's sentence.

28. In January 2008 the applicant was granted refugee status in Ukraine.

RELEVANT LEGAL FRAMEWORK

29. Article 213 of the Criminal Code of the Russian Federation, as in force at the material time, provided as follows:

> "1. Hooliganism, that is, a gross breach of public order manifested in clear contempt of society and committed with the use of weapons or articles used as weapons ...
>
> 2. The same offence committed by a group of persons by previous agreement, or by an organised group, or in connection with resistance to a representative of authority or to any other person who fulfils the duty of protecting public order or suppressing a breach of public order shall be punishable by deprivation of liberty for a term of up to seven years."

30. Article 167 as in force at the material time provided as follows:

> "1. Deliberate destruction of property or infliction of damage on property if these actions caused significant damage ...
>
> 2. The same acts committed in the course of breaching public order, by way of arson, explosion or in any other dangerous manner ... shall be punishable by compulsory labour for a term of up to five years or by deprivation of liberty for the same term."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (d) OF THE CONVENTION

31. The applicant complained that the District Court had refused to summon witnesses who could have testified that she had not taken part in the protest on 2 August 2004 at the Ministry of Health and Social Development. She relied on Article 6 §§ 1 and 3 (d) of the Convention, which reads as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> ..."

A. Admissibility

32. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The applicant's submissions

33. The applicant insisted that she had not taken part in the protest of 2 August 2004. She submitted that B., G., K., Kl., T. and Ye. could have confirmed that she had not been at the protest. She further submitted that she had not been able to secure the attendance of those witnesses because they had already been convicted of participating in the protest of 2 August 2004 and had been imprisoned pursuant to the court's judgment. Therefore, the defence, unlike the District Court, did not have any enforcement powers to secure the attendance of the witnesses and the District Court had not granted the applicant's request to summon them. In

respect of G.-M.'s testimony, the applicant submitted that he had retracted his pre-trial statement as having been given under duress and that he had testified in court that the applicant had in fact not participated in the protest on 2 August 2004. Lastly, the applicant submitted that other witnesses who had been examined by the District Court had also testified that they had not seen her in the Ministry building on 2 August 2004.

2. The Government's submissions

34. The Government submitted that the applicant did not have an absolute right to summon witnesses and that it was usually for the national courts to decide whether it was necessary or advisable to call a witness. They further submitted that on 14 April 2006 the District Court had refused the applicant's request to summon B., G., K., Kl., T. and Ye. The District Court had explained that the prosecutor had initially identified those witnesses as persons whose attendance was required, but had then not insisted on their attending, having determined that sufficient evidence had already been presented to the court. The ruling of the District Court had been well reasoned; the applicant had had the right to request the attendance of the witnesses again; however, she had not done so. According to the Government, the applicant's participation in the protest on 2 August 2004 had been confirmed by the statements of witnesses given during the pre-trial investigation and in court. Furthermore, the police record of the applicant's arrest on 2 August 2004, her own statements made during the administrative proceedings concerning the protest, and G.-M.'s pre-trial statements confirmed that the applicant had taken part in the protest at the Ministry on 2 August 2004. Lastly, the Government submitted that the proceedings in the applicant's case had been adversarial and had complied with the requirement of equality of arms, since the District Court had duly examined all the requests made by the parties and issued rulings on each of them.

3. The Court's assessment

(a) General principles

35. The Court notes from the material in the case file that B., G., K., Kl., T. and Ye. were first identified as witnesses by the prosecution in the appendix to the bill of indictment submitted to the District Court. However, the prosecutor decided not to summon those witnesses and the applicant, who wished to have them summoned, was unable to rely on their testimony in order to support her claim that she had not been present at the protest on 2 August 2004 (see paragraphs 18-19 above). Therefore, B., G., K., Kl., T. and Ye. are to be regarded as "witnesses on behalf" of the applicant within the meaning of Article 6 § 3 (d) of the Convention.

36. The Court reiterates that under Article 6 of the Convention, the admissibility of evidence is primarily a matter for regulation by national law

and the Court's task is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair. Article 6 § 3 (d) of the Convention does not require the attendance and examination of every witness on the accused's behalf; the essential aim of that provision, as indicated by the words "under the same conditions" is to ensure a full "equality of arms" in the matter (see *Murtazaliyeva v. Russia* [GC], no. 36658/05, § 139, 18 December 2018, with further references).

37. The relevant general principles concerning the examination of defence witnesses have been summarised and clarified recently by the Court in its judgment in *Murtazaliyeva* (cited above). In particular, when examining a complaint that the refusal to summon a witness for the defence irreversibly undermined the fairness of the proceedings against an applicant, the Court has to establish

(i) whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation;

(ii) whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial; and

(iii) whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings (ibid., §§ 139-59).

(b) Application of these principles to the present case

(i) Whether the request to examine witnesses was sufficiently reasoned and relevant to the subject matter of the accusation

38. As the transcript of the trial indicates, the applicant's lawyer requested the District Court to summon B., G., K., Kl., T. and Ye. because they were eyewitnesses to the protest action on 2 August 2004 at the Ministry. Relying on Article 6 §§ 1 and 3 (d) of the Convention, he stated that everyone had the right to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against him (see paragraphs 18-19 above). The Court notes that in her request to summon witnesses the applicant did not state, either directly or indirectly, how, in her opinion, the testimony of those six witnesses would have been relevant to the examination of the case and how it could have influenced the outcome of the proceedings against her. For example, she did not specify that they could have testified that she had not taken part in the protest action on 2 August 2004, thereby rebutting the testimony of prosecution witnesses in that respect. Nor did she state that she could have been acquitted in relation to the protest on the basis of their testimony or that their testimony could have strengthened her defence (see *Murtazaliyeva*, cited above, § 160) or that she did not have the power, unlike the domestic court, to secure the

attendance of witnesses who had already been convicted and imprisoned. Furthermore, the content of the applicant's statement of appeal was similar to her request to the District Court and did not contain any specific reasons as to why the attendance and examination of those witnesses had been necessary in her case.

39. Notwithstanding the above, the Court considers that the relevance of the testimony of the six witnesses was apparent in the applicant's case, despite the scant reasoning given by the defence (see *Murtazaliyeva*, cited above, § 161). In particular, the six witnesses in question directly took part in the protest action in relation to which the applicant was criminally charged, and in which she consistently denied having participated. G.-M., who also participated in the same protest action, retracted his pre-trial statement and testified at trial that he had not seen the applicant on 2 August 2004 during the protest action. He testified that he had signed his pre-trial statement under duress and that it had been falsified. None of the other witnesses who were examined in court testified that the applicant had taken part in the protest action. On the other hand, as the Government pointed out, the District Court also relied on the record of the applicant's arrest on 2 August 2004 and self-incriminating statements she had allegedly made during the administrative proceedings concerning the protest (see paragraph 34 above), which, in the Government's opinion, proved her participation in the protest action. Therefore, in the Court's opinion, given the contradictory accounts and despite the applicant's insufficiently reasoned request, it must have become apparent to the District Court that clarification as to whether or not she had participated in the protest action was required by at least some of the participants in the events of 2 August 2004 at the Ministry, that their attendance and examination were necessary in those circumstances, and that their testimony would have been relevant for the subject matter of the accusation.

(ii) Whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine witnesses at trial

40. The Court observes from the transcript of the trial that when the District Court refused the applicant's request to summon the witnesses, it limited its reasoning to describing the position of the prosecutor on the matter and held that "the court cannot refuse a request to examine a witness who attends the hearing at the parties' initiative". The District Court did not reflect in substance on the relevance of the testimony of eyewitnesses whose attendance had been requested by the defence in the applicant's case. Furthermore, the District Court that examined the applicant's case was the same court that on 20 December 2004 had convicted and sentenced those six persons to terms of imprisonment. The details of that case could not have been unknown to the District Court since it relied on its own judgment

of 20 December 2004 in the proceedings against the applicant and admitted it in evidence (see paragraph 16 above). Therefore, the District Court must have been aware that the applicant could not secure, through her own efforts, the attendance of witnesses who were in prison at the time. However, the District Court did not elaborate on this matter further and did not advance any other reasons for having refused to summon B., G., K., Kl., T. and Ye.

(iii) Whether the domestic courts' decision not to examine witnesses undermined the overall fairness of the proceedings

41. The Court observes that the applicant's conviction in relation to her alleged participation in the protest action on 2 August 2004 was largely based on the record of her arrest on 2 August 2004 and G.-M.'s pre-trial testimony, which, however, he had retracted at trial, testifying that the applicant had in fact not participated in the protest action and that he had signed his statement under duress. The applicant refused to testify, and the applicant's lawyer consistently stated that she had not taken part in the protest action on 2 August 2004; no other witness testified to having seen her on that day. Her lawyer also claimed that her passport had been used on 2 August 2004 by somebody else. At the same time, the domestic court also relied on the statements that the applicant made during the administrative proceedings as proof of her alleged participation in the protest action of 2 August 2004 (see paragraph 34 above). In these circumstances, it appears that additional and relevant testimony of all or at least some of the six eye witnesses could have shed light on the events of 2 August 2004 and clarified the issue of her alleged participation in the protest action on that day. Having regard to these considerations, the Court concludes that the domestic courts' decision not to examine B., G., K., Kl., T. and Ye. at trial undermined the overall fairness of the proceedings against the applicant and that there has been a violation of the applicant's rights under Article 6 §§ 1 and 3 (d) of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

42. The applicant complained that her conviction and the sentence imposed on her in the criminal proceedings had violated her right to freedom of expression under Article 10 of the Convention, which reads as follows:

> "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."

43. The Court notes that in respect of her conviction for participating in the two protest actions, the applicant complained under Article 10 alone. Notice of her complaint was given to the Government by the Court under Articles 10 and 11. The Court, being the master of characterisation to be given in law to the facts of the case, considers that the applicant's complaint is to be examined under Article 10 of the Convention only.

A. Admissibility

44. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

45. The applicant maintained that she had not taken part in the protest action on 2 August 2004 at the Ministry of Health and that her participation in the protest action on 4 May 2005 at the Rossiya Hotel had been peaceful and that she had wished to express her opinion and criticise the policies of the Government. The applicant also submitted that the punishment imposed on her had been highly disproportionate to the seriousness of her actions and had pursued the aim of restricting her freedom of expression and association.

46. The Government submitted that the protests in which the applicant had taken part had not been "peaceful" within the meaning of Articles 10 and 11. In particular, the Government stated that the applicant had violently and unlawfully trespassed into a government building, breached public order, endangered the well-being of other persons, and damaged and destroyed State and hotel property. Instead of expressing her opinions in one of the ways permitted by Russian law – such as at a public gathering, meeting, demonstration, march or picket – she had acted in a manner constituting a criminal offence. The prosecution of the applicant for that criminal offence had not therefore interfered with her freedom of expression and assembly. The applicant had not been prosecuted for her political opinions or demands. She had been prosecuted for participating in mass disorder involving the destruction of State property. Her criminal

prosecution and conviction had been prescribed by the domestic law and had pursued the legitimate aims of protecting public order, resuming the normal functioning of the Ministry and punishing those responsible. The sanction imposed on her had been proportionate to the aims pursued.

2. The Court's assessment

(a) The establishment of the facts

47. In the present case, the finding of a violation under Article 6 by the Court (see paragraph 41 above) has put into doubt the findings by the domestic courts in respect of the applicant's presence at the protest action at the Ministry of Health. In addition, there are no references in the domestic judgments to any assessment of the applicant's individual actions and her concrete role in the collective protest action, in particular regarding her involvement in the protest of 2 August 2004 at the Ministry of Health. In these circumstances, the Court will focus its examination on the applicant's prosecution in connection with her participation in the protest action at the Rossiya hotel.

(b) General principles

48. The relevant general principles concerning the application of Article 10 in the context of protest actions have been summarised by the Court in *Fáber v. Hungary*, no. 40721/08, §§ 32-3, 24 July 2012.

(c) Existence of interference

49. On 4 May 2005 the applicant and L. hung a poster on the exterior wall of the Rossiya Hotel calling for President Putin to resign. They also threw political leaflets out of the window onto people and journalists who had gathered below. She was arrested after conveying her political message to the general public and later convicted. The Court therefore considers that her arrest in connection with the protest action on 4 May 2005 and her criminal conviction in respect of that incident constituted interference with her right to freedom of expression.

(d) Justification for the interference

50. It is not contested that the interference was "prescribed by law", in particular by Article 213 § 2 and Article 167 of the Criminal Code.

51. Furthermore, the arrest of the applicant initially pursued the legitimate aim, for the purposes of Article 10 § 2, of preventing disorder and protecting the rights of others. In particular, the Court reiterates that notwithstanding the acknowledged importance of freedom of expression, Article 10 does not bestow any freedom of forum for the exercise of that right. In particular, that provision does not require the automatic creation of

rights of entry to private property or even, necessarily, to all publicly owned property, such as, for instance, government offices and ministries (see *Taranenko v. Russia*, no. 19554/05, § 78, 15 May 2014). Therefore, as the everyday activities of the Rossiya Hotel were disrupted as a result of the protest, the police were justified in interfering with the expression of political opinions by the applicant with a view to restoring and protecting public order.

52. The dispute in the present case, however, relates to whether the criminal prosecution and conviction of the applicant were "necessary in a democratic society", that is, whether the interference complained of corresponded to a "pressing social need", whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient", and whether the measure taken was "proportionate to the legitimate aims pursued".

53. The applicant was convicted of a gross breach of public order owing to her conduct, which was considered criminal under the applicable legal provisions. The Court notes that similarly to the considerations of the domestic court in the case of *Taranenko* (cited above, § 90), the applicant's conviction in the present case was also at least in part founded on the domestic court's condemnation of the political message conveyed by the applicant on 4 May 2005 ("made a poster with a slogan offending the Head of State", "threw [out of the windows] leaflets containing anti-government slogans", "shouting out anti-government slogans"). It appears that this assessment of the domestic court did not serve any purpose other than to criticise and to dissuade similar protest actions and assemblies, including informal groups of people. At the same time the Court notes that the District Court condemned the methods employed by them as being proscribed by the law (throwing firecrackers onto the street, attaching rock-climbing equipment in the hotel room in order to climb out of the 11th-floor room onto the exterior wall of the building, waving signal flares from side to side near flammable objects, and damaging the property of others). Seen from this angle, the prosecution and conviction of the applicant were justified by the need to attribute responsibility for committing such acts and to deter similar crime, without regard to the context in which they had been committed. Therefore, the Court accepts that the applicant's conviction was based on relevant and sufficient reasons.

54. That being so, the Court nevertheless considers that the sentence of three years and six months' imprisonment imposed on the applicant appears to be exceptionally severe and disproportionate to the aim of the punishment of such criminal conduct. In particular, the Court notes that the applicant's conduct, although involving a certain degree of disturbance and causing some damage to property, did not amount to violence or incite it; and no persons were injured during the protest in which the applicant was implicated (see, for similar reasoning, *Taranenko*, cited above, § 93; *Gül*

and Others v. Turkey, no. 4870/02, § 42, 8 June 2010; and contrast *Osmani and Others v. the former Yugoslav Republic of Macedonia* (dec.), no. 50841/99, ECHR 2001-X, where the police were attacked by a group of about 200 people, who were armed with metal sticks and threw stones, rocks, Molotov cocktails and teargas projectiles at them). Furthermore, the sanction imposed on the applicant appears to be exceptionally severe in light of the Court's case-law on the matter (see *Taranenko*, cited above, §§ 81-9, where the Court gave an overview of sanctions imposed by the domestic authorities in different countries for similar offences and found that those sanctions included: criminal fines, seven and twenty-eight days' imprisonment and a suspended sentence of three-months' detention). Finally, the Court considers that the rather severe sanction imposed in the present case without a doubt aimed to discourage others from participating in political debate and must have had a chilling effect on the applicant and other persons taking part in protest actions (see *Taranenko*, cited above, § 95).

55. The foregoing considerations are sufficient to enable the Court to conclude that the sentence imposed on the applicant was disproportionate to the legitimate aim of protecting public order and that the interference in question was not necessary in a democratic society.

56. There has accordingly been a violation of Article 10 of the Convention.

III. OTHER ALLEGED VIOLATION OF THE CONVENTION

57. Finally, the applicant complained under Article 6 § 1 of the Convention that the examination of her case by the District Court had not been impartial. The Court has examined the complaint submitted by the applicant and, having regard to all the material in its possession and in so far as it falls within the its competence, finds that it does not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

59. The applicant claimed 500,000 euros (EUR) in respect of non-pecuniary damage.

60. The Government submitted that the amount claimed by the applicant was excessive and that, in any case, no award should be made under this head since no violation of her rights had taken place.

61. The Court considers that an award of just satisfaction in the present case must be based on the fact that the applicant was convicted of participation in a protest action in violation of Articles 6 and 10 of the Convention. She undeniably sustained non-pecuniary damage as a result of the violation of her rights. However, the sum claimed by the applicant appears to be excessive. Making its assessment on an equitable basis, the Court awards the applicant EUR 9,800 in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount.

B. Costs and expenses

62. The Court notes that the applicant did not submit a claim in respect of costs and expenses. It therefore makes no award under this head.

C. Default interest

63. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning the refusal to summon witnesses on the applicant's behalf and the criminal conviction for participation in the protest action admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (d) of the Convention;

3. *Holds* that there has been a violation of Article 10 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 9,800 (nine thousand eight hundred euros), plus any tax that may be chargeable, in respect

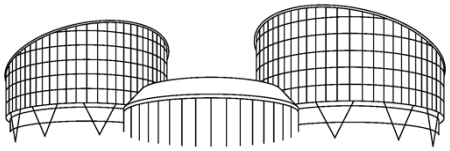
of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 6 April 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Paul Lemmens
Registrar	President



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF YEZHOV AND OTHERS v. RUSSIA

(Application no. 22051/05)

JUDGMENT

Art 10 • Freedom of expression • Animus toward anti-government views in judgment imposing prison sentences, without individualised assessment, on protestors who occupied and damaged ministry premises

STRASBOURG

29 June 2021

FINAL

29/09/2021

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Yezhov and Others v. Russia,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Paul Lemmens, *President,*
Dmitry Dedov,
Georges Ravarani,
María Elósegui,
Darian Pavli,
Anja Seibert-Fohr,
Peeter Roosma, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 22051/05) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Russian nationals, Mr Sergey Aleksandrovich Yezhov, Mr Oleg Aleksandrovich Bespalov and Mr Grigoriy Anatolyevich Tishin ("the applicants"), on 18 May 2005;

the parties' observations;

Having deliberated in private on 16 March 2021 and 1 June 2021,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. The main issue in the present case is whether the applicants' prosecution and conviction resulting from their participation in a protest action breached their rights under Articles 10 and 11 of the Convention. In 2004 the applicants, who were at that time members of an association (the National Bolshevik Party), participated in a public protest against the introduction of a new law replacing social benefits in kind with a meagre amount of monetary compensation. They were prosecuted and convicted for taking over the offices of the Ministry of Health and Social Development in Moscow during the protest.

THE FACTS

2. The applicants were born in 1985, 1977 and 1986 respectively. They were represented, respectively, by Mr D.V. Agranovskiy, Mr V.V. Varivoda and Mr D.V. Sirozhidinov, lawyers practising in Moscow.

3. The Government were represented initially by Mr G. Matyushkin, Representative of the Russian Federation to the European Court of Human Rights, and, most recently, by Mr A. Fedorov, Head of the Office of the

Representative of the Russian Federation to the European Court of Human Rights.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. BACKGROUND INFORMATION

A. Events in issue

5. In 2004, at the time of the events leading to their conviction, the applicants were members of the association, National Bolshevik Party ("the NBP").

6. On 2 August 2004 a group of about thirty members of the NBP gathered in front of the Ministry of Health and Social Development ("the Ministry") to protest against the introduction of a law, prepared by the Ministry transforming social benefits in kind (including free use of public transport, significant discounts on residential utilities, free local telephone service, free medication, free annual treatment at sanatoriums and health resorts, free prosthetic devices and wheelchairs for people with disabilities, guaranteed employment for people with disabilities, and a variety of other services) received by pensioners, war veterans, people with disabilities, victims of Soviet-era political repression, survivors of the Second World War siege of Leningrad, and Chernobyl clean-up workers (representing in total approximately 27% of the population at the relevant time) into monetary compensation ranging from 300 to 1,550 Russian roubles (RUB) a month (approximately 8 to 45 euros at the 2004 exchange rate). The draft law had been prepared by the Ministry and was at that time being debated in the Russian Parliament.

7. The NBP members were dressed in emergency-services uniforms. They pushed the security guard out of the way and forced entry into the building of the Ministry, ran up to the second and third floors and occupied four offices, telling the employees who were working in them to leave because "emergency services training exercises" were taking place. They then nailed the doors shut from the inside using nail guns and blocked them with office furniture. They subsequently waved NBP flags out of the office windows, threw out leaflets and chanted slogans calling for the resignation of the Minister for Health at that time. They also set off firecrackers and threw a portrait of the President of Russia out of the window. The intruders stayed in the office for about an hour until the police broke through the doors and arrested them.

B. Criminal proceedings against the applicants

8. On 5 August 2004 the applicants were charged with a gross breach of public order committed by an organised group and involving the use of weapons, an offence under Article 213 § 2 of the Criminal Code. On the same date the Zamoskvoretskiy District Court of Moscow ordered their detention on the grounds that they were suspected of an especially serious offence and might abscond, obstruct the investigation of the criminal case or reoffend.

9. On 10 and 11 August 2004 the applicants were additionally charged with intentional destruction and degradation of others' property in public places (Article 167 § 2 of the Criminal Code).

10. During the trial, the applicants stated that they had taken part in a peaceful protest against the abolition of social benefits. They stated that they had not intended to cause disorder; rather, they had pursued political and social goals and had only resorted to extravagant measures to draw attention to their cause. They denied destroying any furniture or using or threatening violence against Ministry employees.

11. The court read out the testimony of a security guard at the Ministry which stated that he had been scared as he had thought that an armed siege of the building was taking place. The applicants had pushed him when he had tried to stop them; they had run past the reception area and up to the higher floors. The superintendent of the Ministry building testified that she had called the police after learning that a group of young people in respirators were trespassing in the building. Six Ministry employees and a visitor to the Ministry that day, Mr D., testified about the manner in which the applicants had occupied the building. Two of the employees and Mr D. stated that they had been frightened because they had thought that terrorists were taking over the building. Four other employees testified that they had left their offices when the applicants told them that emergency services training exercises were taking place. None of the witnesses reported having been injured.

12. On 20 December 2004 the Tverskoy District Court of Moscow ("the District Court") found the applicants guilty of disorderly acts (gross breach of public order) and intentional destruction and degradation of others' property in public places. It held as follows:

> "... In the end of July - early August 2004 the unidentified "leaders" of unofficial NBP movement decided to hold an unauthorised protest action in front of the Ministry of Health in connection with introduction of a law transforming social benefits in kind and under pretence of expressing protests against social reforms and abolition of benefits.
>
> ...
>
> According to their plan, in order to force their way unlawfully into the government building and hold the above protest action [the applicants] had purchased and

prepared camouflage and other work uniforms with the insignia of the Ministry of Emergency Situations of the Russian Federation, respirators, two nail guns with at least twenty pellets and dowels, iron brackets, sticks, flagpoles, firecrackers, flags and anti-government leaflets

...

The accused Yezhov testified that.... they had been throwing leaflets out of the windows, chanted slogans showing their negative attitude to the leaders of the State and also against the Minister of Health, "Zurabov – the enemy of people", "Lay off Zurabov". ... He further testified that the protest was spontaneous, he had not received any instruction from anyone as to what had to be done inside of the Ministry's building.

...

Through their actions the defendants ... seriously breached public order and significantly harmed the public interest by destabilising the work of a public institution for an extended period of time and by chanting anti-government slogans. They showed a manifest lack of respect for society and State authority by forcing employees of the Ministry of Health and Social Development out of their offices and by throwing a portrait of the President of the Russian Federation out of the window of a public institution ... They used nail guns, which might have caused bodily injuries [to Ministry employees] and threw firecrackers out of the windows, creating a risk of physical harm to the citizens and cars in the street. Therefore, the court concludes that the defendants committed disorderly acts.

The defendants committed criminal acts as an organised criminal group which was highly structured, consisting of a large number of members and supporters of an unofficial National Bolshevik movement, who gathered together to commit the crimes in question ...

... the defendants' arguments that they had no intention of causing disorder and that their unlawful actions were motivated by their resentment towards the draft law under discussion and by their political views are unsubstantiated. The defendants, who are members of an organised criminal group, armed themselves with nail guns, nails, firecrackers and other objects, forcibly entered the building of the Ministry and ... deliberately damaged and destroyed property. This shows that they had the intention of causing disorder.

The court is not convinced by the defendants' argument that the doors of offices nos. 270 and 318 were damaged by [the police] and that the defendants were not responsible for that damage. It has been established that the doors had already been damaged before the arrival of the police ... as the defendants had nailed them shut ... Moreover, [the police] had to break open the doors to stop the unlawful actions of the members of the organised criminal group ..."

13. The District Court sentenced each applicant to five years' imprisonment. It also ordered the applicants to pay RUB 147,317 (approximately 4,000 euros at that time) to the Ministry in compensation for the damage sustained.

14. The applicants appealed. In particular, they complained that they had been convicted for taking part in a peaceful protest against the abolition of social benefits in Russia. They had not shown a lack of respect for society. Nor had they used or threatened violence. The third applicant also argued

that nail guns could not be regarded as weapons. They had been used to nail the doors shut rather than to injure or threaten people. The second applicant referred to Article 29 (freedom of expression) and Article 30 (freedom of peaceful assembly) of the Constitution.

15. On 29 March 2005 the Moscow City Court ("the appeal court") upheld the judgment on appeal. The relevant part of the judgment reads as follows:

> "[The defendants' arguments] that they did not intend to cause disorder and that they participated in a peaceful political protest action are unfounded and cannot exempt them from responsibility for [their] disorderly acts. By choosing to use such methods to express themselves, the participants in the protest action understood that their actions were breaching the established rules of conduct in society, disturbing citizens' peace and the work of a public institution ... Therefore, the appeal court agrees with the findings of [the District Court] that the defendants seriously breached public order and showed a manifest lack of respect for society."

16. The appeal court also upheld the District Court's conclusions that nail guns and firecrackers could be regarded as weapons, that the defendants rather than the police had been responsible for the damage to property and that their actions, in addition to destabilising the work of the Ministry, had resulted in significant pecuniary losses for it.

17. The appeal court found, however, that the sentence handed down was too severe. The District Court had not taken into account that the first applicant (Mr Yezhov) was of frail health and studied at a university, that the third applicant (Mr Tishin) was a minor, that none of the defendants had a criminal record, or that all of them had good references. It reduced the first and third applicants' sentences to two years and six months' imprisonment, and the second applicant's sentence to three years' imprisonment, which also included four months of the applicants' detention on remand (between 2 August and 20 December 2004).

II. RELEVANT LEGAL FRAMEWORK

A. Code of Criminal Procedure of the Russian Federation

18. Article 91 (Grounds for apprehension arrest of a suspect) of the Code of Criminal Procedure, as in force at the material time, provided as follows:

> "1. An officer involved in a pre-investigation inquiry or an investigator is empowered to arrest a person under suspicion of a criminal offence punishable by a prison term in the following circumstances:
>
> (1) where the person has been apprehended during or immediately after committing the offence ..."

B. Criminal Code of the Russian Federation

19. Article 213 of the Criminal Code, as in force at the material time, provided as follows:

> "1. Hooliganism, that is, a gross breach of public order manifested in clear contempt of society and committed with the use of weapons or articles used as weapons ...
>
> 2. The same offence committed by a group of persons by previous agreement, or by an organised group, or in connection with resistance to a representative of authority or to any other person who fulfils the duty of protecting public order or suppressing a breach of public order shall be punishable by deprivation of liberty for a term of up to seven years."

20. Article 167 as in force at the material time provided as follows:

> "1. Deliberate destruction of property or infliction of damage on property, if these actions caused significant damage ...
>
> 2. The same acts committed in the course of breaching public order, by way of arson, explosion or in any other dangerous manner ..., shall be punishable by compulsory labour for a term of up to five years or by deprivation of liberty for the same term."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

21. The applicants complained that their prosecution and conviction for expressing of their opinion against the abolition of social benefits had violated Article 10 of the Convention, which read as follows:

Article 10

> "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.

A. Admissibility

22. The Court further notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It

further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

23. The applicants contended that the detention on remand of Mr Yezhov had interfered with, *inter alia*, his rights under Article 10 and that it had not been justified, as it had been based solely on the fact that he did not have a permanent place of residence in Moscow. Furthermore, the applicants submitted that their detention on remand had not been justified because their case had not been particularly complex, they had not been members of a "mafia-type" organised criminal group, they had not resisted arrest and there had been no evidence that they would pursue criminal activities were they not to be detained. The applicants furthermore submitted that their chanting of non-offensive anti-government slogans should not have constituted a criminal offence and that the right to express opinion was provided for in the Russian Constitution. They pointed out that the repetitive reference in the domestic judgments to their acts as presenting inherent danger for the public had exposed bias of the authorities in respect of them and indicated that they had been persecuted for their political views. The applicants also argued that their punishment had been highly disproportionate to the severity of their crime, had had an adverse impact on the development of the civil society in Russia and had had a chilling effect on persons who had supported political opposition.

24. The Government submitted that the prosecution of the applicants for that criminal offence had not interfered with their freedom of expression and assembly. They further argued that the applicants had not been prosecuted for their political opinions or demands. They had been prosecuted for participating in mass disorder involving the destruction of State property. Their arrest, detention on remand, criminal prosecution and conviction had been prescribed by the domestic law and had pursued the legitimate aims of protecting public order, resuming the normal functioning of the Ministry of Health and Social Development and punishing those responsible. The sanctions imposed on them had been proportionate to the aims pursued.

2. The Court's assessment

25. The Court must determine whether there has been an interference with the applicants' right to freedom of expression and if so, whether it was "prescribed by law", pursued one or more of the legitimate aims set out in paragraph 2 of Article 10 of the Convention and whether it was "necessary in a democratic society" in order to achieve those aims.

(a) Whether there has been an interference with the exercise of the right to freedom of expression

26. The Court has previously held that protests can constitute expressions of opinion within the meaning of Article 10. Thus, protests against hunting involving physical disruption of the hunt or a protest against the extension of a motorway involving a forcible entry into the construction site and climbing into the trees to be felled and onto machinery in order to impede the construction works were found to constitute expressions of opinion protected by Article 10 (see *Steel and Others v. the United Kingdom*, 23 September 1998, § 92, Reports of Judgments and Decisions 1998-VII, and *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 28, ECHR 1999-VIII). The arrest and detention of protesters therefore constituted an interference with the right to freedom of expression (ibid.). The arrest of students who, during an official ceremony at a university, shouted slogans and raised banners and placards protesting against various practices of the university administration which they considered to be anti-democratic also constituted an interference with the right to freedom of expression (see *Açık and Others v. Turkey*, no. 31451/03, § 40, 13 January 2009).

27. The applicants in the present case were arrested at the scene of a protest action against the government policies. They were part of a group of about thirty people who forced their way through identity and security checks into the Ministry of Health building and locked themselves in some of its offices, where they started to chant slogans and to distribute leaflets out of the windows. They were charged with participation in mass disorder in connection with their taking part in the protest action and remanded in custody for almost four months, at the end of which time they were convicted as charged and sentenced to two years and six months' (Mr Yezhov and Mr Tishin) and to three years' imprisonment (Mr Bespalov).

28. The Court considers that their arrest, detention and conviction constituted interference with the right to freedom of expression.

(b) Prescribed by law

29. The applicants did not contest that their arrest and subsequent criminal prosecution and conviction were "prescribed by law", in particular, by Article 91 of the Code of Criminal Procedure (see paragraph 18 above) and Articles 213 and 167 of the Criminal Code (see paragraphs 19 and 20 above). The Court will thus proceed on this basis.

(c) Legitimate aim

30. The Court notes that the applicants' protest disrupted the ordinary activities of Ministry employees and resulted in damage to State property. It

therefore finds that the arrest of the applicants, their detention on remand, criminal conviction and committal to prison pursued the legitimate aims of preventing disorder and protecting the rights of others (see *Steel and Others*, cited above, § 97).

(d) Necessary in a democratic society

31. The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, and the Court looks at the interference complained of in the light of the case as a whole, including the content of the statement held against the applicant and its context. In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient", and whether the measure taken was "proportionate to the legitimate aims pursued" (see *Tatár and Fáber v. Hungary*, nos. 26005/08 and 26160/08, §§ 33-34, 12 June 2012, with further references).

32. As to whether the measures in issue corresponded to a "pressing social need", the Court notes that the applicants' protest concerned a topic of public interest, that is, the pending introduction of a controversial law and that they wished to draw the attention of their fellow citizens and public officials to their disapproval of it. The Court however considers that they did not have a right to enter a publicly owned property, such as the office building of the Ministry, in the manner that they did, to express their opinion (see, for similar reasoning, *Taranenko v. Russia*, no. 19554/05, §§ 77-78, 15 May 2014). The police were therefore justified in arresting the applicants and removing them from the premises of the Ministry, with a view to the protection of public order and the resumption of the Ministry's functions, and those actions appear proportionate to the aim pursued. Whether their criminal convictions also met a pressing social need will depend on the reasons provided by the national courts and the proportionality of the sentences.

33. The Court further notes that the applicants were convicted of a gross breach of public order as a result of their conduct during the protest. The District Court condemned the methods employed by them as being proscribed by the law (using nail guns to block the doors, throwing firecrackers onto the street, forcing Ministry's employees out of their offices and damaging the property). The prosecution and conviction of the applicants were therefore justified by the need to attribute responsibility for committing such acts and to deter similar crime. However, as it follows from the text of the domestic judgment, similarly to the domestic court in the case of *Taranenko* (cited above, § 92), the District Court in the present case did not seek to establish, to the extent possible, the individual role of

each of the applicants during the protest, the extent of their involvement and their individual acts during the protest, having thus deprived them of opportunity to contest the concrete reasons for limiting their freedom of expression (see *Gülcü v. Turkey*, no. 17526/10, §§ 113-14, 19 January 2016). By failing to make an individual assessment of facts in respect of each of the applicants, the District Court denied them an important procedural safeguard against arbitrary interference with the rights protected under Article 10 of the Convention (ibid., § 114; *Hakobyan and Others v. Armenia*, no. 34320/04, § 99, 10 April 2012).

34. Furthermore, the District Court condemned, in rather clear terms, not only the criminal acts imputed to the applicants but also the content and the form of the message conveyed by them ("prepared ... anti-government leaflets", "chanting anti-government slogans", "showing manifest lack of respect for ... State authority by ... throwing the portrait of the President of the Russian Federation out of the window") and penalised them for that political message (see, for similar reasoning, *Stepan Zimin v. Russia*, nos. 63686/13 and 60894/14, § 76, 30 January 2018). By doing so, the District Court showed a degree of animus towards the applicants' political views that is difficult to reconcile with the Article 10 duty on national authorities to remain neutral with respect to legitimate political viewpoints and not to dissuade others from criticising government policies altogether. The District Court considered the applicants' anti-government rhetoric as unacceptable or even criminal, thus going beyond the narrow margin of appreciation afforded to the domestic authorities under Article 10 in respect of political speech, matters of public interest and criticism of the government, all of which enjoy a high level of protection from State interference (see *Bédat v. Switzerland* [GC], no. 56925/08, § 49, 29 March 2016, with further references; see also *Incal v. Turkey*, 9 June 1998, § 54, *Reports of Judgments and Decisions* 1998-IV).

35. Therefore, considering the lack of any individualised assessment of each of the applicants' role in the protest and the adverse attitude of the District Court towards their political message, the Court is not convinced that the reasons given in support of the applicants' conviction were "relevant and sufficient" for the purposes of Article 10 § 2 of the Convention.

36. Turning to the sanction imposed on the applicants, the Court observes that they were initially sentenced to five years' imprisonment and that sentence was reduced to two years and six months' imprisonment for the first and third applicants and to three years' imprisonment for the second applicant. In this respect, the Court reiterates that it examines with particular scrutiny the cases where sanctions imposed by the national authorities for protest-related conduct involve a prison sentence (see *Taranenko*, cited above, § 87). The Court does not consider that the sanction imposed on the applicants in the present case was proportionate to the aim of the

punishment of their criminal conduct, in the light of its case-law on the matter (ibid., §§ 81-89, for an overview by the Court of sanctions imposed by the domestic authorities in different countries for similar offences). Even considering that the behaviour of the applicants in the present case was more disruptive (mostly owing to the nailing of the doors) than the actions of the applicant in the case of *Taranenko* (cited above), the sanctions imposed on the current applicants (at first four months in detention on remand that was then calculated as part of the custodial sentence between two and a half and three years) were nevertheless significantly more severe than the sanction in *Taranenko* (detention on remand for a year and three years' imprisonment, suspended for three years), which suggests a generally repressive attitude of the national authorities towards the members of this political movement (see paragraph 35 above).

37. The foregoing considerations are sufficient to enable the Court to conclude that the interference in question was not necessary in a democratic society.

38. There has accordingly been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

39. The applicants further complained that their prosecution and conviction for participating in a peaceful protest had violated Article 11 of the Convention.

40. However, having regard to the facts of the case, the submissions of the parties and its above findings under Article 10 of the Convention (see paragraphs 25-38 above), the Court considers that that there is no need to examine separately this complaint (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014, with further references).

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

41. Finally, the Court has examined the other complaints lodged by the applicants under Articles 3, 5, 6, 9, 14 and 18 of the Convention and, having regard to all the material in its possession and in so far as they fall within the Court's competence, finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

43. The applicants claimed 100,000 euros (EUR) in respect of non-pecuniary damage.

44. The Government submitted that the finding of a violation would constitute sufficient just satisfaction in the present case. They further submitted that the applicants' claim in respect of non-pecuniary damage was excessive and unsubstantiated.

45. The Court considers that the applicants have suffered non-pecuniary damage as a result of the violation found. The damage cannot be sufficiently compensated for by a finding of a violation alone. Making its assessment on an equitable basis, the Court awards the applicants EUR 7,500 each in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

46. The applicants did not submit a claim in respect of costs and expenses. Accordingly, the Court makes no award under this head.

C. Default interest

47. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the complaint concerning the interference with the applicants' right to freedom of expression admissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 10 of the Convention;

3. *Holds*, by six votes to one, that there is no need to examine separately the complaint under Article 11 of the Convention;

4. *Declares*, unanimously, the remainder of the application inadmissible;

5. *Holds*, by six votes to one,
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,500 (seven thousand five hundred euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 29 June 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Paul Lemmens
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Dedov is annexed to this judgment.

P.L.
M.B.

DISSENTING OPINION OF JUDGE DEDOV

1. I regret that I cannot agree with the majority that there has been a violation of Article 10 of the Convention. The Court considered that the applicants did not have the right to enter a public building and that their arrest by the police was justified; however, their criminal convictions did not meet a pressing social need because the reasons given in support of the applicants' conviction were not "relevant and sufficient" for the purposes of Article 10 § 2 of the Convention (see paragraph 35). Therefore, the emphasis was laid on the adequacy of the authorities' reaction. In the view of the Court, the reaction was proportionate in the beginning but not proportionate at the end of the proceedings, as the sanction imposed on the applicants in the present case was not proportionate to the aim of punishing their criminal conduct, and the interference in question was even "not necessary in a democratic society".

2. The majority paid little attention to the manner in which the applicants expressed their opinion; they limited this factor to the initial stage of interference (apprehension) and made no legal assessment of those factual circumstances. The domestic courts, by contrast, concentrated on the applicants' behaviour, which played a central role for the legal characterisation of the situation as a mass disorder. The Court accepted that the applicants' behaviour had been disruptive, but the severity of the sanction prevented the Court from supporting the conclusion of the domestic courts.

3. The severity of the sanction – two and a half years of imprisonment – is a borderline issue in the present case, thus the domestic authorities should enjoy a certain margin of appreciation. However, when striking a balance between the individual rights and the public interests, the Court attaches particular weight to freedom of speech. I certainly agree with this approach. However, we should not forget that this approach is theoretical and even idealistic, so it depends on certain criteria. An ideal situation, under which freedom of speech would be at its maximum, is when the issue raised is of public importance for sustainable development and social progress; when the opinion is expressed in a polite, respectful manner which could be shocking and provocative, but not insulting, aggressive or violent; and when the opinion consists of rational arguments eligible for commencing a public debate.

4. In the present case the applicants' behaviour did not meet any of the above criteria and ultimately undermined the importance of this individual right within the fair balance analysis. The applicants manifested their opinion on a very controversial issue of social benefits, which were poorly structured, covered almost half of the population, were difficult to manage and highly burdensome for the State budget. Obviously, the reforms in question were necessary at that time. The applicants expressed their opinion

irrationally and in a very aggressive manner, destroying property, frightening innocent people by referring to an emergency situation, carrying nail guns which could accidentally injure other people, and using firecrackers which could have started a fire. They seized a State building ("an armed siege of the building was taking place" according to witnesses), an act that has been considered "internal terrorism" in the USA. The history of the "National Bolshevik Party" counts sixteen takeovers of public buildings, so the "chilling effect", in my view, had been necessary in the present case.

5. According to the Convention, freedom of speech is not absolute. However, the liberal approach makes it almost absolute since it allows a negative reaction in the case of violence only, and tolerates actions that are dangerous, aggressive, destructive, threatening, scary, but not actually violent. Freedom of speech was born when there was no more strength left to endure injustice and inhuman treatment.

6. Now the moral situation has changed to the opposite: inequality and unfairness have significantly reduced, but the manner in which opinions are expressed have become hard to endure. This is the result of a radical liberal approach which supports a vision of freedom of speech that departs far from rational debate and becomes indistinguishable from hooliganism. This situation inevitably requires a holistic approach on the part of the Court.

Supreme Court

Director of Public Prosecutions *v* Ziegler and others

[2021] UKSC 23

2021 Jan 12; June 25

Lord Hodge DPSC, Lady Arden, Lord Sales, Lord Hamblen, Lord Stephens JJSC

Human rights — Freedom of expression and assembly — Interference with — Defendants charged with obstructing highway during demonstration against arms fair — Whether defendants lawfully exercising Convention rights so as to have "lawful . . . excuse" — Whether interference with defendants' Convention rights proportionate — Proper approach to proportionality by appellate court on appeal by way of case stated — Magistrates' Courts Act 1980 (c 43), s 111 — Highways Act 1980 (c 66), s 137 — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 10, 11

The defendants were charged with obstructing the highway, contrary to section 137 of the Highways Act 1980[1], by causing a road to be closed during a protest against an arms fair that was taking place at a conference centre nearby. The defendants had obstructed the highway for approximately 90 minutes by lying in the middle of the approach road to the conference centre and attaching themselves to two lock boxes with pipes sticking out from either side, making it difficult for police to remove them from the highway. The defendants accepted that their actions had caused an obstruction on the highway, but contended that they had not acted "without lawful . . . excuse" within the meaning of section 137(1), particularly in the light of their rights to freedom of expression and peaceful assembly under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2]. The district judge acquitted the defendants of all charges, finding that the prosecution had failed to prove that the defendants' actions had been unreasonable and therefore without lawful excuse. The prosecution appealed by way of case stated, pursuant to section 111 of the Magistrates' Courts Act 1980[3]. The Divisional Court of the Queen's Bench Division allowed the appeal, holding that the district judge's assessment of proportionality had been wrong. The defendants appealed. It was common ground on the appeal that the availability of the defence of lawful excuse depended on the proportionality of any interference with the defendants' rights under articles 10 or 11.

On the appeal—

Held, allowing the appeal, (1) that it was clear from the jurisprudence of the European Court of Human Rights that intentional action by protesters to disrupt the activities of others, even with an effect that was more than de minimis, did not automatically lead to the conclusion that any interference with the protesters' rights was proportionate for the purposes of articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms; that, rather, there had to be an assessment of the facts in each individual case to determine whether the interference was "necessary in a democratic society" for the purposes of articles 10(2) and 11(2); that, therefore, deliberate physically obstructive conduct by protesters was capable of being something for which there was a "lawful . . . excuse" for the purposes of section 137(1) of the Highways Act 1980, even where the impact of the deliberate obstruction on other highway users was more than de minimis and

[1] Highways Act 1980, s 137: see post, para 8.
[2] Human Rights Act 1998, Sch 1, Pt I, art 10: see post, para 14. Art 11: see post, para 15.
[3] Magistrates' Courts Act 1980, s 111(1): see post, para 36.

prevented them, or was capable of preventing them, from passing along the highway; and that whether or not the protesters had a lawful excuse would depend on (per Lady Arden, Lord Hamblen and Lord Stephens JJSC) whether the protesters' convictions for offences under section 137(1) were justified restrictions on their Convention rights or (per Lord Hodge DPSC and Lord Sales JSC) whether the police response in seeking to remove the obstruction involved the exercise of their powers in a proportionate manner (post, paras 63–70, 94, 99, 121, 154).

(2) (Lord Hodge DPSC and Lord Sales JSC dissenting) that, on an appeal by way of case stated under section 111 of the Magistrates' Courts Act 1980, the test to be applied by the appellate court to an assessment of the decision of the trial court in respect of a defence of lawful excuse under section 137 of the Highways Act 1980 when Convention rights were engaged was the same as that applicable generally to appeals on questions of law in a case stated, namely that an appeal would be allowed where there was an error of law material to the decision reached which was apparent on the face of the case stated or if the decision was one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found; that, in accordance with that test, where the defence of lawful excuse depended upon an assessment of proportionality, an appeal would lie if there had been an error or flaw in the court's reasoning on the face of the case stated which undermined the cogency of its conclusion on proportionality; that such assessment fell to be made on the basis of the primary and secondary findings set out in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached; and that, therefore, the Divisional Court in the present case had applied an incorrect test by asking itself whether the district judge's assessment of proportionality had been wrong (post, paras 42–45, 49–54, 99, 106–108).

Edwards v Bairstow [1956] AC 14, HL(E) and *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, SC(E) considered.

(3) (Lord Hodge DPSC and Lord Sales JSC dissenting in part, but agreeing in allowing the appeal) that there had been no error or flaw in the district judge's reasoning on the face of the case stated such as as to undermine the cogency of his conclusion on proportionality; that, in particular, he had not erred in considering as relevant factors the facts that the defendants' actions (a) had been entirely peaceful, (b) had not given rise either directly or indirectly to any form of disorder, (c) had not involved the commission of any other criminal offence, (d) had been aimed only at obstructing vehicles headed to the arms fair, (e) had related to a matter of general concern, namely the legitimacy of the arms fair, (f) had been limited in duration, (g) had not given rise to any complaint by anyone other than the police and (h) had stemmed from the defendants' long-standing commitment to opposing the arms trade; and that, accordingly, the convictions should be set aside and the dismissal of the charges against the defendants restored (post, paras 71–78, 80–88, 99, 109–113, 115–118).

Nagy v Weston [1965] 1 WLR 280, DC and *City of London Corpn v Samede* [2012] PTSR 1624, CA considered.

Decision of the Divisional Court of the Queen's Bench Division [2019] EWHC 71 (Admin); [2020] QB 253; [2019] 2 WLR 1451 reversed.

The following cases are referred to in the judgments:

A v Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 AC 68; [2005] 2 WLR 87; [2005] 3 All ER 169, HL(E)

Abdul v Director of Public Prosecutions [2011] EWHC 247 (Admin); [2011] HRLR 16, DC

Arrowsmith v Jenkins [1963] 2 QB 561; [1963] 2 WLR 856; [1963] 2 All ER 210, DC

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
B (A Child) (Care Proceedings: Threshold Criteria), In re [2013] UKSC 33; [2013] 1 WLR 1911; [2013] 3 All ER 929, SC(E)
Balçik v Turkey (Application No 25/02) (unreported) 29 November 2007, ECtHR
Bracegirdle v Oxley [1947] KB 349; [1947] 1 All ER 126, DC
City of London Corpn v Samede [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374; [1984] 3 WLR 1174; [1985] ICR 14; [1984] 3 All ER 935, HL(E)
DB v Chief Constable of Police Service of Northern Ireland [2017] UKSC 7; [2017] NI 301, SC(NI)
D'Souza v Director of Public Prosecutions [1992] 1 WLR 1073; [1992] 4 All ER 545; 96 Cr App R 278, HL(E)
Edwards v Bairstow [1956] AC 14; [1955] 3 WLR 410; [1955] 3 All ER 48, HL(E)
Garry v Crown Prosecution Service [2019] EWHC 636 (Admin); [2019] 1 WLR 3630; [2019] 2 Cr App R 4, DC
Google LLC v Oracle America Inc (2021) 141 S Ct 1183
Gough v Director of Public Prosecutions [2013] EWHC 3267 (Admin); 177 JP 669, DC
H v Director of Public Prosecutions [2007] EWHC 2192 (Admin), DC
Hammond v Director of Public Prosecutions [2004] EWHC 69 (Admin); 168 JP 601, DC
Hashman and Harrup v United Kingdom (Application No 25594/94) (1999) 30 EHRR 241, ECtHR (GC)
Hitch v Stone [2001] EWCA Civ 63; [2001] STC 214, CA
Huang v Secretary of State for the Home Department [2007] UKHL 11; [2007] 2 AC 167; [2007] 2 WLR 581; [2007] 4 All ER 15, HL(E)
Kudrevičius v Lithuania (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)
Kuznetsov v Russia (Application No 10877/04) (unreported) 23 October 2008, ECtHR
Lashmankin v Russia (Application No 57818/09) (unreported) 7 February 2017, ECtHR
Love v Government of the United States of America [2018] EWHC 172 (Admin); [2018] 1 WLR 2889; [2018] 2 All ER 911, DC
Mayor of London (on behalf of the Greater London Authority) v Hall [2010] EWCA Civ 817; [2011] 1 WLR 504, CA
Molnár v Hungary (Application No 10346/05) (unreported) 7 October 2008, ECtHR
Nagy v Weston [1965] 1 WLR 280; [1965] 1 All ER 78, DC
Navalnyy v Russia (Application Nos 29580/12, 36847/12, 11252/13, 12317/13, 43746/14) (2018) 68 EHRR 25, ECtHR (GC)
New Windsor Corpn v Mellor [1974] 1 WLR 1504; [1974] 2 All ER 510
Norwood v Director of Public Prosecutions [2003] EWHC 1564 (Admin); [2003] Crim LR 888, DC
Oladimeji v Director of Public Prosecutions [2006] EWHC 1199 (Admin)
Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) [1982] AC 724; [1981] 3 WLR 292; [1981] 2 All ER 1030, HL(E)
Primov v Russia (Application No 17391/06) (unreported) 12 June 2014, ECtHR
R v North West Suffolk (Mildenhall) Magistrates' Court, Ex p Forest Heath District Council [1998] Env LR 9, CA
R (Aguilar Quila) v Secretary of State for the Home Department [2011] UKSC 45; [2012] 1 AC 621; [2011] 3 WLR 836; [2012] 1 All ER 1011, SC(E)

A *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 WLR 1622; [2001] 3 All ER 433, HL(E)
R (Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55; [2007] 2 AC 105; [2007] 2 WLR 46; [2007] 2 All ER 529, HL(E)
R (P) v Liverpool City Magistrates' Court [2006] EWHC 887 (Admin); 170 JP 453
R (R) v Chief Constable of Greater Manchester Police [2018] UKSC 47; [2018] 1 WLR 4079; [2019] 1 All ER 391, SC(E)
B *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100; [2006] 2 WLR 719; [2006] 2 All ER 487, HL(E)
R (Z) v Hackney London Borough Council [2019] EWCA Civ 1099; [2019] PTSR 2272, CA; [2020] UKSC 40; [2020] 1 WLR 4327; [2020] PTSR 1830; [2021] 2 All ER 539, SC(E)
Sáska v Hungary (Application No 58050/08) (unreported) 27 November 2012, ECtHR
C *Smith and Grady v United Kingdom* (Application Nos 33985/96, 33986/96) (1999) 29 EHRR 493, ECtHR
Steel v United Kingdom (Application No 24838/94) (1998) 28 EHRR 603, ECtHR
Vogt v Germany (Application No 17851/91) (1995) 21 EHRR 205, ECtHR (GC)

No additional cases were cited in argument.

D **APPEAL** from the Divisional Court of the Queen's Bench Division

On 7 February 2018, following a trial on 1 and 2 February 2018, District Judge Hamilton, sitting at Stratford Magistrates' Court, acquitted the defendants, Nora Ziegler, Henrietta Cullinan, Joanna Frew and Christopher Cole, of the charge of obstructing the highway, contrary to section 137 of the Highways Act 1980. By a case stated that was served on the defendants on E 20 March 2018, the prosecution appealed. By a judgment dated 22 January 2019 the Divisional Court of the Queen's Bench Division (Singh LJ and Farbey J) [2019] EWHC 71 (Admin); [2020] QB 253 allowed the appeal.

With permission of the Supreme Court (Lord Kerr of Tonaghmore, Lord Hodge and Lady Arden JJSC) granted on 3 December 2019, the defendants appealed.

The issues in the appeal, as stated in the parties' agreed statement of facts F and issues, were: (1) What was the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights were engaged in a criminal matter? (2) Was deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, where the impact of the deliberate G obstruction on other highway users was more than de minimis, and prevented them, or was capable of preventing them, from passing along the highway?

The facts are stated in the judgment of Lord Hamblen and Lord Stephens JJSC, post, paras 1–6.

H *Henry Blaxland QC*, *Blinne Ní Ghrálaigh* and *Owen Greenhall* (instructed by *Hodge Jones & Allen LLP*) for the defendants.

As far back as 1965 the courts explained "lawful authority or excuse" as encompassing the concept of "reasonableness": see *Nagy v Weston* [1965] 1 WLR 280. In respect of the offence of obstruction of the highway contrary to section 137 of the Highways Act 1980, reasonableness is a question of

fact to be assessed having regard to all the prevailing circumstances, including the duration of the obstruction, its location and purpose and whether it did in fact cause an actual, as opposed to a potential, obstruction. A defendant will not be guilty of deliberately obstructing the highway unless it is proved that such obstruction was not reasonable.

Even before the coming into force of the Human Rights Act 1998, it was possible for protesters engaged in an obstructive protest on the highway to argue successfully that they were exercising a lawful right to protest and therefore had a "lawful" right to protest.

The Convention rights which are in issue in this appeal are the rights contained in article 10 (concerning the right to freedom of expression) and article 11 (concerning the right to freedom of peaceful assembly) of the Convention for the Protection of Human Rights and Fundamental Freedoms. Those two articles and the parallel rights and obligations arising under common law must be considered when assessing the reasonableness of any obstruction of the highway and the proportionality of any interference with a right to protest.

The assessment of whether an obstruction of the highway was reasonable in the context of articles 10 and 11 is inevitably a fact-sensitive one that will depend on factors including the extent to which the continuation of the protest would breach domestic law, the importance to protesters of the precise protest location, the duration of the protest, and the extent of the actual interference caused to the rights of others: see *City of London Corpn v Samede* [2012] PTSR 1624.

The actions of the defendants in the present case were no more than symbolic. They could not have prevented arms being delivered to the arms fair, nor could they have prevented the arms fair taking place. Their protest was aimed at raising awareness of their cause. There was no evidence led by the prosecution that the protest caused disruption to traffic, or to the venue where the arms fair was being held, or to other people. It was entirely speculative whether there was obstructive conduct on the part of the protesters. There was evidence of potential interference but not of actual interference. There was no material which showed to the criminal standard that traffic was disrupted.

[Reference was made to *Kudrevičius v Lithuania* (2015) 62 EHRR 34.]

Even deliberate interference with the activities of others can fall within the protection of article 11. It must be shown by the prosecution that there was interference with the rights of others. Article 11 must be construed in a way which does not limit free speech and peaceful assembly. The defendants' intention was to cause some disruption but it did not take them outside article 11.

The trial judge's decision was impeccable and contained no legal error. The Divisional Court failed to accord due weight to the trial judge's findings, contrary to the need for appellate caution in relation to both findings of fact and value judgments. The Divisional Court substituted its own view of the evidence for that of the trial judge despite the fact it had not seen the live evidence and the video footage of the protest which was the material on which the trial judge had assessed the nature of the protest and the disruption it caused.

Where a statutory defence such as that arising under section 137 of the Highways Act 1980 encompasses the engagement of one or more

A Convention rights, the assessment of whether the prosecution has disproved that a defendant's use of the highway was reasonable constitutes an evaluative assessment within the province of the tribunal of fact. Therefore the approach to be taken by an appellate court is not simply to consider whether in its view the conclusion of the court below was "wrong", but rather whether that conclusion was reached either as a result of an identifiable flaw in the court's logic or reasoning or whether it was a B conclusion which no properly directed tribunal could have reached. The Divisional Court fell into error in determining otherwise.

John McGuinness QC (instructed by *Crown Prosecution Service, Appeals and Review Unit*) for the prosecution.

The Divisional Court did not conclude as a matter of law that, in a prosecution under section 137 of the Highways Act 1980, findings of fact of C a complete obstruction of the highway for a significant period of time can never constitute a "lawful . . . excuse" for wilful obstruction within the meaning of section 137(1) of the Highways Act 1980. The Divisional Court held that those facts were "highly relevant" and "highly significant" to the assessment of proportionality in this case and concluded that the trial judge had given insufficient consideration to them in striking a fair balance D between the defendants' Convention rights and the rights and interests of others.

The essential facts can be ascertained from the case stated. It was clear that there was a deliberate or "wilful" obstruction of the highway which was planned rather than spontaneous. Its specific purpose was disruption of the traffic to the venue at which the arms fair was being held. It was aimed at a particular type of traffic which was delivering material to the arms fair. E The disruption lasted 90 minutes, which was a period of some length in the circumstances. The defendants used apparatus which was hard to disassemble in order to lock themselves together. They refused to unlock themselves and it can be inferred that they knew there would be a delay in removing them from the highway because police removal experts and specialist cutting equipment were needed. The reality was that the defendants knew they would remain on the road until the police were able, F with difficulty, to remove them.

In essence the primary facts were not in issue. But whether the facts as found did or may have constituted a lawful excuse called for a value judgment by the trial judge: see *Norwood v Director of Public Prosecutions* [2003] EWHC 1564 (Admin). The tribunal of fact was dealing with the balancing act.

G The decision depended on the proportionality between the offence and the defendants' Convention rights. The Divisional Court concluded that the trial judge had erred in its assessment of proportionality and had not struck the fair balance necessary in that assessment.

On an appeal by way of case stated the High Court has a very wide discretion: see section 28A of the Senior Courts Act 1981. In the fact-specific circumstances of this case, the Divisional Court's review did accord due H weight to the assessment made by the trial judge, and correctly concluded that it was wrong.

Blaxland QC replied.

The court took time for consideration.

25 June 2021. The following judgments were handed down.

LORD HAMBLEN and **LORD STEPHENS JJSC**

1. Introduction

1 In September 2017, the biennial Defence and Security International ("DSEI") arms fair was held at the Excel Centre in East London. In the days before the opening of the fair equipment and other items were being delivered to the Excel Centre. The appellants were strongly opposed to the arms trade and to the fair and on Tuesday, 5 September 2017 they took action which was intended both to draw attention to what was occurring at the fair and also to disrupt deliveries to the Excel Centre.

2 The action taken consisted of lying down in the middle of one side of the dual carriageway of an approach road leading to the Excel Centre (the side for traffic heading to it). The appellants attached themselves to two lock boxes with pipes sticking out from either side. Each appellant inserted one arm into a pipe and locked themselves to a bar centred in the middle of one of the boxes.

3 There was a sizeable police presence at the location in anticipation of demonstrations. Police officers approached the appellants almost immediately and went through the "five-stage process" to try and persuade them to remove themselves voluntarily from the road. When the appellants failed to respond to the process they were arrested. It took, however, approximately 90 minutes to remove them from the road. This was because the boxes were constructed in such a fashion that was intentionally designed to make them hard to disassemble.

4 The appellants were charged with wilful obstruction of a highway contrary to section 137 of the Highways Act 1980 ("the 1980 Act"). On 1–2 February 2018, they were tried before District Judge Hamilton at Stratford Magistrates' Court. The district judge dismissed the charges, handing down his written judgment on 7 February 2018. Having regard to the appellants' right to freedom of expression under article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") and their right to freedom of peaceful assembly under article 11 ECHR, the district judge found that "on the specific facts of these particular cases the prosecution failed to prove to the requisite standard that the defendants' limited, targeted and peaceful action, which involved an obstruction of the highway, was unreasonable".

5 The respondent appealed by way of case stated to the Divisional Court, Singh LJ and Farbey J. Following a hearing on 29 November 2018, the Divisional Court handed down judgment on 22 January 2019, allowing the appeal and directing that convictions be entered and that the cases be remitted for sentencing: [2020] QB 253. On 21 February 2019, the appellants were sentenced to conditional discharges of 12 months.

6 On 8 March 2019, the Divisional Court dismissed the appellants' application for permission to appeal to the Supreme Court, but certified two points of law of general public importance. On 3 December 2019, a panel of the Supreme Court (Lord Kerr of Tonaghmore, Lord Hodge and Lady Arden JJSC) granted permission to appeal.

A 7 The parties agreed in the statement of facts and issues that the issues in the appeal, as certified by the Divisional Court as points of law of general public importance, are:

(1) What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights are engaged in a criminal matter?

B (2) Is deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the 1980 Act, where the impact of the deliberate obstruction on other highway users is more than de minimis, and prevents them, or is capable of preventing them, from passing along the highway?

2. The legal background

C 8 Section 137 of the 1980 Act provides:

"137 *Penalty for wilful obstruction*

"(1) If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine not exceeding level 3 on the standard scale."

D 9 In *Nagy v Weston* [1965] 1 WLR 280 it was held by the Divisional Court that "lawful excuse" encompasses "reasonableness". Lord Parker CJ said at p 284 that these are "really the same ground" and that:

"there must be proof that the use in question was an unreasonable use. Whether or not the user amounting to an obstruction is or is not an unreasonable use of the highway is a question of fact. It depends upon all the circumstances, including the length of time the obstruction continues,

E the place where it occurs, the purpose for which it is done, and of course whether it does in fact cause an actual obstruction as opposed to a potential obstruction."

10 In cases of obstruction where ECHR rights are engaged, the case law preceding the enactment of the Human Rights Act 1998 ("the HRA") needs to be read in the light of the HRA.

F 11 Section 3(1) of the HRA provides: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

12 Section 6 of the HRA makes it unlawful for a public authority to act in a way which is incompatible with Convention rights. The courts are public authorities for this purpose (section 6(3)(a)), as are the police.

G 13 The Convention rights are set out in Schedule 1 to the HRA 1998. The rights relevant to this appeal are those under article 10 ECHR, the right to freedom of expression, and article 11 ECHR, the right to freedom of peaceful assembly.

14 Article 10 ECHR materially provides:

"1. Everyone has the right to freedom of expression. This right shall

H include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . .

"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."

15 Article 11 ECHR materially provides:

"1. Everyone has the right to freedom of peaceful assembly . . .

"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."

16 In the present case the Divisional Court explained how section 137(1) of the 1980 Act can be interpreted compatibly with the rights in articles 10 and 11 ECHR in cases where, as was common ground in this case, the availability of the statutory defence depends on the proportionality assessment to be made. It stated as follows:

"62. The way in which the two provisions can be read together harmoniously is that, in circumstances where there would be a breach of articles 10 or 11, such that an interference would be unlawful under section 6(1) of the HRA, a person will by definition have 'lawful excuse'. Conversely, if on the facts there is or would be no violation of the Convention rights, the person will not have the relevant lawful excuse and will be guilty (subject to any other possible defences) of the offence in section 137(1).

63. That then calls for the usual enquiry which needs to be conducted under the HRA. It requires consideration of the following questions:

"(1) Is what the defendant did in exercise of one of the rights in articles 10 or 11?

"(2) If so, is there an interference by a public authority with that right?

"(3) If there is an interference, is it 'prescribed by law'?

"(4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph 2 of article 10 or article 11, for example the protection of the rights of others?

"(5) If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?

"64. That last question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate:

"(1) Is the aim sufficiently important to justify interference with a fundamental right?

"(2) Is there a rational connection between the means chosen and the aim in view?

"(3) Are there less restrictive alternative means available to achieve that aim?

"(4) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

A "65. In practice, in cases of this kind, we anticipate that it will be the last of those questions which will be of crucial importance: a fair balance must be struck between the different rights and interests at stake. This is inherently a fact-specific enquiry."

17 Guidance as to the limits to the right of lawful assembly and protest on the highway is provided in the Court of Appeal decision in *City of* B *London Corpn v Samede* [2012] PTSR 1624, a case involving a claim for possession and an injunction in relation to a protest camp set up in the churchyard of St Paul's Cathedral. Lord Neuberger of Abbotsbury MR gave the judgment of the court, stating as follows at paras 39–41:

"39. As the judge recognised, the answer to the question which he identified at the start of his judgment [the limits to the right of lawful C assembly and protest on the highway] is inevitably fact sensitive, and will normally depend on a number of factors. In our view, those factors include (but are not limited to) the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of D the owners of the land, and the rights of any members of the public.

"40. The defendants argue that the importance of the issues with which the Occupy Movement is concerned is also of considerable relevance. That raises a potentially controversial point, because as the judge said, at para 155: 'it is not for the court to venture views of its own on the substance of the protest itself, or to gauge how effective it has been in E bringing the protestors' views to the fore. The Convention rights in play are neither strengthened nor weakened by a subjective response to the aims of the protest itself or by the level of support it seems to command . . . the court cannot—indeed, must not—attempt to adjudicate on the merits of the protest. To do that would go against the very spirit of articles 10 and 11 of the Convention . . . the right to protest is the right to protest right or wrong, misguidedly or obviously correctly, for morally dubious aims or F for aims that are wholly virtuous.'

"41. Having said that, we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom. In this case the judge accepted that the G topics of concern to the Occupy Movement were 'of very great political importance': para 155. In our view, that was something which could fairly be taken into account. However, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important, or with which they agree. As the H Strasbourg court said in *Kuznetsov v Russia* (Application No 10877/04) (unreported) 23 October 2008, para 45: 'any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles—however shocking and unacceptable certain views or words used may appear to the authorities—do a disservice to democracy and often even endanger it. In a

democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly as well as by other lawful means . . .' The judge took into account the fact that the defendants were expressing views on very important issues, views which many would see as being of considerable breadth, depth and relevance, and that the defendants strongly believed in the views they were expressing. Any further analysis of those views and issues would have been unhelpful, indeed inappropriate."

3. The case stated

18 The outline facts as found in the case stated have been set out in the Introduction. The district judge's findings followed a trial in which almost all of the prosecution case was in the form of admissions and agreed statements. Oral evidence about what occurred was given by one police officer and police body-worn video footage was also shown.

19 All the appellants gave evidence of their long-standing opposition to the arms trade and of their belief that there was evidence of illegal activity taking place at the DSEI arms fair, which the Government had failed to take any effective action to prevent. The district judge found at para 16 of the case stated that:

"All . . . defendants described their action as 'carefully targeted' and aimed at disrupting traffic headed for the DSEI arms fair. Most but not all of the defendants accepted that their actions may have caused disruption to traffic that was not headed to the DSEI arms fair. Conversely it was not in dispute that not all access routes to the DSEI arms fair were blocked by the defendants' actions and it would have been possible for a vehicle headed to the DSEI arms fair but blocked by the actions to have turned around and followed an alternative route."

20 The district judge identified the issue for decision at para 37 of the case stated, as being:

"whether the prosecution had proved that the demonstrations in these two particular cases were of a nature such that they lost the protections afforded by articles 10 and 11 and were consequently unreasonable obstructions of the highway."

21 He recognised that this required an assessment of the proportionality of the interference with the appellants' Convention rights, in relation to which he took into account the following points (at para 38 of the case stated):

"(a) The actions were entirely peaceful—they were the very epitome of a peaceful protests [sic].

"(b) The defendants' actions did not give rise either directly or indirectly to any form of disorder.

"(c) The defendants' behavior [sic] did not involve the commission of any criminal offence beyond the alleged offence of obstruction of the highway which was the very essence of the defendants' protest. There was no disorder, no obstruction of or assault on police officers and no abuse offered.

A "(d) The defendants' actions were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair . . . I did hear some evidence that the road in question may have been used, at the time, by vehicles other than those heading to the arms fair, but that evidence was speculative and was not particularly clear or compelling. I did not find it necessary to make any finding of fact as to whether 'non-DSEI traffic' was or was not in fact obstructed since the authorities cited above appeared to envisage 'reasonable' obstructions causing some inconvenience to the 'general public' rather than only to the particular subject of a demonstration . . .

"(e) The action clearly related to a 'matter of general concern' . . . namely the legitimacy of the arms fair and whether it involved the marketing and sale of potentially unlawful items (e g those designed for torture or unlawful restraint) or the sale of weaponry to regimes that were then using them against civilian populations.

"(f) The action was limited in duration. I considered that it was arguable that the obstruction for which the defendants were responsible only occurred between the time of their arrival and the time of their arrests—which in both cases was a matter of minutes. I considered this since, at the point when they were arrested the defendants were no longer 'free agents' but were in the custody of their respective arresting officers and I thought that this may well have an impact on the issue of 'wilfulness' which is an essential element of this particular offence. The prosecution in both cases urged me to take the time of the obstruction as the time between arrival and the time when the police were able to move the defendants out of the road or from below the bridge. Ultimately, I did not find it necessary to make a clear determination on this point as even on the Crown's interpretation the obstruction in *Ziegler* lasted about 90–100 minutes . . .

"(g) I heard no evidence that anyone had actually submitted a complaint about the defendants' action or the blocking of the road. The police's response appears to have been entirely on their own initiative.

"(h) Lastly, although compared to the other points this is a relatively minor issue, I note the long-standing commitment to opposing the arms trade that all four defendants demonstrated. For most of them this stemmed, at least in part, from their Christian faith. They had also all been involved in other entirely peaceful activities aimed at trying to halt the DSEI arms fair. This was not a group of people who randomly chose to attend this event hoping to cause trouble."

22 The district judge's conclusion at para 40 of the case stated was that on these facts the prosecution had failed to prove to the requisite standard that the obstruction of the highway was unreasonable and he therefore dismissed the charges. The question for the High Court was expressed at para 41 of the case stated as follows:

H "The question for the High Court therefore is whether I was correct to have dismissed the case against the defendants in these circumstances. The point of law for the decision of the High Court, is whether, as a matter of law, I was entitled to reach the conclusions I did in these particular cases."

4. The decision of the Divisional Court

23 It was common ground between the parties prior to the hearing of the appeal that the appropriate appellate test on an appeal by way of case stated was whether the district judge had reached a decision which it was not reasonably open to him to reach. That is the conventional test on an appeal by way of case stated, as applied in many Divisional Court decisions.

24 At the hearing of the appeal the court suggested that in cases involving an assessment of proportionality the applicable approach should be that set out by Lord Neuberger of Abbotsbury PSC in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, namely whether the judge's conclusion on proportionality was wrong. As Lord Neuberger PSC stated at paras 91–92:

> "91. That conclusion leaves open the standard which an appellate court should apply when determining whether the trial judge was entitled to reach his conclusion on proportionality, once the appellate court is satisfied that the conclusion was based on justifiable primary facts and assessments. In my view, an appellate court should not interfere with the trial judge's conclusion on proportionality in such a case, unless it decides that that conclusion was wrong. I do not agree with the view that the appellate court has to consider that judge's conclusion was 'plainly' wrong on the issue of proportionality before it can be varied or reversed. As Lord Wilson JSC says in para 44, either 'plainly' adds nothing, in which case it should be abandoned as it will cause confusion, or it means that an appellate court cannot vary or reverse a judge's conclusion on proportionality of [sic] it considers it to have been 'merely' wrong. Whatever view the Strasbourg court may take of such a notion, I cannot accept it, as it appears to me to undermine the role of judges in the field of human rights.
>
> "92. I appreciate that the attachment of adverbs to 'wrong' was impliedly approved by Lord Fraser in the passage cited from *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647, 652, by Lord Wilson JSC at para 38, and has something of a pedigree: see e g per Ward LJ in *Assicurazioni* [2003] 1 WLR 577, para 195 (although aspects of his approach have been disapproved: see *Datec* [2007] 1 WLR 1325, para 46). However, at least where Convention questions such as proportionality are being considered on an appeal, I consider that, if after reviewing the trial judge's decision, an appeal court considers that he was wrong, then the appeal should be allowed. Thus, a finding that he was wrong is a sufficient condition for allowing an appeal against the trial judge's conclusion on proportionality, and, indeed, it is a necessary condition (save, conceivably, in very rare cases)."

25 *In re B* was a family law case but the Divisional Court noted that the test had been applied in other contexts, and in particular in extradition cases—see *Love v Government of the United States of America* [2018] 1 WLR 2889. It concluded that it should also be applied in the criminal law context, stating as follows at para 103:

> "We can see no principled basis for confining the approach in *In re B* to family law cases or not applying it to the criminal context. This is because the issue of principle discussed by Lord Neuberger PSC in that case related to the approach to be taken by an appellate court to the

A assessment by a lower court or tribunal of proportionality under the HRA. That is a general question of principle and does not arise only in a particular field of law."

26 Applying that test to the facts as found, the Divisional Court held that the district judge's assessment of proportionality was wrong "because (i) he took into account certain considerations which were irrelevant; B and (ii) the overall conclusion was one that was not sustainable on the undisputed facts before him, in particular that the carriageway to the Excel Centre was completely blocked and that this was so for significant periods of time, between approximately 80 and 100 minutes" (para 129).

27 Of the factors listed at paras 38(a) to (h) of the case stated as cited in para 21 above, the Divisional Court considered those set out at paras 38(a), C (b), (c), and (g) to be of little or no relevance and that at para 38(h) to be irrelevant. It disagreed with the district judge's conclusion at para 38(f) that an obstruction of the highway for 90–100 minutes was of "limited duration". The Divisional Court considered that to be a "significant period of time". Its core criticism was of para 38(d), in relation to which it stated as follows at para 112:

D "At para 38(d) the district judge said that the defendants' actions were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair. However, the fact is that the ability of other members of the public to go about their lawful business, in particular by passing along the highway *to and from the Excel Centre* was completely obstructed. In our view, that is highly relevant in any assessment of proportionality. This is not a case where, as commonly occurs, *some* E *part of the highway* (which of course includes the pavement, where pedestrians may walk) is *temporarily obstructed* by virtue of the fact that protestors are located there. That is a common feature of life in a modern democratic society. For example, courts are well used to such protests taking place on the highway outside their own precincts. However, there is a fundamental difference between that situation, where it may be said F (depending on the facts) that a 'fair balance' is being struck between the different rights and interests at stake, and the present cases. In these two cases *the highway was completely obstructed and some members of the public were completely prevented from doing what they had the lawful right to do*, namely use the highway for passage to get *to the Excel Centre* and this occurred for *a significant period of time*." (Emphasis added.)

G **28** The Divisional Court explained at para 117 that the "fundamental reason" why it considered the district judge's assessment of proportionality to be wrong was that:

"there was no 'fair balance' struck in these cases between the rights of the individuals to protest and the general interest of the community, including the rights of other members of the public to pass along the H highway. Rather the ability of other members of the public to go about their lawful business was *completely prevented* by the physical conduct of these defendants for *a significant period of time*. That did not strike a fair balance between the different rights and interests at stake." (Emphasis added.)

5 What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of 'lawful excuse' when Convention rights are engaged in a criminal matter?

The conventional approach

29 As indicated above, the conventional approach of the Divisional Court to appeals by way of case stated in criminal proceedings is to apply an appellate test of whether the court's conclusion was one which was reasonably open to it—i e is not *Wednesbury* irrational or perverse (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). This is reflected in a number of decisions of the Divisional Court, including cases involving issues of proportionality.

30 *Oladimeji v Director of Public Prosecutions* [2006] EWHC 1199 (Admin) concerned an appeal by way of case stated from the decision of magistrates to reject a "reasonable excuse" defence to an offence of failing to provide a specimen of breath when required to do so, contrary to section 7(6) of the Road Traffic Act 1988. In dismissing the appeal, Keene LJ at para 22 identified the relevant issue as being as follows:

> "the real issue is whether the justices were entitled on the evidence and the facts they found to conclude that the appellant had no reasonable excuse for his failure. It seems to me that they were. In the light of the facts to which I have referred, their conclusion was not perverse. It was within the range of conclusions properly open to them."

31 *H v Director of Public Prosecutions* [2007] EWHC 2192 (Admin) concerned an appeal by way of case stated from a district judge's decision to admit identification evidence notwithstanding a breach of Code D of the Police and Criminal Evidence Act 1984 ("PACE"). At para 19 Auld LJ stated the proper approach on such an appeal to be as follows:

> "Finally, I should note the now well established approach of the Court of Appeal (Criminal Division) to section 78 cases, when invited to consider the trial judge's exercise of judgment as to fairness, only to interfere with the judge's ruling if it is *Wednesbury* irrational or perverse. In my view, this court should adopt the very same approach on appeals to it by way of case stated on a point of law, for on such a point, anything falling short of *Wednesbury* irrationality will not do."

32 More recently, in *Garry v Crown Prosecution Service* [2019] 1 WLR 3630 the issue on the appeal was the operation of the "reasonable excuse" defence to the offence of carrying an offensive weapon contrary to section 1 of the Prevention of Crime Act 1953. Rafferty LJ followed the approach of Auld LJ in *H v Director of Public Prosecutions* as to the appropriate standard of review, stating at para 25 as follows:

> "On appeals by way of case stated on a point of law this court adopts the same approach as does the Court of Appeal to a trial judge's exercise of judgment, interfering with the judge's ruling only if it be *Wednesbury* irrational or perverse . . . : *H v Director of Public Prosecutions* [2007] EWHC 2192 (Admin). The ruling in this case was not *Wednesbury* irrational let alone perverse."

33 There have been a number of examples of appeals by way of case stated in cases involving Convention rights and issues of proportionality in

A which the Divisional Court has stated the applicable test to be whether the conclusion of the court below was one which was reasonably open to it—see, for example, *Norwood v Director of Public Prosecutions* [2003] EWHC 1564 (Admin) at [40] (Auld LJ) (article 10 ECHR); *Hammond v Director of Public Prosecutions* (2004) 168 JP 601, para 33 (May LJ) (articles 9 and 10 ECHR), and *Gough v Director of Public Prosecutions* (2013) 177 JP 669, para 21 (Sir Brian Leveson P) (article 10 ECHR).

B **34** *Abdul v Director of Public Prosecutions* [2011] HRLR 16 was an appeal by way of case stated from a district judge's decision that a prosecution for an offence under section 5 of the Public Order Act 1986 was a proportionate interference with the appellants' rights under article 10 ECHR. The alleged offences concerned slogans shouted by the appellants who were protesting in the vicinity of a local Royal Anglian Regiment C homecoming parade following its return from Afghanistan and Iraq. The slogans which the appellants shouted included "British soldiers murderers", "Rapists all of you" and "Baby killers". In giving the main judgment of the Divisional Court, Gross LJ said that "even if there is otherwise a prima facie case for contending that an offence has been committed under section 5, it is still for the Crown to establish that prosecution is a proportionate response, necessary for the preservation of public order" (para 49(vi)). He noted at D para 49(viii) that the legislature had entrusted that decision to magistrates or a district judge and stated the appellate test to be as follows:

> "The test for this court on an appeal of this nature is whether the decision to which the district judge has come was open to her or not. This court should not interfere unless, on well-known grounds, the appellants can establish that the decision to which the district judge has come is one E she could not properly have reached."

35 None of these cases were referred to by the Divisional Court in this case. Since the issue of the appropriate appellate test was not raised until the hearing the parties had not prepared to address that issue, nor did they apparently seek further time to do so. In the result, the Divisional Court reached its decision that the appropriate appellate test was that set out in F *In re B* without consideration of a number of relevant authorities.

Edwards v Bairstow

36 The conventional approach of the Divisional Court to apply a strict appellate test of irrationality or perversity reflects recognition of the fact that an appeal by way of case stated is an appeal from the tribunal of fact which G is only permissible on a question of law (or excess of jurisdiction). As stated in section 111(1) of the Magistrates' Courts Act 1980 ("MCA"):

> "(1) Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is *wrong in law* or is in excess of jurisdiction by applying to H the justices composing the court to state a case for the opinion of the High Court on *the question of law* or jurisdiction involved . . ." (Emphasis added.)

37 It has long been recognised that appellate restraint is required in cases involving appeals from tribunals of fact which are only allowed on

questions of law. The leading authority as to the appropriate approach in such cases is the House of Lords decision in *Edwards v Bairstow* [1956] AC 14. That case concerned an appeal by way of case stated from a decision of the Commissioners for the General Purposes of the Income Tax. Such appeals are only allowable if the decision can be shown to be wrong in law. The case concerned whether a joint venture for the purchase and sale of a spinning plant was an "adventure . . . in the nature of trade". The commissioners had decided that it was not and before the courts below the appeal had been dismissed on the grounds that the question was purely one of fact. The House of Lords allowed the appeal. In a well-known and often cited passage, Lord Radcliffe explained the proper approach as follows (at p 36):

> "When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too, there has been error in point of law . . . the true and only reasonable conclusion contradicts the determination."

38 This approach has been followed for other case stated appeal procedures—see, for example, *New Windsor Corpn v Mellor* [1974] 1 WLR 1504 in relation to appeals from commons commissioners. It has also been applied in other related contexts, such as, for example, appeals from arbitration awards. Since the Arbitration Act 1979 appeals have only been allowed on questions of law arising out of an award. In *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724 the question arose as to the proper approach to an appeal against an arbitrator's decision that a charterparty had been frustrated by delay, a question of mixed fact and law. It was held that *Edwards v Bairstow* should be applied. As Lord Roskill stated at pp 752–753:

> "My Lords, in *Edwards v Bairstow* [1956] AC 14, 36, Lord Radcliffe made it plain that the court should only interfere with the conclusion of special commissioners if it were shown either that they had erred in law or that they had reached a conclusion on the facts which they had found which no reasonable person, applying the relevant law, could have reached. My Lords, when it is shown on the face of a reasoned award that the appointed tribunal has applied the right legal test, the court should in my view only interfere if on the facts found as applied to that right legal test, no reasonable person could have reached that conclusion. It ought not to interfere merely because the court thinks that upon those facts and applying that test, it would not or might not itself have reached the same conclusion, for to do that would be for the court to usurp what is the sole function of the tribunal of fact."

A **39** The conventional approach of the Divisional Court to appeals by way of case stated in criminal proceedings is to similar effect. A conclusion will be one which is open to the court unless it is one which no reasonable court, properly directed as to the law, could have reached on the facts found. If on the face of the case stated, there is an error of law material to the decision reached, then it will be wrong in law and, as such, a conclusion which it was not reasonably open to the court to reach.

B **40** In the context of appeals by way of case stated in criminal proceedings (unlike in arbitration appeals), a conclusion will be open to challenge on the grounds that it is one which no reasonable court could have reached even if it categorised as a conclusion of fact. As stated by Lord Goddard CJ in *Bracegirdle v Oxley* [1947] KB 349, 353:

> C "It is said that this court is bound by the findings of fact set out in the cases by the magistrates. It is true that this court does not sit as a general court of appeal against magistrates' decisions in the same way as quarter sessions. In this court we only sit to review the magistrates' decisions on points of law, being bound by the facts which they have found, provided always that there is evidence on which they could come to the conclusions of fact at which they have arrived . . . if magistrates come to a decision to D which no reasonable bench of magistrates, applying their minds to proper considerations, and giving themselves proper directions, could come, then this court can interfere, because the position is exactly the same as if the magistrates had come to a decision of fact without evidence to support it."

In *R v North West Suffolk (Mildenhall) Magistrates' Court, Ex p Forest* E *Heath District Council* [1998] Env LR 9, 18–19 Lord Bingham CJ agreed with those observations, adding as follows:

> "It is obviously perverse and an error of law to make a finding of fact for which there is no evidential foundation. It is also perverse to say that black is white, which is essentially what the justices did in *Bracegirdle v Oxley*. But it is not perverse, even if it may be mistaken, to prefer the F evidence of A to that of B where they are in conflict. That gives rise, in the absence of special and unusual circumstances (absent here), to no error of law challengeable by case stated in the High Court. It gives rise to an error of fact properly to be pursued in the Crown Court."

41 In *D'Souza v Director of Public Prosecutions* [1992] 1 WLR 1073 the House of Lords applied the *Edwards v Bairstow* test to an appeal by way G of case stated in criminal proceedings concerning whether the appellant, who had absconded from a hospital where she was lawfully detained under the Mental Health Act 1983, was a person who was "unlawfully at large and whom [the police constables were] pursuing" under section 17(1)(d) of PACE so as to empower entry to her home without a warrant. Lord Lowry (with whose judgment all their lordships agreed) categorised this issue as "a question of fact" but one which "must be answered within the relevant H legal principles and paying regard to the meaning in their context of the relevant words" (at p 1082H). Lord Lowry's conclusion (at p 1086F), citing Lord Radcliffe's judgment in *Edwards v Bairstow*, was that:

> "I do not consider that it was open to the Crown Court to find that 'those seeking to retake the escaped patient' and in particular the

constables concerned, were pursuing her, because there was in my view no material in the facts found on which (taking a proper view of the law) they could properly reach that conclusion."

In re B

42 In the light of the well-established appellate approach to appeals from tribunals of fact which are only permitted on questions of law, including in relation to cases stated under section 111 of the MCA, we do not consider that the Divisional Court was correct to decide that there is a different appellate test where the appeal raises an assessment of proportionality and, moreover, to do so without regard to any of the relevant authorities.

43 *In re B* [2013] 1 WLR 1911 was a family law case and involved the appellate test under CPR r 52.11(3) that an appeal will be allowed where the decision of the lower court is "wrong", whether in law or in fact. The Divisional Court placed reliance on the extradition case of *Love* [2018] 1 WLR 2889 but that too involves a wide right of appeal "on a question of law or fact" (sections 26(3)(a) and 103(4)(a) of the Extradition Act 2003). An appeal may be allowed if "the district judge ought to have decided a question before him differently" and "had he decided it as he ought to have done, he would have been required to discharge the appellant"—see sections 27(3) and 104(3). In argument, reliance was also placed on the application of *In re B* in judicial review appeals. There are, however, generally no disputed facts in judicial review cases, nor do they involve appeals from the only permissible fact finder. In the specific context of challenges to the decision of a magistrates' court, where an error of law is alleged, the appropriate remedy is normally by way of case stated rather than by seeking judicial review—see, for example, *R (P) v Liverpool City Magistrates' Court* (2006) 170 JP 453, para 5.

44 It would in any event be unsatisfactory, as a matter of both principle and practicality, for the appellate test in appeals by way of case stated to fluctuate according to the nature of the issue raised. That would mean that there were two applicable appellate tests and that it would be necessary to determine in each case which was applicable. That would be likely to depend upon whether or not the case turns on an assessment of proportionality, which may well give rise to difficult and marginal decisions as to how central the issue of proportionality is to the decision reached. On any view, having alternative appellate tests adds unnecessary and undesirable complexity and uncertainty.

45 A prosecution under section 137 of 1980 Act, for example, requires proof of a number of different elements. There must be an obstruction; the obstruction must be of a highway; it must be wilful, and it must be without lawful authority or excuse. Some cases stated in relation to section 137 prosecutions may involve no proportionality issues at all; some may involve proportionality issues and other issues; some may involve only proportionality issues. The appellate test should not vary according to the ingredients of the case stated.

46 Whilst we do not consider that *In re B* is the applicable appellate test it may, nevertheless, be very relevant to appeals by way of case stated that turn on issues of proportionality. The law as stated in *In re B* has been

A developed in later cases. In *In re B* at para 88 Lord Neuberger PSC stated as follows:

> "If, after reviewing the judge's judgment and any relevant evidence, the appellate court considers that the judge approached the question of proportionality correctly as a matter of law and reached a decision which he was entitled to reach, then the appellate court will not interfere. If, on
B the other hand, after such a review, the appellate court considers that the judge made a significant error of principle in reaching his conclusion or reached a conclusion he should not have reached, then, and only then, will the appellate court reconsider the issue for itself if it can properly do so (as remitting the issue results in expense and delay, and is often pointless)."

C **47** This approach was qualified by the Supreme Court in *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079. In that case Lord Carnwath JSC (with whom the other justices agreed) said at para 64:

> "In conclusion, the references cited above show clearly in my view that to limit intervention to a 'significant error of principle' is too narrow an approach, at least if it is taken as implying that the appellate court has to
D point to a specific principle—whether of law, policy or practice—which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be 'wrong' under CPR
E r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR, para 34: 'the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge
F below was wrong . . .' "

48 As Lewison LJ stated in *R (Z) v Hackney London Borough Council* [2019] PTSR 2272, para 66:

> "It is not enough simply to demonstrate an error or flaw in reasoning. It must be such as to undermine the cogency of the conclusion. Accordingly, if there is no such error or flaw, the appeal court should not
G make its own assessment of proportionality."

Lewison LJ's observations as to the proper approach were endorsed by the Supreme Court [2020] 1 WLR 4327—see the judgment of Lord Sales JSC at para 74 and that of Lady Arden JSC at paras 118–120.

49 In cases stated which turn on an assessment of proportionality, the factors which the court considers to be relevant to that assessment are likely
H to be the subject of findings set out in the case, as they were in the present case. If there is an error or flaw in the reasoning which undermines the cogency of the conclusion on proportionality that is, therefore, likely to be apparent on the face of the case. In accordance with *In re B*, as clarified by the later case law, such an error may be regarded as an error of law on the

face of the case. It would, therefore, be open to challenge under the *Edwards v Bairstow* appellate test. As Lady Arden JSC observes, any such challenge would have to be made on the basis of the primary and secondary findings set out in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached. The review is of the judgment and any relevant findings, not "any relevant evidence".

50 In his judgment Lord Sales JSC sets out in detail the differences between rationality and proportionality and why he considers that the same approach should be adopted in all cases on appeal which concern whether an error of law has been made in relation to an issue of proportionality.

51 As Lady Arden JSC's analysis at para 101 of her judgment demonstrates, the nature and standard of appellate review will depend on a number of different factors. Different kinds of proceedings necessarily require different approaches to appellate review. For example, an appeal against conviction following a jury trial in the Crown Court, where the Court of Appeal Criminal Division must assess the safety of a conviction, is a very different exercise to that which is carried out by the Court of Appeal Civil Division in reviewing whether a decision of the High Court is wrong in judicial review proceedings, although both may involve proportionality assessments.

52 Whilst we agree that the approach to whether there is an error of law in relation to an issue of proportionality determined in a case stated is that set out in *In re B*, as clarified by the later case law, *Edwards v Bairstow* remains the overarching appellate test, and the alleged error of law has to be considered by reference to the primary and secondary factual findings which are set out in the case.

53 In the present case the Divisional Court considered that there were errors or flaws in the reasoning of the district judge taking into account a number of factors, which it considered to be irrelevant or inappropriate and that these undermined the cogency of the conclusion reached. Although the Divisional Court applied the wrong appellate test, it may therefore have reached a conclusion which was justifiable on the basis that there was an error of law on the face of the case. We shall address this question when considering the second issue on the appeal.

Conclusion in relation to the first certified question

54 For all these reasons, we consider that the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights are engaged in a criminal matter is the same as that applicable generally to appeals on questions of law in a case stated under section 111 of the MCA, namely that set out in *Edwards v Bairstow*. That means that an appeal will be allowed where there is an error of law material to the decision reached which is apparent on the face of the case, or if the decision is one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found. In accordance with that test and *In re B*, where the statutory defence depends upon an assessment of proportionality, an appeal will lie if there is an error or flaw in the reasoning on the face of the case which undermines the cogency of the conclusion on proportionality. That assessment falls to be made on the basis of the primary and secondary findings set out in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached.

A *6. Is deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, where the impact of the deliberate obstruction on other highway users is more than de minimis, and prevents them, or is capable of preventing them, from passing along the highway?*

The second certified question

B **55** As the Divisional Court explained, (see para 28 above) a fundamental reason why it considered the district judge's assessment of proportionality to be wrong was that there was no fair balance struck between the different rights and interests at stake given that "the ability of other members of the public to go about their lawful business was completely prevented by the physical conduct of these defendants for a significant period of time". That fundamental reason led the Divisional C Court to certify the second question which the parties agreed as being in the terms set out in para 7(2) above ("the second certified question"). The implication of the second certified question is that deliberately obstructive conduct cannot constitute a lawful excuse for the purposes of section 137 of the Highways Act 1980, where the impact on other highway users is more than de minimis, so as to prevent users, or even so as to be *capable* of D preventing users, from passing along the highway. In those circumstances, the interference with the protesters' article 10 and article 11 ECHR rights would be considered proportionate, so that they would not be able to rely on those rights as the basis for a defence of lawful excuse pursuant to section 137 of the 1980 Act.

56 On behalf of the appellants it was submitted, to the contrary, that deliberate physically obstructive conduct by protesters is capable of E constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, even where the impact of the deliberate obstruction on other highway users is more than de minimis. In addition, it was submitted that the district judge's assessment of proportionality did not contain any error or flaw in reasoning on the face of the case such as to undermine the cogency of his conclusion. Accordingly, it was submitted that the Divisional Court's order directing convictions should be set aside and that this court should F issue a direction to restore the dismissal of the charges.

Articles 10 and 11 ECHR

57 The second certified question relates to both the right to freedom of expression in article 10 and the right to freedom of assembly in article 11. Both rights are qualified in the manner set out respectively in articles 10(2) G and 11(2): see paras 14–15 above. Article 11(2) states that "No restrictions shall be placed" except "such as are prescribed by law and are necessary in a democratic society". In *Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 100 the European Court of Human Rights ("ECtHR") stated that "The term 'restrictions' in article 11(2) must be interpreted as including both measures taken before or during a gathering and those, such as H punitive measures, taken afterwards" so that it accepted at para 101 "that the applicants' conviction for their participation in the demonstrations at issue amounted to an interference with their right to freedom of peaceful assembly". Arrest, prosecution, conviction, and sentence are all "restrictions" within both articles. Different considerations may apply to the proportionality of each of those restrictions. The proportionality of arrest,

which is typically the police action on the ground, depends on, amongst other matters, the constable's reasonable suspicion. The proportionality assessment at trial before an independent impartial tribunal depends on the relevant factors being proved beyond reasonable doubt and the court being sure that the interference with the rights under articles 10 and 11 was necessary. The police's perception and the police action are but two of the factors to be considered. It may have looked one way at the time to the police (on which basis their actions could be proportionate) but at trial the facts established may be different (and on that basis the interference involved in a conviction could be disproportionate). The district judge is a public authority, and it is his assessment of proportionality of the interference that is relevant, not to our mind his assessment of the proportionality of the interference by reference only to the intervention of the police that is relevant. In that respect we differ from Lord Sales JSC (see for instance para 120, 153 and 154) who considers that the defence of "lawful excuse" under section 137 depends on an assessment of the proportionality of the police response to the protest and agree with Lady Arden JSC at para 94 that "the more appropriate question is whether the convictions of the appellants for offences under section 137(1) of the Highways Act 1980 were justified *restrictions* on the right to freedom of assembly under article 11 or not" (emphasis added).

58 As the Divisional Court identified at para 63 the issues that arise under articles 10 and 11 require consideration of five questions: see para 16 above. In relation to those questions it is common ground that (i) what the appellants did was in the exercise of one of the rights in articles 10 and 11; (ii) the prosecution and conviction of the appellants was an interference with those rights; (iii) the interference was prescribed by law; and (iv) the interference was in pursuit of a legitimate aim which was the prevention of disorder and the protection of the rights of others to use the highway. That leaves the fifth question as to whether the interference with either right was "necessary in a democratic society" so that a fair balance was struck between the legitimate aims of the prevention of disorder and protection of the rights and freedoms of others and the requirements of freedom of expression and freedom of assembly.

59 Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case.

60 In a criminal case the prosecution has the burden of proving to the criminal standard all the facts upon which it relies to establish to the same standard that the interference with the articles 10 and 11 rights of the protesters was proportionate. If the facts are established then a judge, as in this case, or a jury, should evaluate those facts to determine whether or not they are sure that the interference was proportionate.

61 In this case both articles 10 and 11 are invoked on the basis of the same facts. In the decisions of the ECtHR, whether a particular incident falls to be examined under article 10 or article 11, or both, depends on the particular circumstances of the case and the nature of a particular applicant's claim to the court. In *Kudrevčius v Lithuania*, para 85 and in *Lashmankin v Russia* (Application No 57818/09) (unreported) 7 February 2017, at para 364, both of which concerned interference with peaceful protest, the ECtHR stated that article 11 constitutes the lex specialis

A pursuant to which the interference is to be examined. The same approach was taken by the ECtHR at para 91 of its judgment in *Primov v Russia* (Application No 17391/06) (unreported) 12 June 2014. However, given that article 11 is to be interpreted in the light of article 10, said to constitute the lex generalis, the distinction is largely immaterial. The outcome in this case will be the same under both articles.

B *Deliberate obstruction with more than a de minimis impact*

62 The second certified question raises the issue as to how intentional action by protesters disrupting traffic impacts on an assessment of proportionality under articles 10 and 11 ECHR.

63 The issue of purposeful disruption of others was considered by the ECtHR in *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241, C paras 27–28 and *Steel v United Kingdom* (1998) 28 EHRR 603, para 142. It was also considered by the ECtHR in *Kudrevičius v Lithuania* in relation to the purposeful disruption of traffic and in *Primov v Russia* in relation to an attempted gathering which would have disrupted traffic.

64 The case of *Steel v United Kingdom* did not involve obstructive behaviour on a highway but rather involved an attempt by the first D applicant, with 60 others, to obstruct a grouse shoot. The first applicant was arrested for breach of the peace for impeding the progress of a member of the shoot by walking in front of him as he lifted his shotgun. She was detained for 44 hours before being released on conditional bail. She was charged with breach of the peace and using threatening words or behaviour, contrary to section 5 of the Public Order Act 1986. At trial she was convicted of both offences and the Crown Court upheld the convictions on appeal. She E complained to the European Commission of Human Rights ("the Commission") on the basis, in particular, of violations of articles 10 and 11, arising from the disproportionality of the restrictions on her freedom to protest. At para 142 of its judgment the Commission noted that "the first . . . applicant [was] demonstrating not only by verbal protest or holding up placards and distributing leaflets, but *by physically impeding the* F *activities against which [she was] protesting*" (emphasis added). In addressing this issue, the Commission recalled "that freedom of expression under article 10 goes beyond mere speech, and considers that the applicants' protests were expressions of [her] disagreement with certain activities, and as such fall within the ambit of article 10". Despite the protest physically impeding the activities of those participating in the grouse shoot the Commission found that "there was a clear interference with the applicants' G freedom under article 10 of the Convention". Thereafter the Commission considered whether the interference was prescribed by law, whether it pursued a legitimate aim and whether it was proportionate. In relation to proportionality it found that the removal of the applicant by the police from the protest and her detention for 44 hours, even though it interfered with her freedom to demonstrate, could, in itself, be seen as proportionate to the aim of preventing disorder. It reached similar findings in relation to the H proportionality of the convictions: see paras 154–158. However, the points of relevance to this appeal are: (a) that deliberate obstructive conduct which has a more than de minimis impact on others, still requires careful evaluation in determining proportionality; and, (b) that there is a separate evaluation of proportionality in respect of each restriction. In *Steel* those

separate evaluations included the proportionality of the removal of the first applicant from the scene (para 155), the proportionality of the detention of the first applicant for 44 hours before being brought before a magistrate (para 156) and the proportionality of the penalties imposed on the first applicant (paras 157–158). A separate analysis was carried out in relation to the third, fourth and fifth applicants leading to the conclusion that their removal from the scene was not proportionate: see paras 168–170.

65 The case of *Hashman and Harrup v United Kingdom* similarly did not involve a protest obstructing a highway. Rather, the applicants had intentionally disrupted the activities of the Portman Hunt to protest against fox hunting. Proceedings were brought against the applicants in respect of their behaviour. They were bound over to keep the peace and be of good behaviour. They complained to the ECtHR that this was a breach of their article 10 rights. At para 28 the ECtHR noted that "the protest took the form of impeding the activities of which they disapproved" but considered "nonetheless that it constituted an expression of opinion within the meaning of article 10" and that "The measures taken against the applicants were, therefore, an interference with their right to freedom of expression". Again, the point of relevance to this appeal is that deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality.

66 In *Kudrevičius v Lithuania* the applicants had been involved in a major protest by farmers against the Lithuanian government. The protests involved the complete obstruction of the three major roads in Lithuania. Subsequently the first and second applicants were convicted of inciting the farmers to blockade the roads and highway contrary to article 283(1) of the Criminal Code. The remaining applicants were convicted of a serious breach of public order during the riot by driving tractors onto the highway and refusing to obey requests by the police to move them. Before the ECtHR the applicants complained that their convictions had violated their rights to freedom of expression and freedom of peaceful assembly, guaranteed by articles 10 and 11 ECHR respectively. The extent of the significant obstruction intended and caused can be discerned from the facts. One of the highways which was obstructed was the main trunk road connecting the three biggest cities in the country. It was obstructed on 21 May 2003 at around 12.00 by a group of approximately 500 people who moved onto the highway and remained standing there, thus stopping the traffic. Another of the highways was a transitional trunk road used to enter and leave the country. It was obstructed on 21 May 2003 at 12.00 by a group of approximately 250 people who moved onto the highway and remained standing there, thus stopping the traffic until 12 noon on 23 May 2003. The third highway which was obstructed was also a transitional trunk road used to enter and leave the country. It was obstructed on 21 May 2003 at 11.50 by a group of 1,500 people who moved onto the highway and kept standing there, thus stopping the traffic. In addition, on the same day between 15.00 and 16.30 tractors were driven onto the highway and left standing there. Such blockage continued until 16.00 on 22 May 2003. According to the Lithuanian Government, all three roads were blocked at locations next to the customs post for approximately 48 hours. The Government alleged, in particular, that owing to the blocking rows of heavy goods vehicles and cars formed in Lithuania and Poland at the Kalvarija border crossing and that

heavy goods vehicles were forced to drive along other routes in order to avoid traffic jams. It was also alleged that as the functioning of the Kalvarija customs post was disturbed, the Kaunas Territorial Customs Authority was obliged to re-allocate human resources as well as to prepare for a possible re-organisation of activities with the State Border Guard Service and the Polish customs and that, as a consequence, the Kaunas Territorial Customs Authority incurred additional costs; however, the concrete material damage had not been calculated.

67 The ECtHR in *Kudrevičius* at para 97 recognised that intentional disruption of traffic was "not an uncommon occurrence in the context of the exercise of freedom of assembly in modern societies". However, the court continued that "physical conduct purposely obstructing traffic and the ordinary course of life in order to *seriously disrupt the activities carried out by others* is not at the core of that freedom as protected by article 11 of the Convention" (emphasis added). The court also added that "This state of affairs *might* have implications for any assessment of 'necessity' to be carried out under the second paragraph of article 11" (emphasis added). It is apparent from *Kudrevičius* that purposely obstructing traffic still engages article 11 but seriously disrupting the activities carried out by others is not at the core of that freedom so that it "*might*", not "*would*", have implications for any assessment of proportionality. In this way, such disruption is not determinative of proportionality. On the facts of that case the Lithuanian authorities had struck a fair balance between the legitimate aims of the "prevention of disorder" and "protection of the rights and freedoms of others" and the requirement of freedom of assembly. On that basis the criminal convictions and the sanctions imposed were not disproportionate in view of the serious disruption of public order provoked by the applicants. However, again, the point of relevance to this appeal is that deliberate obstructive conduct which has a more than de minimis impact on others still requires careful evaluation in determining proportionality.

68 The case of *Primov v Russia* involved a complaint to the ECtHR that the Russian authorities' refusal to allow a demonstration, the violent dispersal of that demonstration and the arrest of the three applicants breached their right to freedom of expression and to peaceful assembly, guaranteed by articles 10 and 11 of the Convention respectively. The protesters wished to gather in the centre of the village of Usukhchay. To prevent them from doing so the police blocked all access to the village. One of the reasons for this blockade was that if allowed to demonstrate in the centre of the village the crowd would risk blocking the main road adjacent to the village square. In conducting a proportionality assessment between paras 143–153 the ECtHR referred to the importance for the public authorities to show a certain degree of tolerance towards peaceful gatherings. At para 145 it stated:

> "The court reiterates in this respect that any large-scale gathering in a public place inevitably creates inconvenience for the population. Although a demonstration in a public place may cause some disruption to ordinary life, including disruption of traffic, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by article 11 of the Convention is not to be deprived of its substance (see *Galstyan* [*Galstyan v Armenia* (2007) 50 EHRR 25], paras 116–117, and *Bukta* [*Bukta v*

> *Hungary* (2007) 51 EHRR 25], para 37). The appropriate 'degree of tolerance' cannot be defined in abstracto: the court must look at the particular circumstances of the case and particularly to the extent of the 'disruption of ordinary life'."

So, there should be a certain degree of tolerance to disruption to ordinary life, including disruption of traffic, caused by the exercise of the right to freedom of expression or freedom of peaceful assembly.

69 This is not to say that there cannot be circumstances in which the actions of protesters take them outside the protection of article 11 so that the question as to proportionality does not arise. Article 11 of the Convention only protects the right to "peaceful assembly". As the ECtHR stated at para 92 of *Kudrevičius*:

> "[the] notion [of peaceful assembly] does not cover a demonstration where the organisers and participants have violent intentions. The guarantees of article 11 therefore apply to all gatherings except those where the organisers and participants have such intentions, incite violence or otherwise reject the foundations of a democratic society."

There is a further reference to conduct undermining the foundations of a democratic society taking the actions of protesters outside the protection of article 11 at para 98 of *Kudrevičius*. At para 155 of its judgment in *Primov and v Russia* the ECtHR stated that "article 11 does not cover demonstrations where the organisers and participants have violent intentions . . . However, an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration if the individual in question remains peaceful in his or her own intentions or behaviour". Moreover, a protest is peaceful even though it may annoy or cause offence to the persons opposed to the ideas or claims that the protest is seeking to promote.

70 It is clear from those authorities that intentional action by protesters to disrupt by obstructing others enjoys the guarantees of articles 10 and 11, but both disruption and whether it is intentional are relevant factors in relation to an evaluation of proportionality. Accordingly, intentional action even with an effect that is more than de minimis does not automatically lead to the conclusion that any interference with the protesters' articles 10 and 11 rights is proportionate. Rather, there must be an assessment of the facts in each individual case to determine whether the interference with article 10 or article 11 rights was "necessary in a democratic society".

Factors in the evaluation of proportionality

71 In setting out various factors applicable to the evaluation of proportionality it is important to recognise that not all of them will be relevant to every conceivable situation and that the examination of the factors must be open textured without being given any pre-ordained weight.

72 A non-exhaustive list of the factors normally to be taken into account in an evaluation of proportionality was set out at para 39 of the judgment of Lord Neuberger of Abbotsbury MR in *City of London Corpn v Samede* [2012] PTSR 1624 (see para 17 above). The factors included "the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of

A the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public". At paras 40–41 Lord Neuberger MR identified two further factors as being: (a) whether the views giving rise to the protest relate to "very important issues" and whether they are "views which many would see as being of considerable breadth, depth and relevance"; and, (b) whether the protesters "believed in the views they were expressing". In relation to (b) it is
B hard to conceive of any situation in which it would be proportionate for protesters to interfere with the rights of others based on views in which the protesters did not believe.

73 In *Nagy v Weston* [1965] 1 WLR 280 (see para 9 above) one of the factors identified was "the place where [the obstruction] occurs". It is apparent, as in this case, that an obstruction can have different impacts
C depending on the commercial or residential nature of the location of the highway.

74 A factor listed in *City of London Corpn v Samede* was "the extent of the actual interference the protest causes to the rights of others". Again, as in this case, in relation to protests on a highway the extent of the actual interference can depend on whether alternative routes were used or could have been used. In *Primov v Russia* at para 146 a factor taken into account in
D relation to proportionality by the ECtHR was the availability of "alternative thoroughfares where the traffic could have been diverted by the police".

75 Another factor relevant to proportionality can be discerned from para 171 of the judgment of the ECtHR in *Kudrevičius* in that it took into account that "the actions of the demonstrators had not been directly aimed at an activity of which they disapproved, but at the physical blocking of
E another activity (the use of highways by carriers of goods and private cars) which had no direct connection with the object of their protest, namely the government's alleged lack of action vis-à-vis the decrease in the prices of some agricultural products". So, a relevant factor in that case was whether the obstruction was targeted at the object of the protest.

76 Another factor identified in *City of London Corpn v Samede* was "the importance of the precise location to the protesters". In *Mayor of*
F *London (on behalf of the Greater London Authority) v Hall* [2011] 1 WLR 504, para 37 it was acknowledged by Lord Neuberger MR, with whom Arden and Stanley Burnton LJJ agreed, that "The right to express views publicly . . . and the right of the defendants to assemble for the purpose of expressing and discussing those views, extends . . . to the location where they wish to express and exchange their views". In *Sáska v Hungary*
G (Application No 58050/08) (unreported) 27 November 2012, at para 21 the ECtHR stated that "the right to freedom of assembly includes the right to choose the time, place and modalities of the assembly, within the limits established in paragraph 2 of article 11". This ability to choose, amongst other matters, the location of a protest was also considered by the ECtHR in *Lashmankin v Russia*, 7 February 2017. At para 405 it was stated that:

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> "the organisers' autonomy *in determining the assembly's location*, time and manner of conduct, such as, for example, whether it is static or moving or whether its message is expressed by way of speeches, slogans, banners or by other ways, are important aspects of freedom of assembly. Thus, *the purpose of an assembly is often linked to a certain location and/or time, to allow it to take place within sight and sound of its target*

object and at a time when the message may have the strongest impact." (Emphasis added.)

In this case the appellants ascribed a particular "symbolic force" to the location of their protest, in the road, leading to the Excel Centre.

77 It can also be seen from para 405 of *Lashmankin* that the organisers of a protest have autonomy in determining the manner of conduct of the protest. That bears on another factor set out in *City of London Corpn v Samede*, namely "the extent to which the continuation of the protest would breach domestic law". So, the manner and form of a protest on a highway will potentially involve the commission of an offence contrary to section 137 of the 1980 Act. However, if the protest is peaceful then no other offences will have been committed, such as resisting arrest or assaulting a police officer. In *Balçik v Turkey* (Application No 25/02) (unreported) 29 November 2007, at para 51 the ECtHR took into account that there was no evidence to suggest that the group in that case "presented a danger to public order, apart from possibly blocking the tram line". So, whilst there is autonomy to choose the manner and form of a protest an evaluation of proportionality will include the nature and extent of actual and potential breaches of domestic law.

78 Prior notification to and co-operation with the police may also be relevant factors in relation to an evaluation of proportionality, especially if the protest is likely to be contentious or to provoke disorder. If there is no notification of the exact nature of the protest, as in this case, then whether the authorities had prior knowledge that some form of protest would take place on that date and could have therefore taken general preventive measures would also be relevant: see *Balçik v Turkey* at para 51. However, the factors of prior notification and of co-operation with the police and the factor of any domestic legal requirement for prior notification, must not encroach on the essence of the rights: see *Molnár v Hungary* (Application No 10346/05) (unreported) 7 October 2008, paras 34–38 and *DB v Chief Constable of Police Service of Northern Ireland* [2017] NI 301, para 61.

Whether the district judge's assessment of proportionality contained any error or flaw in reasoning on the face of the case such as to undermine the cogency of his conclusion

79 A conventional balancing exercise involves individual assessment by the district judge conducted by reference to a concrete assessment of the primary facts, or any inferences from those facts, but excluding any facts or inferences which have not been established to the criminal standard. It is permissible within that factorial approach that some factors will weigh more heavily than others, so that the weight to be attached to the respective factors will vary according to the specific circumstances of the case. In this case the factual findings are set out in the case stated and it is on the basis of those facts that the district judge reached the balancing conclusion that the prosecution had not established to the requisite standard that the interference with the articles 10 and 11 rights of the appellants was proportionate. This raises the question on appeal as to whether there were errors or flaws in the reasoning on the face of the case which undermines the cogency of the conclusion on proportionality, insofar as the district judge is said to have taken into account a number of factors which were irrelevant or inappropriate.

80 The Divisional Court at paras 111–118 considered the assessment of proportionality carried out by the district judge (see para 21 above). The

A Divisional Court considered that the factors at paras 38(a) to (c) were of little or no relevance. We disagree. In relation to the factor at para 38(a), article 11 protects peaceful assembly. The ECtHR requires "a certain degree of tolerance towards peaceful gatherings", see *Primov v Russia* at para 68 above. The fact that this was intended to be and was a peaceful gathering was relevant. Furthermore, the factor in para 38(b) that the appellants' actions did not give rise, directly or indirectly, to any form of disorder was also relevant. B There are some protests that are likely to provoke disorder. This was not such a protest. Rather it was a protest on an approach road in a commercial area where there was already a sizeable police presence in anticipation of demonstration without there being any counter-demonstrators or any risk of clashes with counter-demonstrators: (for the approach to the risk of clashes with counter-demonstrations see para 150 of *Primov v Russia*). The protest C was not intended to, nor was it likely to, nor did it in fact provoke disorder. There were no "clashes" with the police. The factor taken into account by the district judge at para 38(c) related to the commission of any other offences and this also was relevant, as set out in *City of London Corpn v Samede* (see para 17 above) in which one of the factors listed was "the extent to which the continuation of the protest would breach domestic law". The Divisional Court considered that none of these factors prevented the offence of D obstruction of the highway being committed in a case such as this. That reasoning is correct in that the offence can be committed even if those factors are present. However, the anterior question is proportionality, to which all those factors are relevant. There was no error or flaw in the reasoning of the district judge in taking these factors into account in his assessment of proportionality. That assessment was central to the question as to whether E the appellants should be convicted under section 137 of the 1980 Act.

81 The Divisional Court's core criticism related to the factor considered by the district judge at para 38(d). We have set out in para 27 above the reasoning of the Divisional Court. We differ in relation to those aspects to which we have added emphasis.

(i) We note that in para 112 the Divisional Court stated that the "highway *to and from* the Excel Centre was completely obstructed" but later stated F that "members of the public were *completely prevented* from" using "the highway for passage *to* get to the Excel Centre" (emphasis added). We also note that at para 114 the Divisional Court again stated that there was there was "*a complete obstruction of the highway*" (emphasis added). In fact, the highway *from* the Excel Centre was not obstructed, so throughout the duration of the protest this route *from* the Excel Centre was available to be G used. Moreover, whilst this approach road for vehicles *to* the Excel Centre was obstructed it was common ground that access could be gained by vehicles by another route. On that basis members of the public were not "completely prevented" from getting *to* the Excel Centre, though it is correct that for a period vehicles were obstructed from using this particular route.

(ii) The fact that "actions" were carefully targeted and were aimed only at obstructing vehicles headed to the DSEI arms fair was relevant: see para 75 H above. Furthermore, the district judge found that the targeting was effective, as the evidence as to the use of the road by vehicles other than those heading to the arms fair was speculative and was not particularly clear or compelling (see para 38(d) of the case stated set out at para 21 above). He made no finding as to whether "non-DSEI" traffic was or was not in fact obstructed

since even if it had been this amounted to no more than reasonable obstruction causing some inconvenience to the general public. Targeting and whether it was effective are relevant matters to be evaluated in determining proportionality.

(iii) The choice of location was a relevant factor to be taken into account by the district judge: see para 76 above.

(iv) The Divisional Court considered that the obstruction was for a "significant period of time" whilst the district judge considered that the "action was limited in duration". As we explain in paras 83–84 below whether the period of 90 to 100 minutes of actual obstruction was "significant" or "limited" depends on the context. It was open to the district judge to conclude on the facts of this case that the duration was "limited" and it was also appropriate for him to take that into account in relation to his assessment of proportionality.

(v) The Divisional Court's conclusion referred to disruption to "members of the public". However, there were no findings by the district judge as to the number or even the approximate number of members of the public who were inconvenienced by this demonstration which took place on one side of an approach road to the Excel Centre in circumstances where there were other available routes for deliveries to the Centre (see para 19 above). Furthermore, there were no factual findings that the protest had any real adverse impact on the Excel Centre.

82 The Divisional Court agreed at para 113 with the factor taken into account by the district judge at para 38(e) of the case stated:

> "that the action clearly related to a matter of general concern, namely the legitimacy of the arms fair and whether it involved the marketing and sale of potentially unlawful items. That was relevant in so far as it emphasised that the subject matter of the protests in the present cases was a matter of legitimate public interest. As Mr Blaxland submitted before us, the content of the expression in this case was political and therefore falls at the end of the spectrum at which greatest weight is attached to the kind of expression involved."

That was an appropriate factor to be taken into account: see para 72 above. As in *Primov v Russia* at paras 132–136 the appellant's message "undeniably concerned a serious matter of public concern and related to the sphere of political debate". There was no error or flaw in the reasoning of the district judge in taking this factor into account in relation to the issue of proportionality.

83 The Divisional Court disagreed with the district judge's conclusion at para 38(f) of the case stated that an obstruction of the highway for 90–100 minutes was of limited duration. The Divisional Court at para 112 referred to the period of obstruction as having "occurred for a significant period of time". Then at para 114 the Divisional Court stated:

> "On any view, as was common ground, the duration of the obstruction of the highway was not de minimis. Accordingly, the fact is that there was *a complete obstruction of the highway for a not insignificant amount of time*. That is highly significant, in our view, to the proper evaluative assessment which is required when applying the principle of proportionality." (Emphasis added.)

As we have observed the district judge did not find that there was a *complete obstruction of the highway* but rather that the obstruction to vehicles was to that side of the approach road leading to the Excel Centre. It is correct that the district judge equivocated as to whether the duration of the obstruction was for a matter of minutes until the appellants were arrested, or whether it was for the 90 to 100 minutes when the police were able to move the appellants out of the road. It would arguably have been incorrect for the district judge to have approached the duration of the obstruction on the basis that it was for a matter of minutes rather than by reference to what actually occurred. The district judge, however, did not do so and instead correctly approached his assessment based on the period of time during which that part of the highway was actually obstructed. Lord Sales JSC at para 144 states that the district judge ought to have taken into account any longer period of time during which the appellants intended the highway to be obstructed. If it was open to the district judge to have done so, then we do not consider this to be a significant error or flaw in his reasoning. However, we agree with Lady Arden JSC at para 96 that the appellants "cannot . . . be convicted on the basis that had the police not intervened their protest would have been longer". We agree that the proportionality assessment which potentially leads to a conviction can only take into account the obstruction of the highway that actually occurs.

84 It is agreed that the actual time during which this access route to the Excel Centre was obstructed was 90 to 100 minutes. The question then arises as to whether this was of limited or significant duration. The appraisal as to whether the period of time was of "limited duration" or was for "a not insignificant amount of time" or for "a significant period of time" was a fact-sensitive determination for the district judge which depended on context including, for instance the number of people who were inconvenienced, the type of the highway and the availability of alternative routes. We can discern no error or flaw in his reasoning given that there was no evidence of any significant disruption caused by the obstruction. Rather, it was agreed that there were alternative routes available for vehicles making deliveries to the Excel Centre: see para 19 above.

85 The Divisional Court considered at para 115 that the factor taken into account by the district judge at para 38(g) of the case stated was "of little if any relevance to the assessment of proportionality". The factor was that he had "heard no evidence that anyone had actually submitted a complaint about the defendants' action or the blocking of the road. The police's response appears to have been entirely on their own initiative". In relation to the lack of complaint, the Divisional Court stated that this did not alter the fact that the obstruction did take place and continued that "The fact that the police acted, as the district judge put it, 'on their own initiative' was only to be expected in the circumstances of a case such as this". We agree that for the police to act it was obvious that they did not need to receive a complaint. They were already at the Excel Centre in anticipation of demonstrations and were immediately aware of this demonstration by the appellants. However, the matter to which the district judge was implicitly adverting was that the lack of complaint was indicative of a lack of substantial disruption to those in the Excel Centre. If there had been substantial disruption one might expect there to have been complaints. Rather, on the basis of the facts found by the district judge there was no

substantial disruption. There was no error or flaw in the reasoning of the district judge in considering the matters set out at para 38(g).

86 The Divisional Court at para 116 considered that the factor at para 38(h) of the case stated was irrelevant. In this paragraph the district judge, although he regarded this as a "relatively minor issue", noted the long-standing commitment of the defendants to opposing the arms trade and that for most of them this stemmed, at least in part, from their Christian faith. He stated that they had also all been involved in other entirely peaceful activities aimed at trying to halt the DSEI arms fair. The district judge considered that "This was not a group of people who randomly chose to attend this event hoping to cause trouble". The Divisional Court held that this factor had "no relevance to the assessment which the court was required to carry out when applying the principle of proportionality" and that "It came perilously close to expressing approval of the viewpoint of the defendants, something which . . . is not appropriate for a neutral court to do in a democratic society". However, as set out at para 72 above, whether the appellants "believed in the views they were expressing" was relevant to proportionality. Furthermore, it is appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. Political views, unlike "vapid tittle-tattle" are particularly worthy of protection. Furthermore, at para 38(h) the district judge took into account that the appellants were not a group of people who randomly chose to attend this event hoping to cause trouble. We consider that the peaceful intentions of the appellants were appropriate matters to be considered in an evaluation of proportionality. There was no error or flaw in the reasoning of the district judge in taking into account the matters set out at para 38(h).

Conclusion in relation to the second certified question

87 We would answer the second certified question "yes". The issue before the district judge did not involve the proportionality of the police in arresting the appellants but rather proportionality in the context of the alleged commission of an offence under section 137 of the 1980 Act. The district judge determined that issue of proportionality in favour of the appellants. For the reasons which we have given there was no error or flaw in the district judge's reasoning on the face of the case such as to undermine the cogency of his conclusion on proportionality. Accordingly, we would allow the appeal on this ground.

7. Overall conclusion

88 For the reasons that we have given, we would allow the appeal by answering the certified question set out in para 7(1) as set out in para 54 above; answering the certified question set out in para 7(2) "yes"; setting aside the Divisional Court's order directing convictions; and issuing a direction to restore the dismissal of the charges.

LADY ARDEN JSC

The context in which the certified questions arise

89 This appeal from the order of the Divisional Court (Singh LJ and Farbey J), allowing the appeal of the Director of Public Prosecutions and entering convictions against the appellants, requires this court to answer two

A certified questions set out in para 7 of this judgment. One of the matters which gives this appeal its importance is the context in which those questions have arisen. This appeal involves the right to freedom of peaceful assembly and association set out in article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the Convention"), one of the rights now guaranteed in our domestic law by the Human Rights Act 1998. The European Court of Human Rights ("the B Strasbourg court") has described this important right as follows:

> "the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression [which is also engaged in this case but raises no separate issue for the purposes of this judgment] is one of the foundations of such a society. Thus, it should not be interpreted restrictively." (*Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 91.)

C

90 The agreed statement of facts and issues filed on this appeal sets out the basic facts as follows:

> "1. The appellants took part in a protest against the arms trade on 5 September 2017 outside the Excel Centre in East London, protesting the biennial Defence and Security International ('DSEI') weapons fair taking D place at the centre.
>
> "2. Their protest consisted of them lying down on one side of one of the roads leading to the Excel Centre, and locking their arms onto a bar in the middle of a box ('lock box'), using a carabiner.
>
> "3. The police arrested the appellants within minutes of them beginning their protest, after initiating a procedure known as the 'five-stage process', intended to persuade them to remove themselves voluntarily from the E public highway.
>
> "4. The appellants were removed from the public highway by police removal experts approximately 90 minutes after their protest began (the delay being caused by the necessity for the police to use specialist cutting equipment safely to remove the appellants' arms from the boxes).
>
> "5. The left-hand dual lane carriageway of the public highway leading to F the Excel Centre was blocked for the duration of the appellants' protest; the right-hand dual lane carriageway, leading away from the Excel Centre remained open, as did other access routes to the Excel Centre. The evidence before the trial court of disruption caused by the appellants' protest was limited, and there was no direct evidence of disruption to non-DSEI traffic.
>
> "6. The appellants were charged with obstructing the highway contrary to section 137 of the Highways Act 1980. G
>
> "7. They were tried before District Judge (Magistrates' Court) ('DJ(MC)') Hamilton on 1 and 2 February 2018. The prosecution case was largely agreed and the appellants gave evidence.
>
> "8. DJ Hamilton delivered his reserved judgment on 7 February 2018. He acquitted the appellants on the basis that, having regard inter alia to the appellants' rights under articles 10 and 11, 'on the specific facts of these H particular cases the prosecution failed to prove to the requisite standard that the defendants' limited, targeted and peaceful action, which involved an obstruction of the highway, was unreasonable'." (Case stated, para 40.)

91 Section 137(1) of the Highways Act 1980 provides: "If a person, without lawful authority or excuse, in any way wilfully obstructs the free

passage along a highway he is guilty of an offence and liable to a fine not exceeding [level 3 on the standard scale]." A

92 As Lord Sales JSC, with whom Lord Hodge DPSC agrees, explains, this must now be interpreted so as to permit the proper exercise of the rights guaranteed by articles 10 and 11 of the Convention. Previously it was (for instance) no excuse that the obstruction occurred because the defendant was giving a speech (*Arrowsmith v Jenkins* [1963] 2 QB 561). The Human Rights Act 1998 has had a substantial effect on public order offences and made it important not to approach them with any preconception as to what is or is not lawful. As Lord Bingham of Cornhill observed in *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105, 127: "The Human Rights Act 1998, giving domestic effect to articles 10 and 11 of the European Convention, represented what Sedley LJ in *Redmond-Bate v Director of Public Prosecutions* (1999) 163 JP 789, 795, aptly called a 'constitutional shift'." B C

93 Article 11, which I set out in para 95 below, consists of two paragraphs. The first states the right and the second provides for restrictions on that right. For any exercise of the right to freedom of assembly to be Convention-compliant, a fair balance has to be struck between the exercise of those rights and the exercise of other rights by other persons. It is not necessary on this appeal to refer throughout to article 10 of the Convention (freedom of expression), as well as article 11, but its importance as a Convention right must also be acknowledged. D

94 I pause here to address a point made by Lord Sales JSC and Lord Hodge DPSC that those restrictions occur when the police intervene and so the right to freedom of assembly is delimited by the proportionality of police action. In some circumstances it may be helpful to cross-check a conclusion as to whether conduct is article 11-compliant by reference to an analysis of the lawfulness of police intervention but that cannot be more than a cross-check and it may prove to be a misleading diversion. It may for instance be misleading if the police action has been precipitate, or based on some misunderstanding or for some other reasons not itself article 11-compliant. In addition, if the proportionality of the police had to be considered, it would be relevant to consider why there was apparently no system of prior notification or authorisation for protests around the DSEI fair—a high profile and controversial event—and also what the policy of the police was in relation to any demonstrations around that event and what the police knew about the protest and so on. Moreover, the question of whether any action was article 11-compliant may have to be answered in a situation in which the police were never called and therefore never intervened. Furthermore, the proportionality of police intervention is not an ingredient of the offence, and it is not the state of mind of the police but of the appellants that is relevant. In the present case, the more appropriate question is whether the convictions of the appellants for offences under section 137(1) of the Highways Act 1980 were justified restrictions on the right to freedom of assembly under article 11 or not. E F G H

95 Article 11 provides:

> "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.

A "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 B administration of the state."

96 Thus, the question becomes: was it necessary in a democratic society for the protection of the rights and freedoms of others for the rights of the appellants to be restricted by bringing their protest to an end and charging them with a criminal offence? The fact that their protest was brought to an C end marks the end of the duration of any offence under section 137(1). They cannot, in my judgment, be convicted on the basis that had the police not intervened their protest would have been longer. They can under section 137(1) only be convicted for the obstruction of the highway that actually occurs. In fact, in respectful disagreement with the contrary suggestion made by Lord Sales JSC and Lord Hodge DPSC in Lord Sales JSC's judgment, the appellants did not in fact intend that their protest D should be a long one. If their intentions had been relevant, or the prosecution had requested that such a finding be included in the case stated, the district judge is likely to have included his finding in his earlier ruling that the appellants only wanted to block the highway for a few hours (written ruling of DJ (MC) Hamilton, para 11.)

97 It follows from the structure of article 11 and the importance of the E right that the trial judge, DJ (MC) Hamilton, was right to hold that the prosecution had to justify interference (and under domestic rules of evidence this had to be to the criminal standard). Justification for any interference with the Convention right has to be precisely proved: see *Navalnyy v Russia* (2018) 68 EHRR 25:

F "137. The court has previously held that the exceptions to the right to freedom of assembly must be narrowly interpreted and the necessity for any restrictions must be convincingly established (see *Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 142). In an ambiguous situation, such as the three examples at hand, it was all the more important to adopt measures based on the degree of disturbance caused by the impugned conduct and not on formal grounds, such as non-compliance with the G notification procedure. An interference with freedom of assembly in the form of the disruption, dispersal or arrest of participants in a given event may only be justifiable on specific and averred substantive grounds, such as serious risks referred to in paragraph 1 of section 16 of the Public Events Act. This was not the case in the episodes at hand."

The certified questions

H **98** The issues of law in the appeal, as certified by the Divisional Court, are:

(1) What is the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" when Convention rights are engaged in a criminal matter and, in

particular the lower court's assessment of whether an interference with Convention rights was proportionate? A

(2) Was deliberate physically obstructive conduct by protesters capable of constituting a lawful excuse for the purposes of section 137 of the Highways Act 1980, in circumstances where the impact of the deliberate obstruction on other highway users prevent them completely from passing along the highway for a significant period of time? B

Overview of my answers to the two certified questions

99 For the reasons explained below, my answers to the two certified questions are in outline as follows:

(1) *Standard of appellate review applying to a proportionality assessment.* The standard of appellate review applicable to the evaluation of the compliance with the Convention requirement of proportionality is that laid C down in *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079 ("*R (R)*"), at para 64, which refines the test in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 ("*In re B*"), which was relied on by the Divisional Court. *R (R)* establishes a nuanced correctness standard but in my judgment that standard is limited to the evaluative assessment of proportionality and does not extend to the underlying primary D and secondary facts to which (in this case) the test in *Edwards v Bairstow* [1956] AC 14 continues to apply. That test imposes an "unreasonableness" standard and so, unless it is shown that the findings were such that no reasonable tribunal could have made them, the primary and secondary factual findings of the trial judge will stand. Lord Hamblen and Lord Stephens JJSC agree with this: analysis of the standard applying to the findings of fact (judgment, para 49). E

(2) *Whether the exercise of articles 10 and 11 rights may involve legitimate levels of obstruction.* My answer is yes, this is possible, depending on the circumstances. I agree with what is said by Lord Hamblen and Lord Stephens JJSC on this issue and I would therefore allow this appeal. I consider that the district judge was entitled to come to the conclusions that he did. F

Certified question 1: standard of appellate review applying to proportionality assessment

100 People do not always realise it but there are many different standards of appellate review for different types of appeal. The most familiar examples of different standards of appellate review are the following. Where there is an appeal against a finding of primary fact, the G appellate tribunal in the UK would in general give great weight to the fact that the trial judge saw all the witnesses. In making findings of fact it is very hard for the trial judge to provide a comprehensive statement of all the factors which he or she took into account. Where, however, there is an appeal on a point of law, the court asks whether the trial judge's conclusion was or was not correct in law. The reason for the distinction between these H types of appellate review is clear.

101 But there are many other standards. In appeals by case stated as in the present case, the grounds of appeal are limited to points of law or an excess of jurisdiction (Magistrates' Courts Act 1980, section 111). As Lord Hamblen and Lord Stephens JJSC have explained, the standard of review is

A that laid down in *Edwards v Bairstow*. That means that the appellate court cannot set aside findings of fact unless there was no evidence on which the fact-finding tribunal could make the finding in question and no basis on which it could reasonably have come to its conclusion. In those circumstances the appellate tribunal can only substitute its finding if the fact-finding body could not reasonably have come to any other conclusion: see *Hitch v Stone* [2001] STC 214.

B

102 Standards of appellate review are not ordained by reference to prefigured criteria or similarity on technical grounds to some other case. In formulating them, the courts take into account a range of factors such as the appropriateness of a particular level of review to a particular type of case, the resources available and factors such as the need for finality in litigation and to remove incentives for litigation simply for litigation's sake. At one C end of the gamut of possibilities, there is the de novo hearing and the pure correctness standard and at the other end of the gamut there are types of cases where the approach in *Edwards v Bairstow* applies. In public law, there may be yet other factors such as the need to prevent litigation over harmless errors in administrative acts or where the result of an appeal would simply be inevitable. In some cases, appellate review is required because D there has been a failure to follow a fundamental rule, such as a requirement for a fair hearing. The appearance of justice is important. In yet other cases, if appellate courts interfere unnecessarily in the decisions of trial judges, they may reduce confidence in the judicial system which would itself be harmful to the rule of law. Over-liberality in appeals may lead to unnecessary litigation, and to the over-concentration of judicial power in the very few, which even though for well-intentioned reasons may also be inconsistent E with the idea of a common law and destructive of confidence in the lower courts. In many instances it is difficult to identify any great thirst for normative uniformity in our law, as opposed to the experiential evolution of judge-made law. In criminal cases there are further considerations, and the one that occurs to me in the present case is that these are appeals from acquittals where the trial judge (sitting without a jury) was satisfied on the F evidence before the court that no offence was committed. Courts must proceed cautiously in that situation unless there is a clear error of law which the appeal court has jurisdiction to address.

103 I would accept that it is important to have appellate review in the assessment of proportionality where this raises issues of principle. But in my judgment the assessment of proportionality does not lead to any need to G disturb the rules which apply to the primary and secondary facts on which such an appeal is based. To do so would create a divergence between the treatment of questions of fact when those facts are relied on for the purposes of a proportionality assessment and the treatment of facts relied on for disposing of all other issues in the appeal. Obviously, the same facts in the same matter must be determined in the same way. I would extend this to secondary facts drawn from the primary facts. To give an example, in the H recent case of *Google LLC v Oracle America Inc* (2021) 141 S Ct 1183 (US Supreme Court), a case involving alleged "fair use" of the declaring code of Java, a computer platform, the US Supreme Court (by a majority) treated "subsidiary facts" found by the jury as having the same effect for the purposes of appellate review as primary facts. Subsidiary facts included for

example the jury's finding of market effects and the extent of copying, leaving the ultimate legal question of fair use for the court.

104 As to the standard of appellate review of proportionality assessments, no one has suggested that this is the subject of any Strasbourg jurisprudence. The Divisional Court relied on *In re B* [2013] 1 WLR 1911, a family case. However, in *R (R)* [2018] 1 WLR 4079 this court considered and refined that test in the context of judicial review and the essence of the matter is to be found in para 64 of the judgment of Lord Carnwath JSC with whom the other members of this court agreed:

> "In conclusion, the references cited above show clearly in my view that to limit intervention to a 'significant error of principle' is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle—whether of law, policy or practice—which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be 'wrong' under CPR r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR 1344, para 34: 'the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong'."

105 The refinement by this court of the *In re B* test in *R (R)* as I see it makes it clear that the appeal is only a review. The court does not automatically or because it would have decided the proportionality assessment differently initiate a review: the appellant still has to show that the trial judge was wrong, not necessarily that there was a specific error of principle, which would be the case only in a limited range of cases. It could be an error of law or a failure to take a material factor into consideration which undermines the cogency of the decision. Moreover, the error has to be material. Harmless errors by the trial judge are excluded. This restriction on appeals is perhaps particularly important when the court is dealing with appeals against acquittals. It is still a powerful form of review unlike a marginal review which makes appellate intervention possible only in marginal situations.

106 In short, I would hold that the standard of appellate review applicable in judicial review following *R (R)* should apply to appeals by way of case stated in relation to the proportionality assessment but not in relation to the fact-finding that leads to it.

107 Since circulating the first draft of this judgment I have had the privilege of reading paras 49–54 and 78 of the joint judgment of Lord Hamblen and Lord Stephens JJSC. I entirely agree with what they say in those paragraphs. It is easy to lose sight of the fact that a proportionality assessment is in part a factual assessment and in part a normative assessment. This is so even though there is a substantial interplay between both elements. The ultimate decision on proportionality is reached as an iterative process between the two. As I read the passage from *R (R)* which I have already set

A out in para 104 of this judgment, Lord Carnwath JSC was there dealing with the normative aspects of a proportionality assessment. The assessment is normative for instance in relation to such matters as the legitimacy of placing restrictions on a protest impeding the exercise by others of their rights, and testing events by reference to hypothetical scenarios. But there is also substantial factual element to which the normative elements are applied: for B example, what actually was the legitimate aim and how far was it furthered by the action of the state and was there any less restrictive means of achieving the legitimate end.

108 In reality, no proportionality analysis can be conducted in splendid isolation from the facts of the case. In general, in discussions of proportionality, as this case demonstrates, the role of the facts, and the attributes of the fact-finding process, are under-recognised. It is necessary to C analyse the assessment in order to identify the correct standard of review on appeal applying to each separate element of the assessment, rather than treat a single test as applying to the whole. To take the latter course is detrimental to the coherence of standards of review (see para 102 above).

109 As I see it, the role of the facts is crucial in this case. The proportionality assessment is criticised by Lord Sales JSC and Lord Hodge DPSC for two reasons. First, they hold that the district judge was in D error because he failed to take into account that the relevant carriageway of the dual carriageway leading to the Centre was "completely blocked" by the appellants' actions (Lord Sales JSC's judgment, para 144). But, as para 5 of the statement of facts and issues set out in para 90 above makes clear, while the carriageway was blocked, there was no evidence that alternative routes into the Centre were not available and were not used. There was no dispute E that such routes were available. As the district judge said at para 16 of the case stated:

> "All eight defendants described their action as 'carefully targeted' and aimed at disrupting traffic headed for the DSEI arms fair. Most but not all of the defendants accepted that their actions may have caused disruption to traffic that was not headed to the DSEI arms fair. *Conversely it was not* F *in dispute that not all access routes to the DSEI arms fair were blocked by the defendants' actions and it would have been possible for a vehicle headed to the DSEI arms fair but blocked by the actions to have turned around and followed an alternative route*." (Emphasis added.)

110 The rights of other road users were to be balanced against the rights of the appellants. There was no basis, however, on which the district judge G could take into account that the carriageway was completely blocked when no member of the public complained about the blockage caused by the protest (which is of course consistent with there being convenient alternative routes) and the prosecution did not lead evidence to show that entry into the Excel Centre by alternative routes was prevented. It might even be said that if the district judge had treated the actions of the appellants as a complete H impediment to other road-users that that conclusion could be challenged under *Edwards v Bairstow*. (We are only concerned with mobile vehicular traffic: there is no reference in the case stated to any pedestrians being inconvenienced by having to find any alternative route.) Scholars have debated whether a judge dealing with a proportionality issue has a duty to investigate facts that she or he considers relevant to the proportionality

assessment, but it was not suggested on this appeal that there was such a duty, and in my judgment correctly so.

111 The second point on which Lord Sales JSC and Lord Hodge DPSC hold that the proportionality assessment of the district judge was wrong was that he did not take into account the fact that, but for the police intervention, the protest would have been longer in duration. I have already explained in para 96 above that in my judgment, on a charge of obstruction of the highway, the only time relevant for the purposes of conviction for an offence under section 137 of the Highways Act 1980 was the time when the highway was obstructed. The time cannot depend on whether the appellants would have engaged in a longer protest if they had been able to do so or, per contra, whether they believed that the police would have been more quick-fingered and brought their protest to an end more quickly.

112 This second criticism of the district judge's proportionality assessment was wrong is based on para 38(f) of the case stated which reads:

> "The action was limited in duration. I considered that it was arguable that the obstruction for which the defendants were responsible only occurred between the time of their arrival and the time of their arrests—which in both cases was a matter of minutes. I considered this since, at the point when they were arrested the defendants were no longer 'free agents' but were in the custody of their respective arresting officers and I thought that this may well have an impact on the issue of 'wilfulness' which is an essential element of this particular offence. The prosecution urged me to take the time of the obstruction as the time between arrival and the time when the police were able to move the defendants out of the road or from the bridge. Ultimately, I did not find it necessary to make a clear determination on this point as even on the Crown's interpretation the obstruction in *Ziegler* lasted about 90–100 minutes."

113 As I read that sub-paragraph, the district judge was prepared to accept that the duration of the protest was *either* the few minutes that the appellants were free to make their protest before they were arrested *or* the entire time that they were on the highway until the police managed to remove them. There was a difficult point of law (or mixed fact and law) involved ("whether the defendants were 'free agents' [or] were in the custody of" the police after their arrest). The district judge held that that point did not have to be decided because, either way, in the judgment of the district judge, the duration of the protest was limited. That was the district judge's judgment on the length of time relative to the impeding of the highway. It was not a normative assessment, but an application of the Convention requirement to achieve a fair balance of the relevant rights and of the principle determined on the second issue on this appeal (on which this court is unanimous) to the facts found by the judge who heard all the evidence. It cannot be said that the finding contains some "identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion" (see para 104 above). It was a judgment which the district judge was entitled to reach. In my judgment this court should not on established principles substitute its own judgment for that of the district judge on that evaluation of the facts. Therefore, it should not set aside his proportionality assessment on that point.

Certified question 2: Convention-legitimacy of obstruction and concluding observations on the district judge's fact-finding in this case

114 As I have already explained, before the Human Rights Act 1998 came into force an offence under section 137(1) of the Highway Act 1980 or its predecessor, section 121 of the Highway Act 1959, could be committed by any obstruction. Now that the Human Rights Act 1998 has been enacted and brought into force, the courts interpret section 137 conformably with the Convention and the jurisprudence of the Strasbourg court. Under that jurisprudence, the state must show a certain degree of tolerance to protesters and it is accepted that in some circumstances protesters can obstruct the highway in the course of exercising their article 11 right. Thus, for example, the Strasbourg court held in *Kuznetsov v Russia* (Application No 10877/04) (unreported) 23 October 2008, at para 44:

> "Finally, as a general principle, the court reiterates that any demonstration in a public place inevitably causes a certain level of disruption to ordinary life, including disruption of traffic, and that it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by article 11 of the Convention is not to be deprived of all substance."

115 In the case stated, the trial judge noted that at trial the prosecution submitted that any demonstration that constituted a de facto obstruction of the highway lost the protection of articles 10 and 11 as it was unlawful. For the reasons he gave, the trial judge rejected that proposition and in my judgment he was correct to do so.

116 I agree with Lord Hamblen and Lord Stephens JJSC's thorough review of the considerations relied on by the trial judge. I have in relation to the first certified question dealt with the two criticisms which Lord Sales JSC and Lord Hodge DPSC consider were rightly made. So, I make only some brief concluding points at this stage.

117 Overall, in my respectful view, the district judge made no error of law in not finding facts on which no evidence was led, or if he failed to make a finding of secondary fact which it was not suggested at any stage was required to be made. Moreover, it appears that the prosecution made no representations about the content of the draft case as it was entitled to do under Crim PR r 35.3.6. Alternatively, if new facts are relevant to a proportionality assessment it would seem to me to be unfair to the appellants for an assessment now to be carried out in the manner proposed by Lord Sales JSC and Lord Hodge DPSC, which could enable the prosecution to adduce new evidence or to seek additional findings of fact, which go beyond the case stated.

Conclusion

118 For the reasons given above, I would allow this appeal and make the same order as Lord Hamblen and Lord Stephens JJSC.

LORD SALES JSC (dissenting in part) (with whom **LORD HODGE DPSC** agreed)

119 This case concerns an appeal to the Divisional Court (Singh LJ and Farbey J) by way of case stated from the decision of District Judge Hamilton

("the district judge") in the Stratford Magistrates' Court, in relation to the trial of four defendants (whom I will call the appellants) on charges of offences under section 137 of the Highways Act 1980 ("section 137"). The case stated procedure is governed by section 111 of the Magistrates' Courts Act 1980 and section 28A of the Senior Courts Act 1981. So far as relevant, section 111 only permits the appeal court to allow an appeal if the decision is "wrong in law": section 111(1).

120 I respectfully disagree with what Lord Hamblen and Lord Stephens JJSC say in relation to the first question of law certified by the Divisional Court, regarding the test to be applied by an appellate court to an assessment of the decision of the trial court in respect of a statutory defence of "lawful excuse" under section 137 in a case like this, where the issue on which the defence turns is the proportionality of the intervention by the police. I emphasise this last point, because there will be cases where the defence of "lawful excuse" does not depend on an assessment of what the police do.

121 The second question of law certified by the Divisional Court concerns whether, in principle, a "lawful excuse" defence under section 137 could ever exist in a case involving deliberate physically obstructive conduct by protesters designed to block a highway, where the obstruction is more than de minimis. As to that, I agree with what Lord Hamblen and Lord Stephens JJSC say at paras 62–70. In principle, a "lawful excuse" defence might exist in such a case. Whether it can be made out or not will depend on whether the intervention by police to clear the highway involves the exercise of their powers in a proportionate manner. In general terms, I agree with the discussion of Lord Hamblen and Lord Stephens JJSC at paras 71–78 regarding factors which are relevant to assessment of proportionality in this context.

122 I respectfully disagree with Lord Hamblen and Lord Stephens JJSC regarding important parts of their criticism of the judgment of the Divisional Court. In my opinion, the Divisional Court was right to identify errors by the district judge in his assessment of proportionality. However, in my view the Divisional Court's own assessment of proportionality was also flawed. I would, therefore, have allowed the appeal on a more limited basis than Lord Hamblen and Lord Stephens JJSC, to require that the case be remitted to the magistrates' court.

Human rights compliant interpretation of section 137 of the Highways Act

123 Section 3(1) of the Human Rights Act 1998 ("the HRA") requires a statutory provision to be read and given effect in a way which is compatible with the Convention Rights set out in Schedule 1 to the HRA, so far as it is possible to do so. Schedule 1 sets out relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR"), including article 10 (the right to freedom of expression) and article 11 (the right to freedom of peaceful assembly). Subject to limits which are not material for this appeal, section 6(1) of the HRA makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights. The police are a public authority for the purposes of application section 6. So is a court: section 6(3)(a).

124 The Divisional Court construed section 137 in light of the interpretive obligation in section 3(1) of the HRA and having regard to the

A duties of public authorities under section 6 of that Act. No one has criticised their construction of section 137 and I would endorse it. As the Divisional Court held (paras 61–65), the way in which section 137 can be read so as to be compatible with the Convention rights in article 10 and article 11 is through the interpretation of the phrase "without lawful . . . excuse" in section 137. In circumstances where a public authority such as the police would violate the rights of protesters under article 10 or article 11 by
B arresting or moving them, and hence would act unlawfully under section 6(1) of the HRA, the protesters will have lawful excuse for their activity. Conversely, if arrest or removal would be a lawful act by the police, the protesters will not have a lawful excuse.

125 This interpretation of section 137 means that the commission of an offence under it depends upon the application of what would otherwise be
C an issue of public law regarding the duty of a public authority such as the police under section 6(1) of the HRA. Typically, as in this case, this will turn on whether the police were justified in interfering with the right of freedom of expression engaged under article 10(1) or the right to peaceful assembly under article 11(1), under article 10(2) or article 11(2) respectively. The applicable analysis is well-established. Importantly, for present purposes, the interference must be "necessary in a democratic society" in pursuance of
D a specified legitimate aim, and this means that it must be proportionate to that aim. The four-stage test of proportionality applies: (i) Is the aim sufficiently important to justify interference with a fundamental right? (ii) Is there a rational connection between the means chosen and the aim in view? (iii) Was there a less intrusive measure which could have been used without compromising the achievement of that aim? (iv) Has a fair balance been
E struck between the rights of the individual and the general interest of the community, including the rights of others? The last stage is sometimes called proportionality stricto sensu.

126 In this case the police acted to pursue a legitimate aim, namely the protection of the rights and freedoms of others in being able to use the slip road. The first three stages in the proportionality analysis are satisfied. As will be typical in this sort of case, it is stage (iv) which is critical. Did the
F arrest and removal of the protesters strike a fair balance between the rights and interests at stake?

127 At a trial for an alleged offence under section 137 it will be for the prosecution to prove to the criminal standard that the defendant did not have a lawful excuse, meaning in a case like the present that the public authority did not act contrary to section 6(1) of the HRA in taking action
G against him or her. But that does not change the conceptual basis on which the offence under section 137 depends, which involves importation of the test for breach of a public law duty on the part of the police.

128 It is also possible to envisage a public law claim being brought by protesters against the police in judicial review, say in advance of a protest which is about to be staged, asserting their rights under article 10 and article 11, alleging that their arrest and removal by the police would be in
H breach of those rights and hence in breach of duty under section 6(1) of the HRA, and seeking declaratory or injunctive relief accordingly; or, after the intervention of the police, a claim might be brought pursuant to section 8 of the HRA for damages for breach of those rights. The issues arising in any such a claim would be the same as those arising in a criminal trial of an

alleged offence under section 137 based on similar facts, although the burden and standard of proof would be different.

The role of the district judge and the role of the Divisional Court on appeal

129 The district judge was required to apply the law correctly. He found that the police action against the protesters was disproportionate, so that they had a good defence under section 137. If, on proper analysis, the police action was a proportionate response, this was an error of law; so also if the district judge's reasoning in support of his conclusion of disproportionality was flawed in a material respect. Conversely, in a case where the criminal court found that the police action was proportionate for the purposes of article 10 and article 11 and therefore held that a protester had no "lawful excuse" defence under section 137, but on proper analysis the action was disproportionate, that also would be an error of law open to correction on appeal.

130 It is well established that on the question of proportionality the court is the primary decision-maker and, although it will have regard to and may afford a measure of respect to the balance of rights and interests struck by a public authority such as the police in assessing whether the test at stage (iv) is satisfied, it will not treat itself as bound by the decision of the public authority subject only to review according to the rationality standard: see *A v Secretary of State for the Home Department* [2005] 2 AC 68 ("the *Belmarsh* case"), paras 40–42 and 44 (per Lord Bingham of Cornhill, with whom a majority of the nine-member Appellate Committee agreed); *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 11; *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, paras 29–31 (Lord Bingham) and 68 (Lord Hoffmann); and *R (Aguilar Quila) v Secretary of State for the Home Department* [2012] 1 AC 621, paras 46 (Lord Wilson JSC), 61 (Baroness Hale of Richmond JSC) and 91 (Lord Brown of Eaton-under-Heywood JSC) (Lord Phillips of Worth Matravers PSC and Lord Clarke of Stone-cum-Ebony JSC agreed with Lord Wilson and Baroness Hale JJSC). This reflects the features that the Convention rights are free-standing rights enacted by Parliament to be policed by the courts, that they are in the form of rights which are enforced by the European Court of Human Rights on a substantive basis rather than purely as a matter of review according to a rationality standard, and that the question whether a measure is proportionate or not involves a more searching investigation than application of the rationality test. Thus, in relation to the test of proportionality stricto sensu, even if the relevant decision-maker has had regard to all relevant factors and has reached a decision which cannot be said to be irrational, it remains open to the court to conclude that the measure in question fails to strike a fair balance and is disproportionate.

131 Similarly, a lower court or tribunal will commit an error of law where, in a case involving application of the duty in section 6(1) of the HRA, it holds that a measure by a public authority is disproportionate where it is proportionate or that it is proportionate where it is disproportionate. Where the lower court or tribunal has directed itself correctly as to the approach to be adopted in applying a qualified Convention right such as article 10 or article 11, has had proper regard to relevant considerations and has sought to strike a fair balance between rights and interests at the fourth stage of the

A proportionality analysis an appellate court will afford an appropriate degree of respect to its decision. However, a judgment as to proportionality is not the same as a decision made in the exercise of a discretion, and the appellate court is not limited to assessing whether the lower court or tribunal acted rationally or reached a conclusion which no reasonable court or tribunal could reach: see the *Belmarsh* case, para 44. There was a statutory right of appeal from the tribunal in that case only on a point of law. Lord Bingham
B noted at para 40 that in the judgment of the European Court of Human Rights in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 "the traditional *Wednesbury* approach to judicial review . . . was held to afford inadequate protection" for Convention rights and that it was recognised that "domestic courts must themselves form a judgment whether a Convention right has been breached" and that "the intensity of review is somewhat
C greater than under the rationality approach" (citing *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, paras 23 and 27). At para 44, Lord Bingham held that the finding of the tribunal on the question of proportionality in relation to the application of the ECHR could not be regarded as equivalent to an unappealable finding of fact. As he explained:

> "The European Court does not approach questions of proportionality
D as questions of pure fact: see, for example, *Smith and Grady v United Kingdom* . . . Nor should domestic courts do so. The greater intensity of review now required in determining questions of proportionality, and the duty of the courts to protect Convention rights, would in my view be emasculated if a judgment at first instance on such a question were conclusively to preclude any further review [i e by an appellate court]."

E **132** Since that decision, this court has developed the principles to be applied to determine when an appellate court may conclude that a lower court or tribunal has erred in law in its proportionality analysis. So far as concerns cases involving a particular application of a Convention right in specific factual circumstances without wide normative significance, such as in the present case, it has done this by reference to and extrapolation from
F the test set out in CPR r 52.11 (now contained in rule 52.21). An appellate court is entitled to find an error of law if the decision of the lower court or tribunal is "wrong", in the sense understood in that provision: see *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, paras 88–92 (Lord Neuberger of Abbotsbury PSC, with whom Lord Wilson and Lord Clarke JJSC agreed); *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079, paras 53–65 (Lord Carnwath JSC,
G explaining that the appellate court is not restricted to intervening only if the lower court has made a significant error of principle); *R (Z) v Hackney London Borough Council* [2020] 1 WLR 4327, paras 56 and 74. In the latter case it was explained at para 74 that the arguments for a limited role for the appellate court in a case concerned with an assessment of proportionality in a case such as this are of general application and the same approach applies whether or not CPR Pt 52.21 applies. This is an approach
H which limits the range of cases in which an appellate court will intervene to say that a proportionality assessment by a lower court or tribunal involved an error of law, but still leaves the appellate court with a greater degree of control in relation to the critical normative assessment of whether a measure was proportionate or not than an ordinary rationality approach would do.

In determining whether the lower court or tribunal has erred in law in its assessment of proportionality, it may be relevant that it has had the advantage of assessing facts relevant to the assessment by means of oral evidence (as in *In re B (A Child)*); but this is not decisive and the relevant approach on appeal is the same in judicial review cases where all the evidence is in writing: see *R (R) v Chief Constable of Greater Manchester Police* and *R (Z) v Hackney London Borough Council*.

133 In my judgment, the approach established by those cases also applies in the present context of an appeal by way of case stated from the decision of a magistrates' court. Where, as here, the lower court has to make a proportionality assessment for the purposes of determining whether there has been compliance by a public authority with article 10 or article 11, an appellate court is entitled, indeed obliged, to find an error of law where it concludes that the proportionality assessment by the lower court was "wrong" according to the approach set out in those cases. The Divisional Court directed itself that it should follow that approach. In my view, it was right to do so.

134 I respectfully disagree with Lord Hamblen and Lord Stephens JJSC in their criticism of the Divisional Court in this regard. In my view, it is not coherent to say that an appellate court should apply a different approach in the context of an appeal by way of case stated as compared with other situations. The legal rule to be applied is the same in each case, so it is difficult to see why the test for error of law on appeal should vary. The fact that an appeal happens to proceed by one procedural route rather than another cannot, in my view, change the substantive law or the appellate approach to ensuring that the substantive law has been correctly applied.

135 By way of illustration of this point, as observed above, essentially the same proportionality issue could arise in judicial review proceedings against the police, to enforce their obligation under section 6(1) of the HRA directly rather than giving it indirect effect via the interpretation of section 137. The approach on an appeal in such judicial review proceedings would be that set out in *In re B (A Child)* and the cases which have followed it. To my mind, it makes little sense to say that this same issue regarding the lawfulness of the police's conduct should be subject to a different test on appeal. The scope for arbitrary outcomes and inconsistent rulings is obvious, and there is no justification for adopting different approaches.

136 To say, as the Divisional Court did, that the proper test of whether the district judge had reached a decision which was wrong in law on the issue of proportionality of the action by the police is that derived from *In re B (A Child)* is not inconsistent with the leading authority of *Edwards v Bairstow* [1956] AC 14. That case involved an appeal by way of case stated on a point of law from a decision of tax commissioners regarding application of a statutory rule which imposed a tax in respect of an adventure in the nature of trade. The application of such an open-textured rule depended on taking into account a number of factors of different kinds and weighing them together. As Lord Radcliffe said (p 33), it was a question of law what meaning was to be given to the words of the statute; but since the statute did not supply a precise definition of the word "trade" or a set of rules for its application in any particular set of circumstances, the effect was that the law laid down limits "within which it would be permissible to say that a 'trade' [within the meaning of the statutory rule] does or does not

A exist". If a decision of the commissioners fell within those limits, it could not be said to involve an error of law. The decision to decide one way or the other would be a matter of degree which could, in context, best be described as a question of fact. Lord Radcliffe then stated the position as follows (p 36):

> "If the case [as stated] contains anything ex facie which is bad law and
> B which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that, this has been responsible for the determination. So there, too,
> C there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test.
> D For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

137 In a well-known passage in *Council of Civil Service Unions v*
E *Minister for the Civil Service* [1985] AC 374, 410–411, Lord Diplock explained that, as with *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), Lord Radcliffe's explanation of an inferred error of law not appearing ex facie was now to be regarded as an instance of the application of a general principle of rationality as a ground of review or the basis for finding an error of law.
F However, as stated by Lord Bingham in the *Belmarsh* case and other authorities referred to above, irrationality may be insufficient as a basis for determining whether there has been an error of law in a case involving an assessment of proportionality. It may be that in such an assessment a lower court or tribunal has had proper regard to all relevant considerations, has not taken irrelevant considerations into account, and has reached a conclusion as to proportionality which cannot be said to be irrational, yet it
G may still be open to an appellate court to say that the assessment was wrong in the requisite sense. If it was wrong, that constitutes an error of law which appears on the face of the record. The difference between *Edwards v Bairstow* and a case involving an assessment of proportionality for the purposes of the ECHR and the HRA is that the legal standard being applied in the former is the standard of rationality and in the latter is the standard of
H proportionality.

138 Having said all this, however, the difference between application of the ordinary rationality standard on an appeal to identify an error of law by a lower court or tribunal and the application of the proportionality standard for that purpose in a context like the present should not be exaggerated. As Lord Carnwath JSC said in *R (R) v Chief Constable of Greater Manchester*

Police [2018] 1 WLR 4079 at para 64 (in a judgment with which the other members of the court agreed) of the approach to a proportionality assessment to be adopted on appeal, in a passage to which Lord Hamblen and Lord Stephens JJSC also draw attention:

> "to limit intervention to a 'significant error of principle' is too narrow an approach, at least if it is taken as implying that the appellate court has to point to a specific principle—whether of law, policy or practice—which has been infringed by the judgment of the court below. The decision may be wrong, not because of some specific error of principle in that narrow sense, but because of an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be 'wrong' under CPR r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation. As Elias LJ said in *R (C) v Secretary of State for Work and Pensions* [2016] PTSR 1344, para 34: 'the appeal court does not second guess the first instance judge. It does not carry out the balancing task afresh as though it were rehearing the case but must adopt a traditional function of review, asking whether the decision of the judge below was wrong . . .' "

However, this is not to say that the standard of rationality and the standard of proportionality are simply to be treated as the same.

139 I find myself in respectful disagreement with para 44 of the judgment of Lord Hamblen and Lord Stephens JJSC. It seems to me that the proper approach for an appellate court must inevitably be affected by the nature of the issue raised on the appeal. If the appeal is based on a pure point of law, the appellate court does not apply a rationality approach. The position is different if the appeal concerns a finding of fact. This is recognised in the speeches in *Edwards v Bairstow*. The effect of the rights-compatible interpretation of section 137 pursuant to section 3 of the HRA is that a public law proportionality analysis is introduced into the meaning of "lawful excuse" in that provision, and in my view the proper approach for an appellate court to apply in relation to that issue is the one established for good reason in the public law cases.

140 It is clearly right to say, as Lady Arden JSC emphasises, that an assessment of proportionality has to be made in the light of the facts found by the court, but in my opinion that does not mean that the assessment of proportionality is the same as a finding of fact nor that the same approach applies on an appeal for identifying an error of law. As the European Court of Human Rights explained in *Vogt v Germany* (1995) 21 EHRR 205, in setting out the principles applicable in relation to reviewing a proportionality assessment under article 10 (para 52(iii), omitting footnotes):

> "The court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent state exercised its discretion reasonably, carefully and in good faith; what the court has to do is to look at the interference complained of in the light of the case as a whole and

A determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In so doing, the court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts."

B Lord Bingham explained in the *Belmarsh* case that a domestic court reviewing the proportionality of action by a public body should follow the same approach as the Strasbourg court.

The decision of the district judge

141 I turn, then, to the decision of the district judge in applying C section 137, in order to assess whether the case stated discloses any error of law.

142 Assessment of the proportionality of police action in a case like this is fact sensitive and depends on all the circumstances. In broad terms, the interest of protesters in expressing their ideas has to be weighed against the disruption they cause to others by their actions, with account also being taken of other options open to them to express their ideas in an effective D way: see *Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 97. The district judge directed himself correctly as to the interpretation of section 137 and the significance of an assessment of the proportionality of the intervention by the police.

143 However, I consider that two of the criticisms of the decision of the district judge made by the Divisional Court were rightly made. First, at E para 38(d) of the statement of case, the district judge said that the appellants' actions were carefully targeted and thus, on the face of his assessment of proportionality, failed to bring into account in the way he should have done the fact that the relevant highway, even though just a sliproad leading to the Excel Centre, was completely obstructed by them as to that part of the dual carriageway (see para 112 of the judgment of the Divisional Court). I agree with the Divisional Court that, in the context of an assessment of the F proportionality of police action to clear the highway, this was a highly material feature of the case. Since it was not referred to by the district judge, he failed to take account of "a material factor" (in the words of Lord Carnwath JSC) or a relevant consideration (as it is usually referred to in the application of *Wednesbury* and *Edwards v Bairstow*), and accordingly his assessment of proportionality was flawed for that reason.

G **144** Secondly, at para 38(f) of the statement of case, the district judge said that the action was limited in duration and gave this feature of the case significant weight in his assessment of proportionality. At para 114 of its judgment, the Divisional Court said:

> "In our view, that analysis displays an erroneous approach. The reason why the obstruction did not last longer was precisely because the police intervened to make arrests and to remove the respondents from H the site. If they were exercising lawful rights, they should not have been arrested or removed. They might well have remained at the site for much longer. On any view, as was common ground, the duration of the obstruction of the highway was not de minimis. Accordingly, the fact is that there was a complete obstruction of the highway for a not

> insignificant amount of time. That is highly significant, in our view, to the proper evaluative assessment which is required when applying the principle of proportionality."

I agree. In my view, the district judge's assessment left out what was one of the most significant features of the action taken by the appellants. They went to the sliproad with special equipment (the specially constructed boxes to which they attached themselves) designed to make their action as disruptive and difficult to counter as was possible. They intended to block the highway for as long as possible. The fact that their action only lasted for about 90–100 minutes was because of the swift action of the police to remove them, which is the very action the proportionality of which the district judge was supposed to assess. I find it difficult to see how the action of the police was made disproportionate because it had the effect of reducing the disruption which the appellants intended to produce.

145 Therefore, the district judge left out of his assessment this further material factor or relevant consideration; alternatively, one could say that he took into account or gave improper weight to what was in context an immaterial factor, namely the short duration of the protest as produced by the very intervention by the police which was under review.

146 In my opinion, by reason of both these material errors by the district judge, the proportionality assessment by him could not stand. The case as stated discloses errors of law. This is so whether one applies ordinary *Wednesbury* and *Edwards v Bairstow* principles according to the rationality standard or the enhanced standard of review required in relation to a proportionality assessment and the appellate approach in *In re B (A Child)* and the cases which follow it. In fact, the Divisional Court held both that the district judge had erred in a number of specific respects in his assessment of proportionality and that his overall assessment was "wrong" in the requisite sense: paras 117 and 129.

The decision of the Divisional Court

147 Since the district judge had made the material errors to which I have referred, in my judgment the Divisional Court was right to allow the appeal pursuant to section 111(1) of the Magistrates' Courts Act 1980 on the grounds that the decision disclosed errors of law.

148 The question then arises as to what the Divisional Court should have done in these circumstances. Here, the fact that the appeal was by way of case stated is significant. The court hearing such an appeal may determine that there has been an error of law by the lower court but also find that the facts, as stated, do not permit the appeal court to determine the case for itself. Section 28A(3) of the Senior Courts Act 1981 provides in relevant part that:

> "The High Court shall hear and determine the question arising on the case . . . and shall— (a) reverse, affirm or amend the determination in respect of which the case has been stated; or (b) remit the matter to the magistrates' court . . . with the opinion of the High Court, and may make such other order in relation to the matter (including as to costs) as it thinks fit."

149 The Divisional Court considered that, having allowed the appeal, it was in a position to reverse the determination regarding the application of

section 137 in respect of which the case had been stated. The Divisional Court made its own determination that the intervention of the police had been a proportionate interference with the appellants' rights under article 10(1) and article 11(1), with the result that the appellants had no "lawful excuse" for their activity for the purpose of section 137, and therefore substituted convictions of the appellants for offences under that provision.

150 In my judgment, this went too far. As I have said, the assessment of proportionality of police action against protesters in a case like this is highly fact-sensitive. In my view, the facts as set out in the stated case did not allow the Divisional Court simply to conclude that the police action was, in all the circumstances of the case, proportionate. The decision to be made called for a more thorough assessment of the disruption in fact achieved (and likely to have been achieved, if the police did not intervene) by the protesters, the viability and availability of other access routes to the Excel Centre, and the availability to the protesters of other avenues to express their opinions (such as by way of slow marching, as it appears the police had facilitated for others at the location). The Divisional Court did not have available to it the full evidence heard by the district judge, only a summary as set out in the case stated which disclosed his error of law. Therefore, the proper course for the Divisional Court should have been to allow the appeal but to remit the matter to the magistrates' court for further examination of the facts. If the case had been remitted to the district judge, he could have approached the case in relation to the issue of proportionality on a proper basis and set out further findings based on the evidence presented to him. With the passage of time, that might not now be feasible, in which case the effect would have been that there was a mistrial and further examination of the facts would have to be by way of a retrial.

151 I would therefore have allowed the appeal against the order of the Divisional Court to this extent. The order I would have made is that the appeal against the determination by the Divisional Court, that the appeal against the district judge's decision be allowed, should be dismissed, but that an order for remittal to the magistrates' court should be substituted for the convictions which the Divisional Court ordered should be entered.

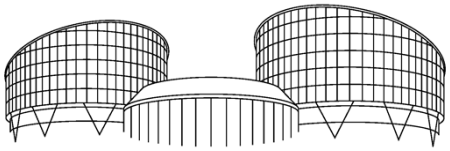
152 In addition, I respectfully consider that the Divisional Court's own assessment of proportionality (on the basis of which it determined that the protesters had committed the offences under section 137 with which they were charged) was flawed in another respect. Unlike Lord Hamblen and Lord Stephens JJSC, I do not myself read the Divisional Court as saying that points (a) to (c) in para 38 of the case stated were of little or no relevance; at para 111 of its judgment the court only said that none of those points "prevents the offence of obstruction of the highway being committed in a case such as this". The Divisional Court correctly identified point (e) as significant and made a correct evaluation of point (g). However, I agree with Lord Hamblen and Lord Stephens JJSC that the Divisional Court's assessment of point (h) at para 116 was flawed: para 80 above and *City of London Corpn v Samede* [2012] PTSR 1624, paras 39–41. This court is not in a position to assess proportionality for itself, given the limited factual picture which emerges from the case stated. Again, the conclusion I would draw is that the appeal to this court should be allowed to the limited extent I have indicated.

153 I would answer the first question certified by the Divisional Court (para 7(1) above) as follows: in a case like the present, where the defence of "lawful excuse" under section 137 depends on an assessment of the proportionality of the police response to the protest, the correct approach for the court on an appeal is that laid down in *In re B (A Child)* and the cases which follow and apply it.

154 I would answer the second question certified by the Divisional Court (para 7(2) above) in the affirmative: deliberate physically obstructive conduct by protesters, where the impact of the deliberate obstruction on other highway users is more than de minimis, and prevents them, or is capable of preventing them, from passing along the highway, is in principle capable of being something for which there is a "lawful excuse" for the purposes of section 137. Whether it does so or not will depend on an assessment of the proportionality of the police response in seeking to remove the obstruction.

Appeal allowed.
Decision of Divisional Court set aside.
Decision of district judge restored.

SHIRANIKHA HERBERT, Barrister



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF EKREM CAN AND OTHERS v. TURKEY

(Application no. 10613/10)

JUDGMENT

Art 11 read in light of Art 10 • Freedom of peaceful assembly • Disproportionately lengthy pre-trial detention and prison sentences for involvement in non-violent courthouse protest disturbing the orderly administration of justice • Margin of appreciation wide but not unlimited
Art 6 § 1 (criminal) and Art 6 § 3 (c) • Fair hearing • Domestic courts' failure to examine conditions surrounding alleged waiver of applicants' right to a lawyer while in police custody • Use of evidence given in the absence of a lawyer to convict the applicants • Failure to observe necessary procedural safeguards • Trial rendered unfair as a whole

STRASBOURG

8 March 2022

FINAL

05/09/2022

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Ekrem Can and Others v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Jon Fridrik Kjølbro, *President,*
Carlo Ranzoni,
Branko Lubarda,
Pauliine Koskelo,
Jovan Ilievski,
Gilberto Felici,
Saadet Yüksel, *judges,*
and Hasan Bakırcı, *Deputy Section Registrar,*

Having regard to:

the application (no. 10613/10) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by fifteen Turkish nationals, listed in the appendix ("the applicants"), on 3 February 2010;

the decision to give notice to the Turkish Government ("the Government") of the complaints concerning the alleged unfairness of the criminal proceedings against the applicants under Article 6 of the Convention and the alleged breach of their right to freedom of assembly under Article 11 of the Convention, and to declare inadmissible the remainder of the complaints;

the parties' observations;

Having deliberated in private on 14 February 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The application concerns the alleged breach of the applicants' right to freedom of assembly under Article 11 of the Convention on account of their conviction for having staged a protest in a courthouse, during which they chanted slogans, displayed a banner, threw leaflets around, and locked themselves in one of its corridors, thereby impeding hearings that were taking place. It further concerns the fairness of criminal proceedings against the applicants under Article 6 of the Convention owing to the alleged invalidity of their waiver of their right to a lawyer when making statements to the police during the preliminary investigation stage.

THE FACTS

2. The applicants' personal details are set out in the appendix. The applicants were represented by Mr M. Erbil and Mrs N. Selçuk, lawyers practising in Istanbul.

3. The Government were represented by their Agent, Mr Hacı Ali Açıkgül, Head of the Department of Human Rights of the Ministry of Justice of the Republic of Turkey.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. On 18 November 2003 at around 10.50 a.m. a group of twenty-three individuals, including the applicants, entered the corridor of the third floor of the Sultanahmet Courthouse in Istanbul, where the registries and hearing rooms of several courts were located, while some civilians and court officials were present in the same corridor . The group began chanting slogans such as "End the Isolation" ("*Tecride Son*"), "No to invasion" ("*İşgale Hayır*"), "Close İmralı Prison" ("*İmralı Cezaevi Kapatılsın*"), "We have not surrendered and we will not surrender" ("*Teslim olmadık olmayacağız*"), "Salute, salute a thousand salutes to İmralı" ("*Selam, Selam, İmralıya Bin Selam*"), "Freedom to Öcalan" ("*Öcalan'a Özgürlük*") and "The messenger of peace is in İmralı" ("*Barış elçisi İmralı'da*").

6. Subsequently, some members of the group closed the door to the corridor and locked themselves in the corridor by toppling metal cupboards behind the door. They then hung a large banner from one of the windows of the corridor and threw leaflets outside. The banner read: "A democratic solution to the Kurdish problem; İmralı Prison must be shut down" ("*Kürt sorununa demokratik çözüm, İmralı Cezaevi kapatılsın*"), and "Youth Initiative for Social Peace" ("*Toplumsal Barış için Gençlik Girişimi*"). The leaflets contained critical remarks concerning the policies of the governing Justice and Development Party. The applicants later submitted to the trial court that they had locked themselves in and that they had originally planned to make a press statement in front of the courthouse, but that they had entered the building owing to the rain. The applicants furthermore submitted to the trial court that they had attempted to go outside again to make the press statement, but that certain civilians had attacked them with a view to lynching them, forcing them to seek shelter in the closest corridor. The door of the corridor had then been shut behind them and as the door had only had one handle, they had not been able to open it from the corridor.

7. According to witness statements, the protesters warned other individuals present in the corridor and inside the offices that they were going to stage a protest but that there was no need to be afraid. It appears that some of the witnesses locked themselves in the hearing rooms and some in the registries during the protest by blocking the entrances to those rooms. The witnesses mainly reported hearing repetitive slogans being chanted outside in the corridor, but they reported that they had come to no harm. Similarly, the incident report of 18 November 2003 drawn up by the Deputy Public Prosecutor of Istanbul indicated that no material damage had been caused in the corridor or to its furniture.

8. The protesters, including the applicants, continued their actions for about an hour until the police broke in and arrested them. According to the Government's version of events the protestors resisted the officers during their arrest by locking arms, prompting the police to use tear gas to disperse them. The applicants contested that version of events, arguing that they had surrendered to the police but that they had nevertheless been beaten at the time of their arrest.

9. Following their arrest, the applicants were first taken to Haseki Hospital and then examined by the Forensic Medicine Institute. According to the medical reports added to the case file, all of the applicants, except for Mehmet Şahin, Özgür Tan and Mahmut Cengiz, presented signs of physical trauma, either at the beginning or at the end of their custody. In particular, even though the medical reports drawn up in respect of the applicants Ekrem Can and Fikret Avras at the beginning of their time in police custody did not note any signs of ill-treatment, the reports compiled at the end of that time concluded that they had been unfit – for a period of one day – for work.

10. Between 18 and 22 November 2003, the applicants were held in police custody on terrorism-related charges and were interviewed by the Anti-Terrorism branch of the Istanbul Security Directorate. According to some documents in the case file, most of the applicants met their lawyer before and after giving statements to the police. According to other forms bearing the signature of each applicant (save for the applicant Mehmet Şahin), the applicants chose to give their statements without the presence of a lawyer. Those forms also indicated that each applicant had been informed of his rights under Article 135 of the former Code of Criminal Procedure and that a copy of a form explaining their rights had been handed to each of them. The forms did not bear the time at which they had been signed, but the dates were recorded by hand.

11. The applicant Mehmet Şahin was the only applicant who requested the assistance of a lawyer during the taking of his statement by the police. A certain A.P., who is not one of the applicants, also appears to have requested the assistance of a lawyer. Both the applicant Mehmet Şahin and A.P. were interviewed in the presence of a lawyer and remained silent before the police. The officers involved in the questioning of Mehmet Şahin and A.P. were not the same as those involved in the questioning of the other applicants. The applicant Kerim Taştan also exercised his right to remain silent, without requesting the assistance of a lawyer.

12. The rest of the applicants gave statements to the police between 19 and 21 November 2003, in the absence of a lawyer. Their statements were transcribed on printed forms, the first page of which was filled in to indicate *inter alia* that they were suspected of, *inter alia*, acting on behalf of the PKK (the Workers' Party of Kurdistan), an illegal organisation. The same page also included a printed message that stated, *inter alia*, that the person being questioned had the right to remain silent and the right to choose a lawyer. It

appears from the forms that all the applicants refused legal assistance, as on each of their forms the box entitled "No lawyer sought" was marked with a printed "X". Moreover, according to these records, all the applicants, except for one, also stated that they did not wish to have a lawyer or to remain silent.

13. The applicant Fikret Avras met a different lawyer respectively on 19 November 2003 at 10.35 a.m. and on 21 November 2003 at 9.30 p.m., and the applicant Ekrem Can met a lawyer on 19 November 2003 at 11.20 a.m.

14. The applicants, except for Kerim Taştan and Mehmet Şahin (who did not give statements to the police), acknowledged having wilfully participated in the protest, pursuant to decisions made by the council of the PKK. Many of the applicants also acknowledged having taken part in other protests organised in support of the PKK.

15. On 21 November 2003 the applicants Ekrem Can and Fikret Avras additionally participated in an "identity parade" conducted with photographs (*fotoğraftan teşhis*) and the applicants Ekrem Can, Fikret Avras and Mahmut Cengiz were also taken to certain locations for a reconstruction of the events in question (*yer gösterme*), during which they were not assisted by a lawyer and acknowledged having been involved in throwing Molotov cocktails at police vehicles, throwing stones at public buses, and attacking a bank on different occasions.

16. The case file contains the copies of two separate handwritten records (*tutanak*). The first record read as follows:

> "On 18 November 2003 I was assigned to represent the defendant, Ekrem Can, by the [Istanbul] Bar Association.
>
> The defendant, Ekrem Can, stated during our meeting, which was held on 19 November 2003 at 11.34 a.m. at the Anti-Terrorism branch of the Istanbul Security Directorate, that he would not give statements to the police, he would not attend any investigative acts without a lawyer and that he would exercise his right to remain silent; this record was prepared and signed together. 19 November 2003 (time: 11.40 a.m.)
>
> Suat Eren (Lawyer) Ekrem Can (arrestee)
>
> Despite this record, there exists a statement record showing that statements were taken [from Ekrem Can]."

17. The second record read as follows:

> "On 18 November 2003 I was assigned by the Bar Association to represent the defendant, Ekrem Can. On 20 November 2003 at 9 p.m. I attempted to hold a meeting with the defendant on the premises of the [Anti-Terrorism] branch of the Istanbul police headquarters. I was prevented from meeting my client on the basis of the usual pretext that 'he was not present on the premises [because] he had been taken outside for the reconstruction of events'.
>
> I have previously been ["fobbed off"] from holding meetings with similar excuses.
>
> The drawing up of this report has been deemed necessary. 20 November 2003, 9 p.m.
>
> Suat Eren (Lawyer) Sami Almaz (Lawyer) "

18. At the end of their period in police custody on 22 November 2003, the applicants were taken to the Forensic Medicine Institute for medical examination. It was found that the applicants Ekrem Can, Fikret Avras, Şenol Akyaz, Ahmet Işık, Güven Öztürk, Kerim Taştan, Muhlis Doğan, Yavuz Oğur, Esat Gezer and Abdulkerim Doğan bore marks of physical trauma on different parts of their bodies that were not life-threatening. Medical reports drawn up in respect of the applicants Ekrem Can and Fikret Avras indicated that they were unfit for work for one day, even though the medical reports compiled at the beginning of their custody indicated no such finding.

19. On 22 November 2003 the applicants gave statements to the public prosecutor in the presence of their lawyers. All the applicants, except for the applicant Muhlis Doğan, contested the version of events and the additional offences to which they had confessed when being interviewed by the police. In that connection, the applicants Fikret Avras and Mahmut Cengiz denied the accuracy of the records concerning the reconstruction of events. The applicants mainly stated that they had agreed to take part in a peaceful protest concerning the "Kurdish problem" and that they had locked themselves in the corridor of the third floor of the courthouse for fear of being forcibly dispersed by the police. The respective lawyers of the applicants Ekrem Can, Fikret Avras, Yavuz Oğur and Osman Taşdemir informed the public prosecutor that they had not been allowed to be present at the police interviews of their clients or the reconstruction of events.

20. Subsequently, on the same day, the applicants were questioned by a judge of the Istanbul State Security Court. The applicants gave similar accounts of the event as those that they had given to the public prosecutor, affirming that they had had the intention of taking part in the making of a press statement in front of or inside the Sultanahmet Courthouse. As in his statements to the public prosecutor, the applicant Ekrem Can denied his affiliation with the group. The lawyer of Fikret Avras requested the judge to bear in mind the fact that he had not been allowed to be present during the taking of statements by the police from his client or during the reconstruction of events. At the end of the questioning, the judge placed all the applicants in pre-trial detention.

21. On 10 December 2003 the Istanbul public prosecutor filed a bill of indictment against the applicants and charged the applicants Ekrem Can, Fikret Avras, Mahmut Cengiz and Şenol Akyaz, with, *inter alia*, membership of a terrorist organisation (Article 168 of the former Criminal Code) and possessing and using explosive materials (Article 264 § 6 *in fine* of the former Criminal Code) and the rest of the applicants with aiding and abetting a terrorist organisation (Article 169 of the former Criminal Code). Furthermore, the public prosecutor charged all the applicants with "interrupting public services through coercion, distortion or the commission of unlawful acts" (Article 188 § 5 *in fine* of the former Criminal Code).

22. At a hearing held on 19 April 2004, the applicants gave evidence to the Istanbul Assize Court ("the trial court"). The applicant Ekrem Can reiterated the statements that he had given to the public prosecutor, asserting that he had become caught up in the protest by mere accident. He further denied any affiliation with the PKK and denied the charges.

23. The applicant Mahmut Cengiz acknowledged that the applicants had planned to make a press statement in front of the Sultanahmet Courthouse regarding the fact that Abdullah Öcalan was being held in isolation in İmralı Prison, adding that they had gone inside the building owing to the rain. He maintained that the police had kept him awake over the course of the three days that he had been held in custody and had forced him into signing certain documents; he did, owing to the refusal of the police to allow him to see his lawyer, despite his repeated requests.

24. The applicant Fikret Avras gave a similar version of events. He also submitted that he had been deprived of sleep during his time in police custody and that officers had slapped him every time that he had replied to their questions with a "no". He further noted that he, Ekrem Can and Mahmut Cengiz had been taken to certain locations by car, and that one of the police officers had forcibly ejected him from the police vehicle and had then forced him – squeezing his arm – to admit while being recorded on video to committing crimes.

25. The rest of the applicants also stated that they had planned to peacefully make a press statement in front of the courthouse. All the applicants, except for the applicants Mehmet Şahin and Kerim Taştan (who had not given statements to the police), retracted the statements that they had given to the police. The rest of the applicants further stated to the trial court that they had been subjected to pressure or ill-treated while in police custody.

26. At the same hearing, the applicants' lawyers submitted that the incident had in fact comprised no more than the making of a simple press statement, and that the applicants should not have been charged with terrorism-related offences. They also submitted that even though they had been present at the police station during the time that the applicants had been held in custody, they had never been called by the police to take part in the interviews of their clients.

27. At a hearing held on 1 November 2004 a number of witnesses gave evidence. M.A.İ. stated that he had been waiting his turn to attend a hearing before a court when a noisy quarrel had broken out in the corridor. According to his statement, after the clamour in the corridor had escalated, the judge had discontinued the hearing, and the people in the hearing room had moved some cabinets behind the hearing room's door in order to securely block the entrance. M.A.İ. further stated that he and others had been confined in the hearing room for a further forty-five minutes. He also stated that the tear gas used to disperse the group had affected the people in the hearing room and that the judge had postponed the rest of the proceedings scheduled for that

day. Another witness, G.İ., a clerk working for a court, attested that at around 10 a.m. two individuals had come into the registry of that court, stating that they would give a statement (in the corridor) and would not harm anyone. G.İ. stated that the group had first chanted PKK-related slogans and the name of Abdullah Öcalan. She and the other people who had barricaded themselves into the hearing room had then unblocked the door and left the office after about an hour; she had not identified any damage in the corridor.

28. At the hearing held on 1 August 2005, the trial court ordered the release of the applicants, except for the applicants Ekrem Can, Fikret Avras, Mahmut Cengiz and Şenol Akyaz.

29. On 26 December 2006 the Istanbul Assize Court delivered its judgment in the case and found that the applicants had chanted certain slogans (see paragraph 5), waved a banner from the windows (see paragraph 6) and closed the door to the corridor, preventing officials from entering by placing metal cupboards behind the door to form a barricade, thereby trapping the lawyers and the court personnel and hampering them in the performance of their duties. On this basis, the trial court found all the applicants guilty under Article 113 § 1 of the Criminal Code of "interrupting public services through coercion, distortion or the commission of unlawful acts", and sentenced each of them to one year and eight months' imprisonment. On the basis of the same acts, all the applicants, except for Ekrem Can, Fikret Avras, Mahmut Cengiz and Şenol Akyaz, were also found guilty under Article 169 of the former Criminal Code of aiding and abetting an armed gang, and were each sentenced to three years and nine months' imprisonment.

30. The trial court further found the applicants Ekrem Can, Fikret Avras, Mahmut Cengiz and Şenol Akyaz guilty of membership of an armed terrorist organisation under Article 314 § 2 of the Criminal Code, and sentenced each of them to six years and three months' imprisonment on the basis of their actions within the courthouse and on the basis of certain other activities, such as procuring new members for the PKK (Şenol Akyaz) and throwing Molotov cocktails (Ekrem Can, Fikret Avras, Mahmut Cengiz), which had been proved by the statements they had made during the police interviews and the reconstruction of events. On the basis of those acts, the trial court furthermore convicted Ekrem Can on two counts of possessing (Article 174 of the Criminal Code) and using explosive materials (Article 170 § 1 (c) of the Criminal Code) and sentenced him to an additional term of eight years and four months' imprisonment and a judicial fine. Lastly, Mahmut Cengiz and Fikret Avras were also convicted of possessing and using explosive materials, and were each sentenced to four years and two months' imprisonment and a judicial fine under the above-mentioned Articles.

31. On 18 March 2009, following an appeal by the applicants, the Court of Cassation partially upheld and partially quashed the trial court's judgment. The Court of Cassation upheld the convictions of the applicants Ekrem Can, Fikret Avras, Mahmut Cengiz and Şenol Akyaz under Article 314 § 2 of the

Criminal Code, those of the applicants Ekrem Can, Fikret Avras and Mahmut Cengiz under Article 174 § 1 and those of the rest of the applicants under Article 169 of the former Criminal Code. However, the Court of Cassation quashed the convictions of all the applicants under Article 113 § 1 of the Criminal Code and those of Ekrem Can, Fikret Avras and Mahmut Cengiz for using explosive materials under Article 170 § 1 (c) of the Criminal Code. Accordingly, the case file was remitted to the trial court in respect of the convictions that were quashed.

32. On 3 February 2010 the applicants lodged their application with the Court while the proceedings were still pending before the trial court.

33. On 30 June 2010 the Istanbul Assize Court once again convicted all the applicants under Article 113 § 1 of the Criminal Code, and sentenced them each to one year and eight months' imprisonment. The trial court went on to convict the applicant Ekrem Can on two counts of using explosive materials, and sentenced him to ten months' imprisonment under Article 170 § 1 (c) of the Criminal Code. The applicants Fikret Avras and Mahmut Cengiz were also convicted under the same Article and were each sentenced to five months for throwing Molotov cocktails.

34. On 2 April 2012 the Court of Cassation upheld the first-instance court's judgment in so far as it concerned the applicants.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

35. The relevant domestic law (as in force at the material time), as well as the case-law of the Constitutional Court regarding the issue of waiver of the right to a lawyer, may be found in *Ruşen Bayar v. Turkey*, (no. 25253/08, §§ 41-46, 19 February 2019).

36. The relevant provisions of the Criminal Code provided as follows at the material time:

Article 113

"1. Where the activities of a public institution are prevented by the use of violence or threats or by any other unlawful act, a penalty of imprisonment for a term of two to five years shall be imposed."

Article 170

"1. Any person who acts in such a way that is capable of creating panic, fear or anxiety among the public or of endangering the life, health, property of the public by:

....

c) firing weapons or using explosives,

...

shall be sentenced to a penalty of imprisonment for a term of six months to three years."

THE LAW

PRELIMINARY ISSUES

A. The Government's preliminary objection and request for the case to be struck out of the Court's list of cases

37. The Government submitted that the applicants, except for Mahmut Cengiz, who had duly authorised Mr Erbil as his representative when the application had been lodged, had failed to appoint a representative or to submit a letter of authority. Accordingly, the Government invited the Court to strike the application out of its list of cases, pursuant to Article 37 § 1 (a) of the Convention, contending that it was clear that the applicants, other than Mahmut Cengiz, had chosen not to pursue their application. Furthermore, the Government invited the Court to disregard the applicants' observations regarding (i) the admissibility and merits of the case and (ii) the just satisfaction claims submitted on behalf of the same fourteen applicants, as they had only been signed by Mr Erbil, who had not been authorised to act on their behalf.

38. The applicants did not comment on this point.

39. The Court notes that when the application was lodged with the Court in 2010, all the applicants were duly represented in accordance with the practice then in force, since both Mr Erbil and Mrs Selçuk had signed the application form, to which were attached, *inter alia*, the two following annexes: (i) an authority form signed by the applicant Mahmut Cengiz and Mr Erbil, and (ii) a power of attorney authorising Ms Selçuk to act as the lawyer of the remaining fourteen applicants. Accordingly, the Government argue, in essence, that the applicants should be required to comply with Rule 47 of the Rules of Court, as amended in 2014 – even though the application was lodged prior to that amendment. As it is not possible to apply that provision retroactively, the Court dismisses the Government's request (see *Beg S.p.a. v. Italy*, no. 5312/11, § 60, 20 May 2021).

40. Moreover, while it is true that the Court corresponded only with Mr Erbil after the Government were given notice of the application on 8 June 2017, Mrs Selçuk informed the Court by a letter dated 6 October 2020 that all such correspondence had been undertaken with her knowledge and approval. That being the case, the Court dismisses the Government's request under Article 37 § 1 (a) of the Convention.

B. Six-month rule and the scope of the case

41. Even though the Government did not raise a preliminary objection as regards the applicants' compliance with the six-month rule, this question calls

for consideration by the Court of its own motion (see *Sabri Güneş v. Turkey* [GC], no. 27396/06, § 29, 29 June 2012).

42. On 18 March 2009 the Court of Cassation upheld the convictions of of the applicants Ekrem Can, Fikret Avras, Mahmut Cengiz and Şenol Akyaz under Article 314 § 2 of the Criminal Code, those of the applicants Ekrem Can, Fikret Avras and Mahmut Cengiz under Article 174 § 1 and those of the rest of the applicants under Article 169 of the former Criminal Code. As a result, those convictions became final.

43. The Court does not have in its possession any document showing that the Court of Cassation's decision was duly served on the applicants or on their lawyers. Neither did the application form contain the date on which the applicants or their lawyers had been apprised of the Court of Cassation's decision. Similarly, the information available in the case file is not such as to enable the Court to discern the exact date on which the decision of the Court of Cassation was deposited with the registry of the trial court. Nevertheless, on 18 June 2009 the trial court drew up a preparatory report (*tensip tutanağı*) whereby it set the date of the first hearing after the Court of Cassation had delivered its decision.

44. In view of the above, the Court of Cassation's decision should be presumed to have been available at the trial court's registry, at the latest, by 18 June 2009. The time-limit started to run on the following day and expired on 18 January 2010. However, the application was lodged with the Court on 3 February 2010 – that is, after the expiry of the six-month time-limit in respect of the above-mentioned convictions.

45. Accordingly, the scope of the Court's examination will be confined to (i) all the applicants' convictions under Article 113 of the Criminal Code and (ii) the convictions of the applicants Ekrem Can, Mahmut Cengiz and Fikret Avras under Article 170 § 1 (c) of the Criminal Code (see *Keskin v. Turkey* (dec.), no. 12923/12, 8 July 2014). The Court will carry out a separate analysis of the admissibility of each complaint below, having regard to the preliminary objections raised by the Government.

46. As regards the remainder of the application, the Court finds that it was introduced out of time and must be rejected, pursuant to Article 35 §§ 1 and 4 of the Convention.

ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 3 (c) OF THE CONVENTION

47. The applicants complained that they had not been allowed to benefit from legal assistance when they had given statements to the police, in breach of Article 6 §§ 1 and 3 (c) of the Convention, which, in so far as relevant, provides:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by [a] tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;"

A. Admissibility

48. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

49. The applicants claimed that the police officers had forced them into signing certain documents which allegedly showed that they had waived their right to a lawyer. However, the fact that all the applicants had asked for a lawyer when giving statements to the public prosecutor and to the above-mentioned judge of the Istanbul State Security Court constituted proof that the documents they had signed during police custody had not reflected the truth. In fact, the applicants had asked for a lawyer during their time in custody, as was shown by the reports drawn up by the lawyers.

50. The Government argued that the contents of the documents that the applicants had signed while in police custody showed that they had waived their right to a lawyer after being duly informed of their fundamental rights. More importantly, the applicants Ekrem Can and Fikret Avras had met their lawyers while in police custody – on 19 November 2003 (both applicants) and on 21 November 2003 (the latter). The validity of the documents signed by the applicants was further supported by the fact that a lawyer had been appointed to represent the applicant Mehmet Şahin at his own request; that lawyer had, moreover, been present at his interview. Lastly, the applicants' convictions had not been solely based on the statements that they had made in the absence of a lawyer. Accordingly, the Government invited the Court to declare the applicants' complaints under Article 6 §§ 1 and 3 (c) of the Convention inadmissible as being manifestly ill-founded.

2. The Court's assessment

(a) General principles

51. The general principles regarding access to a lawyer, the right to remain silent, the privilege against self-incrimination, waiver of the right to legal assistance and the relationship of those rights to the overall fairness of proceedings under the criminal limb of Article 6 of the Convention can be

found in the judgment in the case of *Simeonovi v. Bulgaria* ([GC], no. 21980/04, §§ 112-120, 12 May 2017). The Court reiterates that it examines complaints concerning the restriction of access to a lawyer in the light of a three-pronged test which consists of the following steps: (i) whether the applicant waived his right to legal assistance in an unequivocal manner and whether the waiver was attended by minimum safeguards commensurate with its importance; (ii) whether there were "compelling reasons" to restrict access to a lawyer; and (iii) whether, despite the temporary absence of a lawyer, the overall fairness of the proceedings was ensured.

(b) Application of the principles to the instant case

52. In view of the differences in the facts of their respective cases, the Court deems it appropriate to divide the applicants into two groups for the purposes of its examination under Article 6 §§ 1 and 3 (c) of the Convention.

(i) In respect of the applicants Ekrem Can, Mahmut Cengiz and Fikret Avras

(α) Whether the applicants waived their right to legal assistance

53. The Court is called upon to examine whether the applicants validly waived their right of access to a lawyer during their police interviews and the reconstruction of events that took place during the time they spent in police custody from 18 until 21 November 2003, as it is not disputed between the parties that the applicants were represented by a lawyer when giving statements to the public prosecutor and to the judge of the Istanbul State Security Court on 22 November 2003. Referring to the documents that the applicants had signed while in police custody, the Government asserted that they had validly waived their right to a lawyer. The Government further argued that the fact that the applicants Ekrem Can and Fikret Avras had met their lawyers during the time that they had been in police custody constituted proof that the waivers had been genuine.

54. The Court has already found in cases against Turkey that the validity of a waiver of the right to legal assistance during police custody cannot be shown by mere reference to the documents that an applicant signed while in police custody where that applicant (i) after being granted access to a lawyer neither admitted his or her guilt nor maintained statements that he or she had made to the police before being granted access to that lawyer, and (ii) consistently repudiated the self-incriminatory police statements throughout the ensuing proceedings, in which he or she was represented by a lawyer (see *Akdağ v. Turkey*, no. 75460/10, §§ 48-61, 17 September 2019, and *Ruşen Bayar v. Turkey*, no. 25253/08, §§ 113-123, 19 February 2019 with further references). The Court has also had regard to any indications that an applicant told the domestic courts that he had made a request for legal assistance (contrast *Kaytan v. Turkey*, no. 27422/05, § 31, 15 September 2015, and *Gür v. Turkey* (dec.), no. 39182/08, 14 January 2014).

55. As regards the first limb of the Government's argument, the Court reiterates that it has already examined an identical argument in *Ruşen Bayar* (cited above, §§ 115-123) and dismissed it. As the Government did not put forward any reason capable of requiring it to depart from the conclusion reached therein, the Court rejects the first limb of the Government's argument.

56. As regards the second limb of the Government's argument, the Court notes that the case file contains two records drawn up in handwriting (*Tutanak*) by the lawyer of the applicant Ekrem Can on 19 and 20 November 2003, which were signed by that applicant, his lawyer and another lawyer (see paragraphs 16 and 17). Those records attested that the applicant Ekrem Can had told his lawyer that he would neither make statements to the police, nor take part in any other investigative acts. The second record stated that Ekrem Can's lawyer had been prevented from meeting his client and that the recording of the incident had been deemed necessary (see *Öcalan v. Turkey* [GC], no. 46221/99, § 131, ECHR 2005-IV). In the Court's view, those records seriously undermine the Government's contention that the applicants' waivers were genuine.

57. Furthermore, the applicants retracted the statements that they had made to the police as soon as they were brought before the public prosecutor on 22 November 2003, submitting that they had not been involved in any acts of violence (including the incidents involving Molotov cocktails referred to above), and the applicants Mahmut Cengiz and Fikret Avras specifically denied having taken part, while they had been in police custody, in any reconstruction of events. The applicants also told the public prosecutor and the trial court that they had indeed asked, while they had been in police custody, for a lawyer (see paragraphs 19 and 23).

58. As regards the Government's argument that the applicant Mehmet Şahin had in fact been able to exercise his right to a lawyer and that the applicant Kerim Taştan had been able to exercise his right to remain silent, the Court notes that the police officers involved in those two applicants' interviews and those involved in the interviews of the applicants Ekrem Can, Mahmut Cengiz and Fikret Avras were entirely different (see paragraph 11). Therefore, the mere fact that other applicants could exercise their rights under Article 6 does not suffice to demonstrate that the applicants Ekrem Can, Fikret Avras and Mahmut Cengiz were able to exercise these rights in the same way.

59. In view of the above, the Court considers that it is unable to find that it has been established beyond any reasonable doubt that the three above-mentioned applicants unequivocally, knowingly and intelligently waived their rights under Article 6 of the Convention (see *Ruşen Bayar*, cited above, § 123), notably their right to a lawyer when giving statements during the police interviews and the reconstruction of events that took place while they were in police custody.

(β) Whether there were compelling reasons to restrict access to a lawyer

60. The Court notes that the Government have not offered any compelling reasons for restricting the applicants' access to a lawyer during their police interviews. Furthermore, the domestic legislation in force at the material time did not provide for any reasons for such a restriction, let alone a compelling one (see *Ruşen Bayar*, cited above, § 125). Accordingly, there was no compelling reason to restrict the applicants' access to a lawyer during their time in police custody.

(γ) Whether the overall fairness of the proceedings was ensured

61. The lack of "compelling reasons" for restricting the applicants' access to a lawyer in the present case requires the Court to conduct a very strict scrutiny of the fairness of the proceedings. The absence of such reasons weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. It is incumbent on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction of the applicants' access to a lawyer (see *Beuze v. Belgium* [GC], no. 71409/10, § 145, 9 November 2018; *Ibrahim and Others v. the United Kingdom*, [GC], nos. 50541/08 and 3 others, § 265, 13 September 2016; and the above-cited cases of *Simeonovi*, §§ 118 and 132; and *Ruşen Bayar*, § 126).

62. Having weighed the procedural shortcoming (namely the invalidity of the applicants' waiver of their right to legal assistance) against the overall fairness of the criminal proceedings, the Court notes that the trial court neither attempted to examine the circumstances surrounding those waivers nor subjected to scrutiny their self-incriminatory police statements and the evidence that they had given during the reconstruction of events; nor did it examine the admissibility of those before convicting the applicants (see *Yunus Aktaş and Others v. Turkey*, no. 24744/03, § 51, 20 October 2009). Similarly, the Court of Cassation did not remedy the shortcomings either.

63. The absence of the aforesaid procedural safeguards has already been found by the Court to have violated the overall fairness of criminal proceedings in respect of the same legal question and in a situation where the applicants' statements were used by the national courts to convict them (see *Akdağ*, cited above, §§ 64-71; *Ruşen Bayar*, cited above, §§ 126-136; *Bozkaya v. Turkey*, no. 46661/09, §§ 49-54, 5 September 2017; and *Türk v. Turkey*, no. 22744/07, §§ 53-59, 5 September 2017). The same is also true in respect of the present case, particularly in respect of the fact that the accusations against Ekrem Can, Fikret Avras and Mahmut Cengiz regarding the throwing of Molotov cocktails were made after those applicants had already given confessions in respect thereof to the police and provided

information during the course of the reconstruction of events, which subsequently formed the sole basis of their conviction on those charges.

64. Accordingly, the Court concludes that the domestic courts' failure to examine the conditions surrounding the applicants' alleged waiver of their right to a lawyer between 18 and 21 November 2003 (during the time that they spent in police custody) and the use that they made of evidence given in the absence of a lawyer to convict them, without observing the necessary procedural safeguards, rendered the trial as a whole unfair (see the above-cited cases of *Ruşen Bayar*, § 135; *Bozkaya*, § 53; and *Türk*, § 58).

65. There has therefore been a violation of Article 6 §§ 1 and 3 (c) of the Convention in respect of the applicants Ekrem Can, Mahmut Cengiz and Fikret Avras.

(ii) In respect of the remaining applicants

66. Having regard to the conclusions reached in paragraph 96 below, the Court does not find it necessary to separately examine the complaint lodged by the remaining applicants under Article 6 §§ 1 and 3 (c) of the Convention in view of the fact that the only conviction relevant to the examination of those applicants' complaint is that under Article 113 of the Criminal Code, which the Court considers is more appropriately examined under only Article 11 of the Convention.

ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

67. The applicants complained that they had been intimidated for exercising their right to freedom of peaceful assembly and to make a press statement (containing no incitement to violence), in breach of Articles 10 and 11 of the Convention, which read as follows:

Article 10

"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

"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."

68. The Court notes that even though the applicants relied on both Articles 10 and 11 of the Convention in relation to the same set of facts, their complaints stem not only from their being prevented from making a press statement, but also (and predominantly) from the intervention staged by the police in respect of their protest action, resulting in their forcible removal from the courthouse, where they had opened a banner, chanted slogans and thrown leaflets (see *Tuskia and Others v. Georgia*, no. 14237/07, § 73, 11 October 2018; also compare *Açık and Others v. Turkey*, no. 31451/03, § 40, 13 January 2009; and *Karademirci and Others v. Turkey*, nos. 37096/97 and 37101/97, § 26, ECHR 2005-I), which appears to constitute the thrust of their complaints. That being the case, the Court considers that the applicants' complaints should be examined under Article 11 alone which, however, must be considered in the light of Article 10. In that connection, the Court reiterates that the protection of personal opinions under Article 10 of the Convention is one of the objectives of freedom of peaceful assembly, as enshrined in Article 11 (see *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, §§ 85-86, ECHR 2015).

A. Admissibility

69. The Government invited the Court to declare this complaint inadmissible as being incompatible *ratione materiae* with the provisions of the Convention, arguing that the acts and activities of the applicants fell within the ambit of Article 17 of the Convention in view of the fact that they had (i) chanted slogans praising and glorifying the PKK and its leader, and (ii) occupied the courthouse during the demonstration and set up a barricade, thereby preventing the orderly administration of justice, depriving some of the court personnel of their liberty, and putting at risk the safety of judges. Moreover, prior to the impugned incident, some of the applicants had thrown Molotov cocktails or participated in demonstrations during which acts of violence had been committed.

70. The applicants did not comment on this submission.

71. Article 17 of the Convention reads as follows:

> "Nothing in [the] Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

72. Article 17 is only applicable on an exceptional basis and in extreme cases (see *Paksas v. Lithuania* [GC], no. 34932/04, § 87, ECHR 2011 (extracts)). In cases concerning Article 10 of the Convention, it should only be resorted to if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention (see *Perinçek v. Switzerland* [GC], no. 27510/08, § 114, ECHR 2015 (extracts)).

73. While it is true that some of the slogans chanted by the applicants referred to the leader of the PKK and the conditions of his detention (see paragraph 5 above), the Court notes that it has already examined almost identical slogans within the context of other applications lodged against Turkey under Article 10 of the Convention. It concluded in respect of those cases that such slogans did not constitute an incitement to violence (see, among others, *Belge v. Turkey*, no. 50171/09, §§ 34-35, 6 December 2016 and the cases cited therein, and *Belek and Velioğlu v. Turkey*, no. 44227/04, §§ 24-25, 6 October 2015), and it does not discern any reason in the present case to depart from those findings. Accordingly, the Court dismisses the first limb of the Government's preliminary objection on the basis of Article 17 of the Convention.

74. As regards the second limb of the Government's objection, which focused on the applicants' actions during the protest, the Court finds it more appropriate to join it to the merits of the complaint under Article 11 of the Convention, given that the question of whether the applicants had violent intentions, incited others to violence or committed any violent acts themselves during the protest is inherently linked to and overlaps with the Court's examination of the question of whether there has been an interference with the applicant's rights under that provision (see, *mutatis mutandis*, *Kilin v. Russia*, no. 10271/12, § 49, 11 May 2021).

75. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

76. The Government reiterated that the applicants' complaint must be rejected as falling outside of the scope of Article 11 of the Convention. In the alternative, the Government argued that the interference with the applicants' rights under Article 11 had been prescribed by law (namely Article 113 of the Criminal Code) and that it had pursued the legitimate aims of protecting

national security, health, morals, and the rights and freedom of others and of preventing disorder and crime. The Government further maintained that the applicants had not put an end to their conduct, despite warnings issued by the law enforcement officials, and that the interference by the police had been necessary and proportionate, having regard to the fact that the applicants had chanted slogans in support of a terrorist organisation, deprived civilians and court officials of their liberty and placed those people's security at risk, while disrupting judicial services for a period of at least an hour. The Government did not submit any comments in respect of the criminal sanctions imposed on the applicants.

77. The applicants submitted that the police had used excessive force and prevented them from making a press statement in order to bring certain aspects of the Kurdish problem to the public's attention. They further maintained that during the protest, they had not committed any acts of violence, and nor had their press statement contained any remarks inciting the public to violence. The fact that their protest had neither harmed anyone nor resulted in any damage was important. According to the applicants, the police had blockaded the courthouse, and had portrayed what in fact had been a peaceful protest as an act of terrorism and the forcible occupation of the courthouse.

2. The Court's assessment

(a) General principles

78. The general principles with regard to the right to freedom of assembly can be found in *Navalnyy v. Russia* ([GC], nos. 29580/12 and 4 others, §§ 98-103, 114-115, 120-122, and 128, 15 November 2018).

79. 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 (see *Taranenko v. Russia*, no. 19554/05, § 65, 15 May 2014). Thus, it should not be interpreted restrictively (see *Djavit An v. Turkey*, no. 20652/92, § 56, ECHR 2003-III, and *Barraco v. France*, no. 31684/05, § 41, 5 March 2009). A balance must be always struck between the legitimate aims listed in Article 11 § 2 and the right to free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places (see *Ezelin v. France*, 26 April 1991, § 52, Series A no. 202).

80. Article 11 of the Convention only protects the right to "peaceful assembly" (see, among many others, *Gün and Others v. Turkey*, no. 8029/07, § 49, 18 June 2013) and that notion does not cover a demonstration where the organisers and participants have violent intentions (see *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, § 77, ECHR 2001-IX, and *Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia*, nos. 75734/12 and 2 others, § 285,

19 November 2019, and the cases cited therein). The guarantees of Article 11 therefore apply to all gatherings except those where the organisers and participants have such intentions, incite violence or otherwise reject the foundations of a democratic society (see *Kudrevičius and Others*, cited above, § 92). An assembly tarnished with isolated acts of violence is not automatically considered non-peaceful so as to forfeit the protection of Article 11. In a number of cases where demonstrators had engaged in acts of violence, the Court has held that the demonstrations in question fell within the scope of Article 11 of the Convention but that the interferences with the right guaranteed by that Article were justified for the prevention of disorder or crime and for the protection of the rights and freedoms of others (see *Knežević v. Montenegro* (dec.), no. 54228/18, § 70, 2 February 2021).

81. The right to freedom of assembly includes the right to choose the time, place and manner of conduct of the assembly in question, within the limits established in paragraph 2 of Article 11 (see *Sáska v. Hungary*, no. 58050/08, § 21, 27 November 2012). In particular, that provision does not require the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property, such as, for instance, government offices and ministries (see *Appleby and Others v. the United Kingdom*, no. 44306/98, § 47, ECHR 2003-VI).

(b) Application to the present case

(i) Whether there has been an interference with the exercise of the applicants' freedom of assembly

82. The Court notes that the applicants were arrested, placed in pre-trial detention, prosecuted and convicted on the basis of their actions during their protest on 18 November 2003 at the Sultanahmet Courthouse, which led to the cancellation of some of the hearings scheduled for that day. Nevertheless, none of the witnesses who were present during that protest and who made statements during the ensuing criminal proceedings complained of having suffered any particular bodily harm or of any other kind of damage being inflicted, and nor did they allege that the applicants had engaged in any other kind of violent act (see *Razvozzhayev and Udaltsov*, cited above, § 285). Similarly, the deputy public prosecutor's incident report dated 18 November 2003 (see paragraph 7 above) did not note any damage caused by the applicants' conduct. Even though the Government argued before the Court that the applicants had deprived of their liberties those who had been in the corridor at the time of the protest, the Court notes that the applicants were neither indicted for nor convicted of false imprisonment. It further appears that the court officials and certain other individuals present in the corridor entered the courtrooms or the registries of those courts and locked themselves in; however, they did not complain of the applicants' conduct when they testified as witnesses during the trial.

83. Furthermore, while the alleged prior involvement of the applicants Ekrem Can, Mahmut Cengiz and Fikret Avras in certain other violent acts (which were also examined in the course of the criminal proceedings forming the basis of the present application) may be a relevant consideration when ascertaining whether they had violent intentions when staging their protest at the Sultanahmet Courthouse, it is not in and of itself sufficient to warrant the conclusion that they did in fact have such intentions – particularly when viewed in the light of the fact that certain witnesses attested that the applicants had told them that they should have no fear, assuring them that they would not harm anybody (compare *Schwabe and M.G. v. Germany*, nos. 8080/08 and 8577/08, § 103, ECHR 2011 (extracts) and the cases cited therein). Furthermore, the trial court based its conclusion that certain applicants had participated in the impugned acts on the evidence that they had given in the absence of a lawyer while they had been in police custody, in respect of which the Court has already found a violation of Article 6 §§ 1 and 3 (c) of the Convention (see paragraphs 53 to 65 above). It is also important that no weapons or any other dangerous material were found on the applicants at the time of their arrest.

84. Be that as it may, the Court does not lose sight of the fact that a number of civilians and court officials were confined for approximately one hour inside the offices and hearing rooms as a result of the protest held by the applicants. Those persons were affected by the tear gas that the police administered when dealing with the incident. These elements are sufficient to conclude that the impugned protest negatively impacted the orderly provision of an essential public service (namely judicial services) and disturbed public order for a period of an hour and may have caused fear and discomfort in those who were in the vicinity of the corridor on the third floor of the Sultanahmet Courthouse. That said, in the absence of any violent intention or violent conduct on the part of the applicants, those factors alone do not suffice for the impugned protest to fall outside the scope of Article 11 of the Convention (see *Kudrevičius and Others*, cited above, § 98).

85. In view of the above, and despite the disturbance caused to public order by the applicants' conduct for a period of one hour, their actions were not such as to warrant the conclusion that they relied on the Convention to engage in activity or in acts aimed at the destruction of any of the rights and freedoms set forth in it. On those grounds, the Court dismisses the Government's preliminary objection based on Article 17 of the Convention (see paragraph 69 above).

86. Accordingly, there has been an interference with the applicants' exercise of their right to freedom of assembly on account of their arrest, detention, prosecution and conviction on the basis of their participation in a protest within the premises of the Sultanahmet Courthouse.

(ii) Whether the interference was prescribed by law and pursued a legitimate aim

87. It is not disputed between the parties that the interference with the applicants' right to freedom of expression had a legal basis under the domestic law – in particular under Article 113 § 1 of the Criminal Code and that the relevant law satisfied the quality-of-law requirements under the Convention.

88. The Court further considers that the interference in question pursued the legitimate aims of protecting public safety and the rights and freedoms of others, and of preventing disorder.

(iii) Necessity in a democratic society of the interference with the applicants' rights under Article 11 of the Convention, read in the light of Article 10

89. The test of necessity in a democratic society requires the Court to determine whether the interference complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient (see *Taranenko*, cited above, § 74).

90. The Court notes that even though the applicants' protest concerned an issue of public interest, the manner in which they opted to convey their message and exercised their rights under Article 11 of the Convention not only disturbed public safety and constituted a risk in respect of the protection of the rights and freedoms of "others" present at the Sultanahmet Courthouse, but also disrupted an essential public service – namely the orderly administration of justice (see *Öğrü v. Turkey*, no. 19631/12, § 25, 17 October 2017). That being the case, the Court concludes that the interference in the instant case corresponded to a pressing social need.

91. The Court notes that in cases where the exercise of freedom of expression or association is combined with illegal conduct which is disrupting ordinary life and other activities to a degree exceeding that which is inevitable in the circumstances, the Contracting States enjoy a wide margin of appreciation in their assessment of the necessity of taking measures to restrict such conduct, which cannot enjoy the same privileged protection under the Convention as political speech or debate on questions of public interest or the peaceful manifestation of opinions on such matters (see *Kudrevičius and Others*, cited above, § 156, and *Taranenko*, cited above, § 87). These considerations are equally valid in the context of the present case where the applicants staged their protest in a courthouse in combination with other acts that were, albeit non-violent, capable of seriously disturbing the orderly administration of justice.

92. That being said, the Contracting States do not enjoy unlimited discretion to take any measure they consider appropriate, and it is for the Court to assess the nature and severity of the penalties imposed for conduct involving some degree of disturbance of public order (see *Taranenko*, cited

above, §§ 80-87), with a view to examining the proportionality of an interference in relation to the aim pursued (see the above-cited cases of *Kudrevičius and Others*, § 146, and *Razvozzhayev and Udaltsov*, § 295 and the cases cited therein). At this point, the Court reiterates that a peaceful demonstration should not, in principle, be rendered subject to the threat of a criminal sanction (see *Akgöl and Göl v. Turkey*, nos. 28495/06 and 28516/06, § 43, 17 May 2011), and notably to deprivation of liberty (see *Gün and Others*, cited above, § 83). Thus, the Court must examine with particular scrutiny the cases where sanctions imposed by the national authorities for non-violent conduct involve a prison sentence (see *Taranenko*, cited above, § 87).

93. The Court has already established that the applicants' conduct, albeit involving a certain degree of disturbance, was not violent and caused no damage (see paragraphs 82 to 84 above). The Court cannot therefore discern, including from the domestic courts' decisions, any justification for sentencing each of the applicants – on account solely of their behaviour at the courthouse – to one year and eight months' imprisonment, which is a particularly severe prison sentence. Although sanctions for the applicants' actions might have been warranted by the demands of public order, such lengthy prison sentences were not proportionate to the legitimate aims of protecting public safety and the rights and freedoms of others, or of preventing disorder.

94. In addition, all the applicants were also held in pre-trial detention for a period of at least one year, eight months and fourteen days – again very long periods – on the basis, notably, of acts that fell within the purview of Article 11 of the Convention, notwithstanding the disturbance caused by their protest in the courthouse (see *Taranenko*, cited above, § 94; also compare the above-cited cases of *Knežević*, § 88, with further references, and *Tuskia and Others*, cited above,§ 86).

95. Accordingly, the Court concludes that the interference with the applicants' right to freedom of assembly under Article 11 of the Convention, considered in the light of Article 10, was not "necessary in a democratic society".

96. There has therefore been a violation of Article 11 of the Convention.

OTHER ALLEGED VIOLATIONS OF THE CONVENTION

97. In their submissions dated 14 December 2017, the applicants reiterated that they maintained their complaint that the Istanbul State Security Court, which had tried them, had been neither independent nor impartial. The Court examined this complaint, as specified in the application forms, and declared it inadmissible (pursuant to Rule 54 § 3 of the Rules of Court) on 8 June 2017, when notice of the application was given to the Government. It follows that this complaint concerns substantially the same matter as that

which has already been examined by the Court and must be rejected, in accordance with Article 35 §§ 2 (b) and 4 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

98. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

99. The applicants claimed 10,000 euros (EUR) each in respect of non-pecuniary damage.

100. The Government contested the claims, submitting that they were excessive.

101. The Court considers that the finding of a violation of Article 6 §§ 1 and 3 (c) of the Convention in respect of the applicants Fikret Avras, Mahmut Cengiz and Ekrem Can constitutes sufficient just satisfaction in respect of the complaints under that provision. The Court further notes, in respect of all the applicants, that Article 311 of the current Code of Criminal Procedure allows for the reopening of domestic proceedings in the event that the Court finds a violation of the Convention (see *Mehmet Zeki Çelebi v. Turkey*, no. 27582/07, § 80, 28 January 2020).

102. As regards the complaint under Article 11 of the Convention, the Court considers that the applicants must have sustained non-pecuniary damage which the finding of a violation of the Convention does not suffice to remedy. Therefore, and making its assessment on an equitable basis, the Court finds it appropriate to award each applicant EUR 7,500 plus any tax that may be chargeable on that amount.

B. Costs and expenses

103. The applicants also claimed EUR 4,400 for the costs and expenses incurred before the Court, corresponding to the work undertaken by their lawyer and his assistants and to expenses relating to translation services, stationery and postage costs. In support of those claims, the applicants submitted a timesheet drawn up by their lawyer, together with the Turkish Bar Association's 2017 fee scales.

104. The Government invited the Court not to award any sum under this head, arguing that the documents submitted in support of the claims were of a purely "declaratory" nature, given the applicants' failure to substantiate them with any official document capable of showing that the above-noted costs and expenses had actually been incurred.

105. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,000 jointly covering costs under all heads for costs and expenses, plus any tax that may be chargeable to the applicants (see *Soytemiz v. Turkey*, no. 57837/09, § 67, 27 November 2018 with further references).

C. Default interest

106. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Dismisses* the Government's preliminary objection under Article 37 § 1 (a) of the Convention;

2. *Decides to join* to the merits of the complaint under Article 11 of the Convention the second limb of the Government's preliminary objection under Article 17 of the Convention, and rejects it;

3. *Declares* the application inadmissible in so far as it concerns the convictions of the applicants Ekrem Can, Fikret Avras, Mahmut Cengiz and Şenol Akyaz under Article 314 § 2 of the Criminal Code, those of the applicants Ekrem Can, Fikret Avras and Mahmut Cengiz under Article 174 § 1 and those of the rest of the applicants under Article 169 of the former Criminal Code, as having been introduced outside of the six-month time-limit set by Article 35 § 1 of the Convention;

4. *Declares* the application admissible in so far as it concerns (i) all the applicants' convictions under Article 113 of the Criminal Code and (ii) the convictions of the applicants Ekrem Can, Mahmut Cengiz and Fikret Avras under Article 170 § 1 (c) of the Criminal Code;

5. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention in respect of the applicants Ekrem Can, Mahmut Cengiz and Fikret Avras;

6. *Holds* that there is no need to examine the remaining applicants' complaints under Article 6 §§ 1 and 3 (c) of the Convention;

7. *Holds* that there has been a violation of Article 11 of the Convention;

8. *Holds* that the finding of a violation of Article 6 §§ 1 and 3 (c) of the Convention constitutes in itself sufficient just satisfaction for the non-pecuniary damage that may have been sustained by the applicants Ekrem Can, Mahmut Cengiz and Fikret Avras in that connection;

9. *Holds*
   (a) that the respondent State is to pay each applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (b) that the respondent State is to pay the applicants jointly, within the same three months, EUR 2,000 (two thousand euros), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
   (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

10. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 8 March 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı Deputy Registrar	Jon Fridrik Kjølbro President

APPENDIX

List of applicants

Application no. 10613/10

No.	Applicant's Name	Year of birth/registration	Nationality	Place of residence
1.	Ekrem CAN	1982	Turkish	Tekirdağ
2.	Servet AKDENİZ	1985	Turkish	Edirne
3.	Şenol AKYAZ	1981	Turkish	Istanbul
4.	Fikret ARVAS	1985	Turkish	Tekirdağ
5.	Mahmut CENGİZ	1983	Turkish	Tekirdağ
6.	Abdulkerim DOĞAN	1979	Turkish	Istanbul
7.	Muhlis DOĞAN	1979	Turkish	Istanbul
8.	Esat GEZER	1982	Turkish	Istanbul
9.	Ahmet IŞIK	1978	Turkish	Istanbul
10.	Yavuz OĞUR	1981	Turkish	Istanbul
11.	Güven ÖZTÜRK	1984	Turkish	Istanbul
12.	Mehmet ŞAHİN	1983	Turkish	Istanbul
13.	Özgür TAN	1978	Turkish	Istanbul
14.	Osman TAŞDEMİR	1983	Turkish	Istanbul
15.	Kerim TAŞTAN	1983	Turkish	Kocaeli

A

Employment Appeal Tribunal

Forstater *v* CGD Europe and others

UKEAT/105/20

2021 April 27, 28; June 10

B

Choudhury J (President), Mr C Edwards, Ms M V McArthur

Discrimination — Religion or belief — Philosophical belief — Claimant holding gender-critical belief — Claimant commenting on social media that sex determined at birth and incapable of change — Whether belief not worthy of respect as being in conflict with rights of others — Whether "philosophical belief" — Equality Act 2010 (c 15), s 10

C

The claimant was appointed by the first respondent as a consultant researching projects on sustainable development. Concerned about proposed changes to the Gender Recognition Act 2004, which would make legal recognition of self-identified gender easier, she expressed views on social media that a person's biological sex, which was not to be conflated with gender identity, was either male or female, was determined at conception and could not be changed. Following complaints by colleagues that they found her comments transphobic and offensive, her consultancy

D

contract was not renewed. She brought proceedings in an employment tribunal claiming unlawful discrimination, contrary to section 13 of the Equality Act 2010[1], relying on the protected characteristic of religion or belief. On a preliminary hearing to determine whether the claimant held a "philosophical belief" within section 10(2) of the Act, an employment tribunal identified her belief as being that sex was biologically immutable, there were only two sexes, it was impossible to change sex and in no circumstances was a trans woman in reality a woman or a trans man a man.

E

The tribunal observed that it was obvious how important it was to many trans gender people to be accorded their preferred pronouns and that calling a trans woman "a man" was likely to be profoundly distressing and might amount to unlawful harassment. It concluded that the claimant's belief was absolutist in nature and incompatible with human dignity and the fundamental rights of others, which had been put into effect through the Gender Recognition Act 2004, and it dismissed

F

her complaint on the ground that she had failed to satisfy the criteria to be applied in determining whether her belief qualified for protection as a "philosophical belief" under section 10(2), read compatibly with articles 9 and 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms[2].

On an appeal by the claimant—

Held, allowing the appeal, that, in determining whether the belief identified by the tribunal amounted to a "philosophical belief" within section 10 of the Equality Act 2010, it was appropriate to consider first the effect of articles 9 and 10 of the

G

Human Rights Convention, given that domestic statutory provisions were to be read and understood conformably with the Convention; that, in that regard, the paramount guiding principle was that it was not for the court to inquire into the validity of the belief, and the bar should not be set too high; that the particular threshold requirement relevant to the present case was that the belief must be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others, but only if the belief involved a very

H

grave violation of the rights of others, tantamount to the destruction of those rights, would it be one that was not worthy of respect in a democratic society and fail to

[1] Equality Act 2010, s 10: see post, para 20.
S 13: see post, para 25.
[2] Human Rights Act 1998, Sch 1, Pt I, arts 9, 10: see post, para 26.

qualify for protection; that, in applying section 10, any manifestation of a belief should be considered only in determining whether the belief met the threshold requirements in general; that, while the claimant's belief might in some circumstances cause offence to trans persons, it was not a belief that sought to destroy their rights, and, further, it was widely shared, including amongst respected academics, and was consistent with the law; and that, accordingly, the claimant's belief as to the immutability of sex did amount to a philosophical belief within section 10 (post, paras 4, 53, 55, 56, 62, 70, 77, 79, 111, 113, 114, 117).

Grainger plc v Nicholson [2010] ICR 360, EAT applied.

Gray v Mulberry Co (Design) Ltd [2019] ICR 175, EAT considered.

Per curiam. (1) The conclusion that the claimant's belief as to the immutability of sex amounts to a philosophical belief under section 10 of the Equality Act 2010 does not mean, however, that those with gender-critical beliefs can indiscriminately and gratuitously refer to trans persons in terms other than they would wish. Such conduct could, depending on the circumstances, amount to harassment of, or discrimination against, a trans person (post, paras 4, 118).

(2) Any belief that affects a number of aspects of a person's life and how they live it is likely to comprise a diffuse and diverse range of concepts and principles that would defy precise or concise definition. The standard of exactitude cannot mean setting out a detailed treatise of a claimed philosophical belief in every case. A precise definition of those aspects of the belief that are relevant to the claims in question would suffice. In this regard, it is not incorrect for a tribunal to seek to identify the core elements of a belief in order to determine whether it falls within section 10 of the Equality Act 2010 (post, para 45).

(3) The question whether a belief falls within section 10 of the Equality Act 2010 should not ordinarily take up more than a day of the tribunal's time. Beliefs which appear trivial or flippant ought to be capable of being dealt with fairly quickly. It would only be in very rare cases that it would be necessary for there to be a hearing of several days' length to determine that preliminary issue. Where it appears to the tribunal that the analysis of any preliminary issue is likely to take more than a day or so, the better approach might be to consider whether all issues, including liability, should be heard together (post, para 119).

The following cases are referred to in the judgment:

AP Garçon and Nicot v France (Application Nos 79885/12, 52471/13 and 52596/13) (unreported) 6 April 2017, ECtHR

Campbell v United Kingdom (Application Nos 7511/76 and 7743/76) (1982) 4 EHRR 293, ECtHR

Chief Constable of the West Yorkshire Police v A (No 2) [2004] UKHL 21; [2004] ICR 806; [2005] 1 AC 51; [2004] 2 WLR 1209; [2004] 3 All ER 145, HL(E)

Corbett v Corbett [1971] P 83; [1970] 2 WLR 1306; [1970] 2 All ER 33

Goodwin v United Kingdom (Application No 28957/95) (2002) 35 EHRR 18, ECtHR (GC)

Grainger plc v Nicholson [2010] ICR 360; [2010] 2 All ER 253, EAT

Gray v Mulberry Co (Design) Ltd [2019] ICR 175, EAT; [2019] EWCA Civ 1720; [2020] ICR 715, CA

Handyside v United Kingdom (Application No 5493/72) (1976) 1 EHRR 737, ECtHR

Harron v Chief Constable of Dorset Police [2016] IRLR 481, EAT

Ibragimov v Russia (Application Nos 1413/08 and 28621/11) (unreported) 4 February 2019, ECtHR

Lee v Ashers Baking Co Ltd [2018] UKSC 49; [2020] AC 413; [2018] 3 WLR 1294; [2019] 1 All ER 1, SC(NI)

Lilliendahl v Iceland (Application No 29297/18) (unreported) 11 June 2020, ECtHR

Metropolitan Church of Bessarabia v Moldova (Application No 45701/99) (2001) 35 EHRR 13, ECtHR

A *P v S* (Case C-13/94) EU:C:1996:170; [1996] ICR 795; [1996] All ER (EC) 397; [1996] ECR I-2143, ECJ
Page v NHS Trust Development Authority [2021] EWCA Civ 255; [2021] ICR 941, CA
Palomo Sánchez v Spain (Application Nos 28955/06, 28957/06, 28959/06 and 28964/06) [2011] IRLR 934, ECtHR (GC)
R (C) v Secretary of State for Work and Pensions [2017] UKSC 72; [2017] 1 WLR 4127; [2017] PTSR 1476; [2018] 2 All ER 391, SC(E)
B *R (Elan-Cane) v Secretary of State for the Home Department* [2018] EWHC 1530 (Admin); [2018] 1 WLR 5119; [2018] 4 All ER 519
R (McConnell) v Registrar General for England and Wales [2020] EWCA Civ 559; [2021] Fam 77; [2020] 3 WLR 683; [2020] 2 All ER 813, CA
R (Miller) v College of Policing [2020] EWHC 225 (Admin); [2020] 4 All ER 31
R (Williamson) v Secretary of State for Education and Employment [2005] UKHL 15; [2005] 2 AC 246; [2005] 2 WLR 590; [2005] 2 All ER 1, HL(E)
C *Vajnai v Hungary* (Application No 33629/06) (2008) 50 EHRR 44, ECtHR

APPEAL from an employment judge sitting at London Central

By a decision sent to the parties on 18 December 2019, the employment judge decided that the claimant, Maya Forstater, did not have the protected characteristic of philosophical belief, pursuant to section 10 of the Equality Act 2010, in relation to her complaint of sex discrimination against the
D respondents, CGD Europe, the Centre for Global Development and its president, Masood Ahmed. The tribunal decided that the claimant had failed to satisfy the accepted criterion that the belief had to be worthy of respect in a democratic society and not incompatible with human dignity or conflict with the fundamental rights of others. The claimant appealed on the grounds that her views were not inherently transphobic and that the tribunal
E had erred in inquiring into the validity of her belief at the preliminary stage of the proceedings, when the only question was whether the belief was protected under section 10 of the Equality Act 2010.

Permission to intervene was granted to Index on Censorship and the Equality and Human Rights Commission.

The facts are stated in the judgment, post, paras 7–11.

F *Ben Cooper QC* and *Anya Palmer* (instructed by *Doyle Clayton Solicitors Ltd*) for the claimant.

Jane Russell (instructed by *Bates Wells & Braithwaite London LLP*) for the respondents.

Aileen McColgan QC and *Katherine Taunton* (instructed by *Index on Censorship*) for the first intervener.

G *Karon Monaghan QC* (instructed by *Equality and Human Rights Commission, Manchester*) for the second intervener.

The court took time for consideration.

10 June 2021. **CHOUDHURY J (PRESIDENT)** handed down the following judgment of the appeal tribunal.

H

Introduction

1 The claimant holds the belief that biological sex is real, important, immutable and not to be conflated with gender identity. She considers that statements such as "woman means adult human female" or "trans women

are male" are statements of neutral fact and are not expressions of antipathy towards trans people or "transphobic". Some of the claimant's colleagues found the claimant's statements on Twitter offensive and complained. When her consultancy contract was not renewed, she brought proceedings before the employment tribunal at Central London on the basis that, amongst other claims, she had been discriminated against because of her belief. After a six-day preliminary hearing, the tribunal concluded that the claimant's belief, having regard to its "absolutist" nature, whereby she would "refer to a person by the sex she considers appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading or offensive environment", was one that was "not worthy of respect in a democratic society". Accordingly, the employment judge found that the claimant's belief was not a "philosophical belief" within the meaning of section 10 of the Equality Act 2010 ("EqA"). The sole issue in this appeal is whether the tribunal erred in law in reaching that conclusion.

2 The issue is one that has generated strong feelings, with each side making dramatic claims as to the effect of upholding or reversing the tribunal's judgment. The claimant suggests that the effect of the tribunal's conclusion is "Orwellian" in that it requires her to refer to a trans woman as a woman even though she does not believe that to be true; and the respondents contend that to overturn the tribunal's conclusion would mean that no trans person would be safe in any workplace from the harassment inherent in being "misgendered", that is to say being referred to by non-preferred pronouns or by a different gender to that in which they are living. Such positions are reflective of the debate in wider society about the rights of trans persons, which is often conducted in hyperbolic and intransigent terms. We wish to make clear at the outset that it is not the role of this Employment Appeal Tribunal to express any view as to the merits of either side of that debate (which we shall refer to as the "transgender debate"); its role is simply to determine whether, in reaching the conclusion that it did, the tribunal erred in law. Our judgment should not therefore be read as providing support for or diminishing the views of either side in that debate.

3 In taking that approach, we do not in any way seek to ignore or downplay the difficulties faced by trans persons seeking merely to live their lives peacefully in the gender with which they identify, irrespective of their natal sex. The regrettable reality for many trans persons, however, is that something which most take for granted—the sense of self and autonomy in identity—is under constant challenge and attack. As stated in the *Equal Treatment Bench Book* (2021), chapter 12:

> "15. Awareness, knowledge and acceptance of gender-variant people such as those who are transgendered or gender-fluid has greatly increased over the last decade. Unfortunately, however, there remains a certain mistrust of non-conventional gender appearance and behaviour and many people experience social isolation and/or face prejudice, discrimination, harassment and violence in their daily lives—in schools and places of further education, in the workplace, and whilst being customers and service users. Some people experience rejection from families, work colleagues and friends. Some experience job or home loss, financial problems and difficulties in personal relationships.

A "16. Many trans people avoid being open about their gender identity for fear of a negative reaction from others. This applies in all contexts, but particularly when out in public because of safety issues. There is often concern about online privacy, perpetuated by a fear of being 'outed' online and having no control over the content shared.

"17. A survey for the TUC of over 5,000 LGBT employees in the first half of 2017 found that almost half of transgender respondents had B experienced bullying or harassment at work and that 30% had had their transgender status disclosed against their will. A 2017 Acas research paper confirmed that workplace bullying is common and that many staff identified as transgendered experience it on a daily basis. The Acas report also found that the level of bullying may be higher than other rates of bullying related to, for example, sexual orientation, and that transgender C staff may look for another job rather than endure the costs and emotional labour of going to tribunal or court. The limited protection of the Equality Act 2010, which only covers those who are undergoing or have undergone (or who are perceived to be undergoing or to have undergone) gender reassignment, means non-transitioning, non-binary or otherwise gender non-conforming people are particularly vulnerable.

D "18. In a poll of 1,000 employers across a variety of industries in June 2018, one in three employers admitted they were less likely to hire a transgender person and 43% were unsure if they would.

"19. Social isolation, social stigma and transphobia can have serious effects on transgendered people's mental and physical health. Research shows that levels of self-harm and suicide ideation among young trans people and trans adults are much higher than for cisgender people (those E whose gender identity corresponds to the gender assigned to them at birth).

"20. The coronavirus pandemic with its lockdown and periodic restrictions has had a particularly damaging effect on trans people. Research shows a high level of mental ill health, caused by increased discrimination and hate crime, isolation and reduction in peer group support, in some cases being required to stay at home with transphobic F families, and reduction in access to specialised medical or advice services."

4 The vulnerability of many trans persons is something we bear very much in mind. This case, however, is not about whether greater protection ought to be afforded to trans persons under the EqA, the Gender Recognition Act 2004 ("GRA") or otherwise, such legislative steps being a matter for Parliament and not for the court. This appeal is about the much narrower G issue of whether the claimant's belief as to the immutability of sex is one that amounts to a philosophical belief under section 10 of the EqA. For the reasons we set out below, we have come to the conclusion that it does. That does not mean, however, that those with gender-critical beliefs can indiscriminately and gratuitously refer to trans persons in terms other than they would wish. Such conduct could, depending on the circumstances, amount to harassment of, or discrimination against, a trans person.

H **5** With those introductory remarks out of the way, we proceed with our judgment, which is structured as follows: (a) background; (b) the tribunal's judgment; (c) the legal framework; (d) the grounds of appeal; (e) parties' outline submissions; (f) discussion and analysis; (g) conclusion; (h) note on procedure.

6 The claimant is represented in this appeal by Mr Ben Cooper QC and Ms Anya Palmer and the respondents are represented by Ms Jane Russell. Ms Palmer and Ms Russell both appeared below. Permission to intervene was granted to Index on Censorship ("IoC"), represented by Ms Aileen McColgan QC and Ms Katherine Taunton, and to the Equality and Human Rights Commission ("the Commission"), represented by Ms Karon Monaghan QC. Ms Monaghan made it very clear that the Commission is not taking a position on any matter of controversy, its submissions being confined (like the decision of the Employment Appeal Tribunal) to whether the tribunal erred in law. We are grateful to all counsel for their helpful and illuminating submissions.

Background

7 The second respondent is a not-for-profit think tank based in the USA which focuses on international development. The first respondent is a separate but closely linked organisation based in the UK. The third respondent is the president of the second respondent.

8 The claimant is a researcher, writer and adviser on sustainable development. She was appointed a visiting fellow of the first respondent in November 2016. That appointment was renewed in 2017. In that capacity, the claimant carried out paid consultancy work on specific research projects.

9 The claimant has an active presence on social media and regularly posts comments relating to the transgender debate. In July 2018, the Government launched a consultation on proposed amendments to the GRA which would have made legal recognition of self-identified gender easier. The claimant was concerned by the proposed amendments to the GRA, and from around August 2018 she began to express her beliefs about those issues and her views relating to the transgender debate generally on her personal Twitter account. It is not necessary to set out all of the relevant tweets in detail in this judgment as they are set out in the judgment below. It suffices for present purposes to refer to the following extracts:

(a) On 2 September 2018, the claimant tweeted about the GRA stating:

> "I share the concerns of @fairplaywomen that radically expanding the legal definition of 'women' so that it can include both males and females makes it a meaningless concept, and will undermine women's rights and protection for vulnerable women and girls . . . Some transgender people have cosmetic surgery. But most retain their birth genitals. Everyone's equality and safety should be protected, but women and girls lose out on privacy, safety and fairness if males are allowed into changing rooms, dormitories, prisons, sports teams."

(b) Later that month, the claimant made a number of comments about Pips/Philip Bunce, who is a senior director at Credit Suisse and describes himself as being "gender fluid" and "non-binary". These included:

> "Bunce does not 'masquerade as female' he is a man who likes to express himself part of the week by wearing a dress."
>
> "Yes I think that male people are not woman. I don't think being a woman/female is a matter of identity or womanly feelings. It is biology,"
>
> "Bunce is a white man who likes to dress in women's clothes."

(c) Also in that month, when challenged about what she had said about Pips Bunce, the claimant stated in a conversation on Slack (an online communication platform):

> "You are right on tone. I should be careful and not necessarily antagonistic. But if people find the basic biological truths that 'women are adult human females' or 'trans-women are male' are offensive, then they will be offended.
>
> "Of course in social situations I would treat any trans-woman as an honorary female, and use whatever pronouns etc . . . I wouldn't try to hurt anyone's feelings but I don't think people should be compelled to play along with literal delusions like 'trans-women are women'."

(d) In a letter to Anne Main MP on 30 September 2018, the claimant invited Ms Main not to support the proposed new GRA and said: "Please stand up for the truth that it is not possible for someone who is male to become female. Trans-women are men, and should be respected and protected as men."

10 In late September or early October 2018, some staff of the second respondent (and, later, some staff of the first respondent) raised concerns about some of the claimant's tweets, alleging that they were "transphobic", "exclusionary or offensive" and were making them feel "uncomfortable". An investigation into the claimant's conduct followed, the end result of which was that the claimant was not offered further consultancy work and her visiting fellowship was not renewed. The claimant lodged proceedings in the tribunal alleging, amongst other matters, direct discrimination because of her "gender-critical" beliefs and/or harassment related to those beliefs.

11 The tribunal directed that there be a preliminary hearing to determine, amongst other matters, whether the belief relied upon by the claimant amounts to a philosophical belief within the meaning of section 10 of the EqA, and whether she was in "employment" within the meaning of section 83(2)(a) of the EqA. Those issues came before the tribunal between 13 and 21 November 2019, although, in the event, there was only time to consider the belief issue.

The tribunal's judgment

12 In what is (given the length of the hearing) an admirably concise and sensitively written judgment sent to the parties on 18 December 2019, the tribunal concluded that the "specific belief that the claimant holds, as determined in the reasons, is not a philosophical belief protected by the Equality Act 2010".

13 At para 39 of the judgment, the tribunal set out the claimant's evidence as to her belief:

> "39. In the claimant witness statement she stated:
>
> "39.1 'I believe that people deserve respect, but ideas do not' (para 5).
>
> "39.2 'I do not believe it is incompatible to recognise that human beings cannot change sex whilst also protecting the human rights of people who identify as transgender' (para 13).
>
> "39.3 'I believe that there are only two sexes in human beings (and indeed in all mammals): male and female. This is fundamentally linked to

reproductive biology. Males are people with the type of body which, if all things are working, is able to produce male gametes (sperm). Females have the type of body which, if all things are working, is able to produce female gametes (ova), and gestate a pregnancy' (para 14).

"39.4 'Women are adult human females. Men are adult human males' (para 15).

"39.5 'Sex is determined at conception, through the inheritance (or not) of a working copy of a piece of genetic code which comes from the father (generally, apart from in very rare cases, carried on the Y chromosome)' (para 16).

"39.6 'Some women have conditions which mean that they do not produce ova or cannot conceive or sustain a pregnancy. Similarly, some men are unable to produce viable sperm. These people are still women and men' (para 17).

"39.7 'I believe that it is impossible to change sex or to lose your sex. Girls grow up to be women. Boys grow up to be men. No change of clothes or hairstyle, no plastic surgery, no accident or illness, no course of hormones, no force of will or social conditioning, no declaration can turn a female person into a male, or a male person into a female' (para 23).

"39.8 'Losing reproductive organs or hormone levels through illness or surgery does not stop someone being a woman or a man' (para 24).

"39.9 'A person may declare that they identify as (or even are) a member of the opposite sex (or both, or neither) and ask others to go along with this. This does not change their actual sex' (para 26).

"39.10 'There are still areas of scientific discovery about the pathways of sexual development, including chromosomal and other 'disorders of sexual development' (so called 'intersex' conditions), and about the psychological factors underlying transgender identification and gender dysphoria. However I do not believe that any such research will disprove the basic reality that there are two sexes' (para 60).

"39.11 'Under the Gender Recognition Act 2004, a person may change their legal sex. However this does not give them the right to access services and spaces intended for members of the opposite sex. It is an offence for a person who has acquired information in an official capacity about a person's gender recognition certificate ("GRC") to disclose that information. However this situation where a person's sex is protected information relates to a minority of cases where a person has a GRC, is successfully "passing" in their new identity and is not open about being trans. In many cases people can identify a person's sex on sight, or they may have known the person before transition, or the person may have made it public information that they are trans. There is no general legal compulsion for people not to believe their own eyes or to forget, or pretend to forget, what they already know, or which is already in the public domain' (para 108).

"39.12 'In most social situations we treat people according to the sex they appear to be. And even when it is apparent that someone's sex is different from the gender they seek to portray through their clothing, hairstyle, voice and mannerisms, or the name, title and pronoun they ask to be referred to by, it may be polite or kind to pretend not to notice, or to go along with their wish to be referred to in a particular way. But there is

A no fundamental right to compel people to be polite or kind in every situation' (para 110).

"39.13 'In particular while it may be disappointing or upsetting to some male people who identify as women to be told that it is not appropriate for them to share female-only services and spaces, avoiding upsetting males is not a reason to compromise women's safety, dignity and ability to control their own boundaries as to who gets to see and touch their bodies.'

B

"40. I accept that these passages reflect core aspects of the claimant's belief.

"41. When questioned during live evidence the claimant stated that biological males cannot be women. She considers that if a trans woman says she is a woman that is untrue, even if she has a GRC. On the totality of the claimant's evidence it was clear that she considers there are two sexes, male and female, there is no spectrum in sex and there are no circumstances whatsoever in which a person can change from one sex to another, or to being of neither sex. She would generally seek to be polite to trans persons and would usually seek to respect their choice of pronoun but would not feel bound to; mainly if a trans person who was not assigned female at birth was in a 'woman's space', but also more generally. If a person has a GRC this would not alter the claimant's position. The claimant made it clear that her view is that the words man and woman describe a person's sex and are immutable. A person is either one or the other, there is nothing in between and it is impossible to change from one sex to the other."

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E **14** At para 77, having considered the legal criteria for determining whether a belief is a philosophical belief, the tribunal made the following findings as to the claimant's belief:

"The core of the claimant's belief is that sex is biologically immutable. There are only two sexes, male and female. She considers this is a material reality. Men are adult males. Women are adult females. There is no possibility of any sex in between male and female; or that a person is neither male nor female. It is impossible to change sex. Males are people with the type of body which, if all things are working, is able to produce male gametes (sperm). Females have the type of body which, if all things are working, is able to produce female gametes (ova), and gestate a pregnancy. It is sex that is fundamentally important, rather than 'gender', 'gender identity' or 'gender expression'. She will not accept in any circumstances that a trans woman is in reality a woman or that a trans man is a man. That is the belief that the claimant holds."

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15 We refer in this judgment to that belief as the "gender-critical belief" or "the claimant's belief". It is necessary to set out the tribunal's analysis of that belief in full:

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"82. I accept that the claimant genuinely holds the view that sex is biological and immutable. For her it is more than an opinion or viewpoint based on the present state of information available. Even though she has come to this belief recently she is fixed in it, and appears to be becoming more so. She is not prepared to consider the possibility that

her belief may not be correct. I accept that the belief the claimant holds goes to substantial aspects of human life and behaviour.

"83. I next considered whether the claimant's core belief that sex is immutable lacks a level of cogency and cohesion. It is avowedly not religious or metaphysical, but is said to be scientific. Her belief is that a man is a person who, if everything is working, can produce sperm and a woman is a person who, if everything is working, can produce eggs. This does not sit easily with her view that even if everything is not, in her words, 'working', and may never have done so, the person can still only be male or female. The claimant largely ignores intersex conditions and the fact that biological opinion is increasingly moving away from an absolutist approach to there being genes the presence or absence of which determine specific attributes, to understanding that it is necessary to analyse which genes are present, which are switched on, the extent to which they are switched on and the way in which they interact with other genes. However, I bear in mind that 'coherence' mainly requires that the belief can be understood and that 'not too much should be expected'. A 'scientific' belief may not be based on very good science without it being so irrational that it is unable to meet the relatively modest threshold of coherence. On balance, I do not consider that the claimant's belief fails the test of '[attaining] a certain level of cogency, seriousness, cohesion and importance'; even though there is significant scientific evidence that it is wrong. I also cannot ignore that the claimant's approach (save in respect of refusing to accept that a GRC changes a person's sex for all purposes) is largely that currently adopted by the law, which still treats sex as binary as defined on a birth certificate.

"84. However, I consider that the claimant's view, in its absolutist nature, is incompatible with human dignity and the fundamental rights of others. She goes so far as to deny the right of a person with a GRC to be the sex to which they have transitioned. I do not accept the claimant's contention that the Gender Recognition Act produces a mere legal fiction. It provides a right, based on the assessment of the various interrelated Convention rights, for a person to transition, in certain circumstances, and thereafter to be treated for all purposes as the being of the sex to which they have transitioned. In *Goodwin v United Kingdom* (2002) 35 EHRR 18, a fundamental aspect of the reasoning of the ECtHR was that a person who has transitioned should not be forced to identify with their gender assigned at birth. Such a person should be entitled to live as a person of the sex to which they have transitioned. That was recognised in the Gender Recognition Act which states that the change of sex applies for 'all purposes'. Therefore, if a person has transitioned from male to female and has a GRC that person is legally a woman. That is not something that the claimant is entitled to ignore.

"85. Many trans people are happy to discuss their trans status. Others are not and/or consider it of vital importance not to be misgendered. The *Equal Treatment Bench Book* notes the TUC survey that refers to people having their transgender status disclosed against their will. The claimant does not accept that she should avoid the enormous pain that can be caused by misgendering a person, even if that person has a GRC. In her statement she says of people with GRCs 'In many cases people can

identify a person's sex on sight, or they may have known the person before transition . . . There is no general legal compulsion for people not to believe their own eyes or to forget, or pretend to forget, what they already know, or which is already in the public domain.' The claimant's position is that, even if a trans woman has a GRC, she cannot honestly describe herself as a woman. That belief is not worthy of respect in a democratic society. It is incompatible with the human rights of others that have been identified and defined by the ECtHR and put into effect through the Gender Recognition Act.

"86. There is nothing to stop the claimant campaigning against the proposed revision to the Gender Recognition Act to be based more on self-identification. She is entitled to put forward her opinion that there should be some spaces that are limited to women assigned female at birth where it is a proportionate means of achieving a legitimate aim. However, that does not mean that her absolutist view that sex is immutable is a protected belief for the purposes of the EqA. The claimant can legitimately put forward her arguments about the importance of some safe spaces that are only be available to women identified female at birth, without insisting on calling trans women men.

"87. Human rights law is developing. People are becoming more understanding of trans rights. It is obvious how important being accorded their preferred pronouns and being able to describe their gender is to many trans people. Calling a trans woman a man is likely to be profoundly distressing. It may be unlawful harassment. Even paying due regard to the qualified right to freedom of expression, people cannot expect to be protected if their core belief involves violating others' dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

"88. As set out above, I draw a distinction between belief and separate action based on the belief that may constitute harassment. However, if part of the belief necessarily will result in the violation of the dignity of others, that is a component of the belief, rather than something separate, and will be relevant to determining whether the belief is a protected philosophical belief. While the claimant will as a matter of courtesy use preferred pronouns she will not as part of her belief ever accept that a trans woman is a woman or a trans man a man, however hurtful it is to others. In her response to the complaint made by her co-workers the claimant stated 'I have been told that it is offensive to say, "trans women are men" or that women means "adult human female". However since these statements are true I will continue to say them'.

"89. When in an admittedly very bitter dispute with Gregor Murray, who alleged that they had been misgendered by the claimant, rather than seeking to accommodate Gregor Murray's legitimate wishes she stated: 'I had simply forgotten that this man demands to be referred to by the plural pronouns "they" and "them", Murray also calls it "transphobic" that I recognise a man when I see one. I disagree.' 'In reality Murray is a man. It is Murray's right to believe that Murray is not a man, but Murray cannot compel others to believe this.' And that 'I reserve the right to use the pronouns "he" and "him" to refer to male people. While I may choose

to use alternative pronouns as a courtesy, no one has the right to compel others to make statements they do not believe'.

"90. I conclude from this, and the totality of the evidence, that the claimant is absolutist in her view of sex and it is a core component of her belief that she will refer to a person by the sex she considered appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading, humiliating or offensive environment. The approach is not worthy of respect in a democratic society.

"91. I do not accept that this analysis is undermined by the decision of the Supreme Court in *Lee v Ashers Baking Co Ltd* [2020] AC 413 that persons should not be compelled to express a message with which they profoundly disagreed unless justification is shown. The claimant could generally avoid the huge offence caused by calling a trans woman a man without having to refer to her as a woman, as it is often not necessary to refer to a person's sex at all. However, where it is, I consider requiring the claimant to refer to a trans woman as a woman is justified to avoid harassment of that person. Similarly, I do not accept that there is a failure to engage with the importance of the claimant's qualified right to freedom of expression, as it is legitimate to exclude a belief that necessarily harms the rights of others through refusal to accept the full effect of a GRC or causing harassment to trans women by insisting they are men and trans men by insisting they are women. The human rights balancing exercise goes against the claimant because of the absolutist approach she adopts.

"92. In respect of the belief that the claimant contends she does not hold, that everyone has a gender which may be different to their sex at birth and which effectively trumps sex so that trans men are men and trans women are women, I consider that this is a good example of why, at least in certain circumstances, one needs to apply the *Grainger* criteria to the lack of belief, rather than the alternative belief (see *Grainger plc v Nicholson* [2010] ICR 360). Believing that a trans woman is a woman does not conflict with the approach of the European Court of Human Rights in *Goodwin*, or the Gender Recognition Act, or involve harassment. It does not face the same issue of incompatibility with human dignity and fundamental rights of others as the lack of that belief does because that lack of belief necessarily involves the view that trans women are men. The lack of belief fails to meet the *Grainger* criteria.

"93. It is also a sleight of hand to suggest that the claimant merely does not hold the belief that trans women are women. She positively believes that they are men; and will say so whenever she wishes. Put either as a belief or lack of belief, the view held by the claimant fails the *Grainger* criteria and so she does not have the protected characteristic of philosophical belief."

Legal framework

16 Section 4 of the EqA identifies the characteristics that are "protected characteristics". These are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Sections 5 to 12 of the EqA set out the circumstances in which a person "has" a protected characteristic.

A **17** Section 7 deals with gender reassignment. It provides:

"(1) A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.

"(2) A reference to a transsexual person is a reference to a person who
B has the protected characteristic of gender reassignment.

"(3) In relation to the protected characteristic of gender reassignment—(a) a reference to a person who has a particular protected characteristic is a reference to a transsexual person; (b) a reference to persons who share a protected characteristic is a reference to transsexual persons."

18 We acknowledge that the term "transsexual" has fallen into disfavour
C in recent years, and many consider it offensive. The *Equal Treatment Bench Book* (2020) states as follows at p 243:

"Despite its use in current legislation, the term 'transsexual' is dated and some people find it stigmatising. It is preferable to use the term transgender—if it is necessary to the legal proceedings to refer to a person as being transgender at all."

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19 We use the term "transgender" to refer to those persons whose gender identity does not correspond to their sex at birth and who identify with another gender.

20 Section 10 of the EqA deals with religion or belief. It provides:

"(1) Religion means any religion and a reference to religion includes a
E reference to a lack of religion.

"(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

"(3) In relation to the protected characteristic of religion or belief—(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief; (b) a reference to persons who share a protected characteristic is a reference to persons who
F are of the same religion or belief."

21 The Employment Appeal Tribunal in *Grainger plc v Nicholson* [2010] ICR 360 reviewed the jurisprudence relating to belief in considering the materially similar predecessor provisions (contained in the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660)) and endeavoured to set out the criteria to be applied in determining whether a
G belief qualifies for protection. At para 24, Burton J (President) held as follows:

"I do not doubt at all that there must be some limit placed upon the definition of 'philosophical belief' for the purpose of the 2003 Regulations, but before I turn to consider Mr Bowers's suggested such limitations, I shall endeavour to set out the limitations, or criteria, which are to be
H implied or introduced by reference to the jurisprudence set out above. (i) The belief must be genuinely held. (ii) It must be a belief and not, as in *McClintock v Department of Constitutional Affairs* [2008] IRLR 29, an opinion or viewpoint based on the present state of information available. (iii) It must be a belief as to a weighty and substantial aspect of human life

and behaviour. (iv) It must attain a certain level of cogency, seriousness, cohesion and importance. (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others (para 36 of *Campbell v United Kingdom* (1982) 4 EHRR 293 and para 23 of *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246)."

22 These five criteria, referred to here as "the *Grainger* criteria", have since been applied in several cases and are reflected in the guidance on philosophical belief contained in the Commission's Code of Practice: see para 2.59 of the Code. It is not in dispute that these are the appropriate criteria by which to assess whether a belief qualifies for protection under section 10 of the EqA.

23 The tribunal in the present case found that the claimant's belief only failed to satisfy the fifth *Grainger* criterion, referred to here as "*Grainger* V". It is that criterion, namely that the belief must be "worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others", that is the focus of this appeal.

24 Section 11 of the EqA deals with sex. It provides:

"In relation to the protected characteristic of sex— (a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman; (b) a reference to persons who share a protected characteristic is a reference to persons of the same sex."

25 It is, in most cases, necessary for a person to fall within one or more of sections 5 to 12 of the EqA before any protection may arise under other parts of the EqA. Thus, under section 13 of the EqA for example, "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others." In general, in a claim under the EqA, the first stage will be to identify whether a person has the protected characteristic being claimed. Some characteristics, e g age and race, are universal: every person has those protected characteristics, and the analysis can quickly move to whether or not the relevant cause of action under the EqA is established. In the case of some other characteristics, e g disability or belief, it may be disputed that the person's condition or belief actually satisfies section 6 or section 10 of the EqA respectively. In such cases, there may be a preliminary issue (which may or may not be decided at a preliminary hearing) as to whether the claimant has the relevant protected characteristic. In determining that issue, the tribunal will generally not be required to consider whether any cause of action under the EqA is established.

26 Given the requirement under section 3 of the Human Rights Act 1998 to read and give effect to statutory provisions in a way which is compatible with the rights conferred by the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), it is necessary to consider the following articles of the ECHR which are relevant to the present appeal.

"*Article 8*

"*Right to respect for private and family life*

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

A "2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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.

B "*Article 9*

"*Freedom of thought, conscience and religion*

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

C "2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

D "*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.

E "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

F preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

27 Article 17 of the ECHR, which prohibits the abuse of Convention rights, is also important in this context. It provides:

G "Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

Grounds of appeal

H **28** Whilst permission was granted on the sift to pursue six distinct grounds of appeal, the essential challenge to the judgment is that the tribunal erred in its approach to *Grainger* V, and that, had it approached that criterion correctly, the inevitable conclusion would be that the claimant's belief was protected. Neither Mr Cooper nor Ms Russell sought in their oral submissions to address the six grounds individually; instead, they sought

respectively to attack or defend the judgment on more general principles. We shall therefore approach our judgment in the appeal in the same way.

Submissions

Outline of the claimant's submissions

29 Mr Cooper submitted that the claimant's beliefs do not deny the rights or status of trans persons, that her gender-critical beliefs are widely shared in society including, as the evidence before the tribunal showed, by some trans persons. Her beliefs are similar to those of the claimant in *R (Miller) v College of Policing* [2020] 4 All ER 31, whose beliefs were summarised at para 19 of Julian Knowles J's judgment as follows:

> "In his first witness statement the claimant says that over the years he has worked alongside many members of the lesbian, gay, bisexual and transgender (LGBT) community, and that prior to this case he had never been the subject of any complaints about transphobia. In paras 12, 17 and 18 he writes:
>
> " '. . . 17. I believe that trans women are men who have chosen to identify as women. I believe such persons have the right to present and perform in any way they choose, provided that such choices do not infringe upon the rights of women. I do not believe that presentation and performance equate to literally changing sex; I believe that conflating sex (a biological classification) with self-identified gender (a social construct) poses a risk to women's sex-based rights; I believe such concerns warrant vigorous discussion which is why I actively engage in the debate. The position I take is accurately described as gender critical.' "

30 As Julian Knowles J found at para 250 of *Miller*, there is vigorous ongoing debate about trans rights:

> "I take the following points from this evidence. First, there is a vigorous ongoing debate about trans rights. Professor Stock's evidence shows that some involved in the debate are readily willing to label those with different viewpoints as 'transphobic' or as displaying 'hatred' when they are not. It is clear that there are those on one side of the debate who simply will not tolerate different views, even when they are expressed by legitimate scholars whose views are not grounded in hatred, bigotry, prejudice or hostility, but are based on legitimately different value judgments, reasoning and analysis, and form part of mainstream academic research."

31 Mr Cooper submits that it is clear from these passages in *Miller* that the claimant's views cannot be regarded as inherently transphobic. Furthermore, whilst it is inherent in the claimant's beliefs that she will *in some circumstances* refer to a trans woman as a man (or a trans man as a woman), she would not generally do so, or do so where it was not relevant to the context. Her complaint is that the tribunal's judgment disregards this context and instead requires the claimant to refrain from referring to what she considers to be a trans person's sex in any circumstances. That, submits Mr Cooper, has the effect that the claimant must subordinate her language to reflect views that she does not hold, and is tantamount to state mandated—the tribunal being the representative of the state in this context—adherence to a view she does not actually hold.

A **32** Mr Cooper submits that, although, as held by the House of Lords in *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, it is not for the court to inquire into the validity of a belief, the tribunal did just that, including by taking the view that the claimant's beliefs were not supported by scientific evidence. What it ought to have done, submits Mr Cooper, is to consider whether the claimant's belief was of the B kind that would make article 17 of the ECHR relevant. Had the tribunal taken that approach, it could only have concluded that the belief was worthy of respect in a democratic society. Not only is it worthy of respect, but it is also one that is consistent with the common law under which sex is regarded as binary and fixed at birth for the purposes of all legal provisions which make a distinction between men and women: see *Corbett v Corbett* [1971] P 83, *Chief Constable of the West Yorkshire Police v A (No 2)* [2004] ICR C 806; [2005] 1 AC 51, para 30. The coming into force of section 9 of the GRA, under which a person with a gender recognition certificate ("GRC") "becomes for all purposes" the acquired gender, does not, as the tribunal appears to have found, require the claimant to disregard what she considers to be a material reality, namely that sex is immutable.

33 Mr Cooper submits that the tribunal went astray in engaging in a D balancing of the claimant's rights against those of others; at this stage of the analysis the only question was whether the belief was protected under section 10 of the EqA, read compatibly with articles 9 and 10 of the ECHR. By focusing on the way in which the claimant manifested her belief in certain circumstances, the tribunal was wrongly considering matters that would only become relevant at a later stage of the analysis in determining whether there was any cause of action and/or whether the respondents' actions in E restricting the manifestation of the claimant's belief were justified.

Outline of the interveners' submissions

34 Ms Monaghan adopted Mr Cooper's submissions on the law and submitted that, if the tribunal had taken the correct approach, it would have been bound to conclude that the belief was protected. Like Mr Cooper, F Ms Monaghan submitted that the tribunal erred in considering manifestation of the beliefs at this preliminary stage, where the only question was whether the belief amounted to a philosophical belief and was therefore protected. The suggestion in my judgment in *Gray v Mulberry Co (Design) Ltd* [2019] ICR 175 that, in considering the *Grainger* criteria, the focus should be on manifestation is one that should be reconsidered. Where the tribunal G considered manifestation, it was wrong to do so and acted prematurely.

35 It was further submitted that, although many might disagree with the proposition that sex is binary and that gender identity is a social construct, that is what the law of the land currently states: *Corbett v Corbett*; *R (Elan-Cane) v Secretary of State for the Home Department* [2018] 1 WLR 5119. Even the operation of the GRA recognises that sex is immutable: see e g paragraph 24 of Schedule 3 to the EqA which provides that even where a H person has a GRC, another person may lawfully refuse to validate a marriage if they hold a religious belief that sex is immutable.

36 Ms McColgan for IoC similarly agreed with Mr Cooper's submissions on the law. She concurred that the proper approach was to consider whether the very high threshold for invoking article 17 of the

ECHR had been crossed. Conversely, the tribunal should have approached *Grainger* V on the basis that the requirement to establish that a belief is worthy of respect in a democratic society presents a very low barrier, such that only the most extreme beliefs would be excluded. The barrier is especially low in cases where the belief engages a matter of ongoing political and/or public debate. IoC considered that the tribunal gave little if any weight to the claimant's article 10 ECHR right to the freedom of expression. In any event, like Mr Cooper, she submits that the tribunal erred in engaging in a balancing exercise between competing rights at this stage, where the only question is whether the belief falls within section 10 of the EqA.

Outline of the respondents' submissions

37 Ms Russell submitted that the claimant and interveners had sought to present to the appeal tribunal a sanitised version of the claimant's belief. In fact, she submits, a core component of that belief is to cause trans people enormous pain by misgendering them. This goes beyond causing mere offence; the belief is rooted in giving insult and slander, as shown by the claimant's conduct towards people like Pips Bunce who have complex gender identities. The tribunal took the claimant's belief on its own terms and found that part of it—namely, her commitment to referring to a person by the sex she considers appropriate—was likely to give rise to harassment and create a hostile environment for others. Such conduct is not separable from her belief; it is "baked into" it. The tribunal was correct to say that such a belief did not satisfy *Grainger* V.

38 Ms Russell further submits that the essential question for the tribunal was whether the belief was protected under section 10 of the EqA and thus whether it was compatible with *Grainger* V. That analysis is not reducible to a consideration only of articles 9 and 10 of the ECHR. In any event, the claimant's contention that *Grainger* V should be reduced to a consideration of whether the belief is of a kind to engage the high threshold of article 17 of the ECHR, is based on a misreading of *Campbell v United Kingdom* (1982) 4 EHRR 293. In that case, the European Court of Human Rights said no more than that article 17 was one of the factors to be taken into account, and it is clear from a proper reading of that case that other beliefs, not crossing the article 17 threshold, could also be not worthy of respect in a democratic society. Were that not the case, then only a belief in Nazism or totalitarianism could fail *Grainger* V.

39 The tribunal did not err in undertaking a balancing exercise between the claimant's rights and the rights of others. Misgendering trans persons necessarily amounted to harassment and a violation of their article 8 rights to "personal development and to physical and moral security", which can no longer be regarded as a matter of controversy: see *Goodwin v United Kingdom* 35 EHRR 18, para 90; *Campbell v United Kingdom* at para 56 and *AP Garçon and Nicot v France* (Application Nos 79885/12, 52471/13 and 52596/13) (unreported) 6 April 2017, at para 92. The tribunal was not requiring the claimant to refrain from expressing her beliefs, but merely to stop harassing trans persons by misgendering them. In reaching the conclusions that it did, the tribunal achieved a fair balance between competing rights. The Supreme Court's decision in *Lee v Ashers Baking Co Ltd* [2020] AC 413, in which it was held that it was not unlawfully

A discriminatory for a bakery to refuse to supply a cake iced with the message "Support Gay Marriage" because of the belief of the owners that gay marriage is inconsistent with Biblical teaching, does not assist the claimant, because the claimant's objection is to trans persons and not merely to a message or a viewpoint with which she did not agree.

40 Whilst the claimant's actions might not amount to the gravest forms of hate speech, it was within the lower category of hate speech identified by B the ECtHR in *Lilliendahl v Iceland* (Application No 29297/18) (unreported) 11 June 2020, and which includes "serious, severely hurtful and prejudicial" comments that can justifiably be restricted by the state: *Lilliendahl* at para 45. The decision in *R (Miller) v College of Policing* [2020] 4 All ER 31 is not an answer in the present case because that was decided in the very different context of determining whether the police acted correctly in C approaching Mr Miller's comments on the basis that a criminal offence might have been committed. In any event, there was no suggestion of Mr Miller actively misgendering anyone, whereas the claimant has made it clear that she would do so.

41 Ms Russell also disagreed that the law of the land was that sex is immutable. *Corbett v Corbett*, decided in 1970, was of its time and should D no longer be considered good law. In any case, Parliament has decreed, by enacting section 9 of the GRA, that sex is not immutable and that a person does, upon obtaining a GRC, become "for all purposes" a person of the acquired gender.

42 Finally, it was submitted that, if the appeal is allowed, it would mean that no trans person would be safe from harassment in the workplace by a person holding gender-critical beliefs, and that no employer or service E provided could take action against such a person to maintain a safe space for trans persons. It would also create a two-tier system with natal women having greater rights and protection than that afforded to trans women. That, submits Ms Russell, cannot be right.

Discussion

F **43** We begin by identifying the claimant's belief.

What is the claimant's belief?

44 Bean LJ in *Gray v Mulberry Co (Design) Ltd* [2020] ICR 715, para 26, held:

> G "Precision in pleading is not equally important in every case heard by employment tribunals, but in our view it is essential, before considering whether a belief amounts to a 'philosophical belief' protected under sections 4 and 10(2) of the 2010 Act, to define exactly what the belief is. In this case, as already noted the belief relied on is 'the statutory human or moral right to own the copyright and moral rights of her own creative works and output, except when that creative work or output is produced H on behalf of an employer'."

45 In that case, the belief relied upon was capable of being summed up in a single sentence. Most religious or philosophical beliefs will not be capable of such pithy encapsulation. Indeed, any belief that affects a number of aspects of a person's life and how they live it is likely to comprise a diffuse

and diverse range of concepts and principles that would defy precise or concise definition. The claimant's belief is a case in point. It was described across two detailed witness statements running to almost 50 pages. That evidence was supplemented by oral evidence which was subject to cross-examination. The tribunal did not reject any part of that evidence. However, that did not mean that the tribunal was obliged to set out the entirety of the claimant's written and oral evidence in its reasons in order to satisfy the requirement to "define exactly" what the belief is. The standard of exactitude cannot mean, in our judgment, setting out a detailed treatise of a claimed philosophical belief in every case. A precise definition of those aspects of the belief that are relevant to the claims in question would, in our judgment, suffice. In this regard, we do not consider it incorrect for a tribunal to seek to identify the "core" elements of a belief in order to determine whether it falls within section 10 of the EqA. There may be aspects of a belief that are peripheral or merely practical instances of its main tenets, which need not form part of the definition of the belief that falls to be tested against the *Grainger* criteria.

46 The tribunal in this case summarised the passages in the claimant's evidence as to her belief at para 39 of the judgment (see para 13 above), and accepted (at para 40) that "these passages reflect core aspects of the claimant's belief". It did not consider that the specific tweets that caused concern "represent the core" of that belief: para 76. It then went on at para 77 to define the claimant's core belief as follows:

> "The core of the claimant's belief is that sex is biologically immutable. There are only two sexes, male and female. She considers this is a material reality. Men are adult males. Women are adult females. There is no possibility of any sex in between male and female; or that a person is neither male nor female. It is impossible to change sex. Males are people with the type of body which, if all things are working, is able to produce male gametes (sperm). Females have the type of body which, if all things are working, is able to produce female gametes (ova), and gestate a pregnancy. It is sex that is fundamentally important, rather than 'gender', 'gender identity' or 'gender expression'. She will not accept in any circumstances that a trans woman is in reality a woman or that a trans man is a man. That is the belief that the claimant holds."

47 The concluding sentence of that passage might be interpreted as meaning that what precedes it is a summary of the entirety of the claimant's "core beliefs". However, it would appear from subsequent paragraphs in the judgment that the tribunal also considered it to be part of the claimant's belief that she will refer to a person by the sex she considered appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading, humiliating or offensive environment: see para 90. Mr Cooper takes issue with that aspect of the tribunal's judgment, which he submits mischaracterises the claimant's belief and is inconsistent with the tribunal's earlier acceptance of the claimant's evidence. The tribunal accepted the claimant's evidence that:

> "she would generally seek to be polite to trans persons and would usually seek to respect their choice of pronoun but would not feel bound

A to; mainly if a trans person who was not assigned female at birth was in a 'woman's space', but also more generally".

Mr Cooper also drew our attention to passages in the claimant's statement that in accordance with her belief she considers:

> "it is relevant and important in some circumstances to be able to
B acknowledge, describe or refer to a particular person's sex, even if that differs from his or her gender identity and even if that may cause that individual to be upset".

However, as she also said in her statement:

> "[that] does not mean that it is any part of her belief that trans people should not generally be treated in accordance with their wishes or that she
C will not generally do so, let alone that [trans persons] should not be respected or protected from discrimination, or that they should be abused, disparaged or harassed."

48 Ms Russell submitted that Mr Cooper was seeking to sanitise the tribunal's clear findings as to the nature of the claimant's belief and that in the absence of a perversity appeal, those findings cannot be disturbed.

D **49** We do not agree with Ms Russell that Mr Cooper was seeking to sanitise the tribunal's findings as to belief. We note that the tribunal did not reject any of the claimant's evidence and expressly included reference, at para 41, to the fact that the claimant would "generally" seek to be polite to trans persons and would "usually" seek to respect their choice of pronoun. It also referred, at para 30, to the claimant's evidence that she "would of
E course respect anyone's self-definition of their gender identity in any social and professional context"; and had "no desire or intention to be rude to people". In the light of those findings, it would be wrong, in our view, to read the tribunal's finding at para 90 as if it meant that the claimant would in every circumstance seek to "misgender" trans persons, or cause them pain and thereby create a hostile, etc environment. That interpretation would be
F wholly inconsistent with what the tribunal actually found to be the case. A person who "generally" and "usually" acts in a certain way, cannot simultaneously always or invariably act in the opposite way. On a proper reading of the tribunal's findings, it seems to us that the most that can be said is that the claimant will *sometimes* refuse to use preferred pronouns if she considered it relevant to do so, e g in a discussion about a trans woman being in what the claimant considered to be a women-only space.

G **50** We proceed on the basis that the claimant's belief is as summarised by the tribunal at para 77 of the judgment, read with the passages at paras 39–41.

51 The claimant's gender-critical belief is not unique to her; it is a belief shared by others who consider that it is important to have an open debate about issues concerning sex and gender identity. To understand the nature
H of that debate, the court in *Miller* [2020] 4 All ER 31 considered the evidence of the gender-critical academic, Professor Kathleen Stock:

> "241. It is very important to recognise that the claimant was not tweeting in a vacuum. She was contributing to an ongoing debate that is complex and multi-faceted. In order to understand the contours of that

debate I have been assisted by the first witness statement of Professor Kathleen Stock, Professor of Philosophy at Sussex University. She researches and teaches the philosophy of fiction and feminist philosophy. Her intellectual pedigree is impeccable. She writes:

" '4. In my work, among other things I argue that there's nothing wrong, either theoretically, linguistically, empirically, or politically, with the once-familiar idea that a woman is, definitionally, an adult human female. I also argue that the subjective notion of "gender identity" is ill-conceived intrinsically, and a fortiori as a potential object of law or policy. In light of these and other views, I am intellectually "gender critical"; that is, critical of the influential societal role of sex-based stereotypes, generally, including the role of stereotypes in informing the dogmatic and, in my view, false assertion that—quite literally—"trans women are women". I am clear throughout my work that trans people are deserving of all human rights and dignity.'

"242. Professor Stock co-runs an informal network of around 100 gender-critical academics working in UK and overseas universities. Members of the network come from a wide variety of different disciplines including sociology, philosophy, law, psychology and medicine. She says that many members of the network 'research on the many rich theoretical and practical questions raised by current major social changes in the UK around sex and gender'.

"243. Professor Stock then describes the 'hostile climate' facing gender-critical academics working in UK universities. She says that any research which threatens to produce conclusions or outcomes that influential trans-advocacy organisations would judge to be politically inexpedient faces significant obstacles. These, broadly, are impediments to the generation of research and to its publication. She also explains how gender-critical academics face constant student protests which hinder their work.

"244. At para 17 she says: 'As also indicative, since I began writing and speaking on gender-critical matters: the Sussex University Student Union Executive has put out a statement about me on their website, accusing me of "transphobia" and "hatred"; I've had my office door defaced twice with stickers saying that "TERFs" are "not welcome here" . . .'

"245. I understand that 'TERF' is an acronym for 'trans-exclusionary radical feminist'. It is used to describe feminists who express ideas that other feminists consider transphobic, such as the claim that trans women are not women, opposition to transgender rights and exclusion of trans women from women's spaces and organisations. It can be a pejorative term.

"246. She concludes at para 22: 'there are also unfair obstacles to getting gender-critical research articles into academic publications, and in achieving grant funding. These stem from a dogmatic belief, widespread amongst those academics most likely to be asked to referee a project about sex or gender (e g those already established in gender studies; those in feminist philosophy) that trans women are literally women, that trans men are literally men, and that any dissent on this point must automatically be transphobic . . .'

A "247. Also in evidence is a statement from Jodie Ginsberg, the CEO of Index on Censorship. Index on Censorship is a non-profit organisation that campaigns for and defends free expression worldwide. It publishes work by censored writers and artists, promotes debate, and monitors threats to free speech. She deals with a number of topics, including the Government Consultation on the GRA 2004. She explains at paras 10–11:

B "'10. The proposed reforms to the Gender Recognition Act involve removing the gender recognition procedures described above and replacing them with a simple self-identification process (self-ID). Self-ID means the transitioner does not have to undergo medical or other assessment procedures.

"'11. Many in the UK are concerned that the proposed reforms for self-ID will erase "sex" as a protected characteristic in the Equality Act C 2010 by conflating "sex" and "gender". There are concerns that single sex spaces with important protective functions (women's prisons or women's refuse shelters for victims of domestic violence or rape) will be undermined. The UK Government has said it does not plan to amend the existing protections in the Equality Act; however, this is not convincing to those who see self-ID in any form as fundamentally incompatible with D legal protection for women and girls.'

"248. She goes on to address gender criticism and Twitter and explains that there is ongoing concern that Twitter is stifling legitimate debate on this topic by its terms of service which apparently treat gender-critical comment as hate speech. She then gives a number of examples where the police have taken action because of things people have posted on Twitter about transgender issues.

E "249. She concludes at paras 27–29:

"'27. Index is concerned by the apparent growing number of cases in which police are contacting individuals about online speech that is not illegal and sometimes asking for posts to be removed. This is creating confusion among the wider population about what is and is not legal speech, and—more significantly—further suppressing debate on an issue F of public interest, given that the Government invited comment on this issue as part of its review of the Gender Recognition Act.

"'28. The confusion of the public (and police) around what is, and what is not, illegal speech may be responsible for artificially inflating statistics on transgender hate crime . . . Police actions against those espousing lawful, gender-critical views—including the recording of such G views where reported as "hate incidents"—create a hostile environment in which gender-critical voices are silenced. This is at a time when the country is debating the limits and meaning of "gender" as a legal category.

"'29. It has been reported that the hostile environment in which this debate is being conducted is preventing even Members of Parliament from expressing their opinions openly. The journalist James Kirkup said in a H 2018 report for *The Spectator*: "I know MPs, in more than one party, who privately say they will not talk about this issue in public for fear of the responses that are likely to follow. The debate is currently conducted in terms that are not conducive to—and sometimes actively hostile to—free expression. As a result, it is very unlikely to lead to good and socially sustainable policy."'

"250. I take the following points from this evidence. First, there is a vigorous ongoing debate about trans rights. Professor Stock's evidence shows that some involved in the debate are readily willing to label those with different viewpoints as 'transphobic' or as displaying 'hatred' when they are not. It is clear that there are those on one side of the debate who simply will not tolerate different views, even when they are expressed by legitimate scholars whose views are not grounded in hatred, bigotry, prejudice or hostility, but are based on legitimately different value judgments, reasoning and analysis, and form part of mainstream academic research.

"251. The claimant's tweets were, for the most part, either opaque, profane, or unsophisticated. That does not rob them of the protection of article 10(1). I am quite clear that they were expressions of opinion on a topic of current controversy, namely gender recognition. Unsubtle though they were, the claimant expressed views which are congruent with the views of a number of respected academics who hold gender-critical views and do so for profound socio-philosophical reasons. This conclusion is reinforced by Ms Ginsberg's evidence, which shows that many other people hold concerns similar to those held by the claimant."

52 As already stated above, it is not for the appeal tribunal to express any view as to the merits of the transgender debate, but it is relevant to note, and it was not in dispute before us, that the claimant's belief is shared by many others, including some trans persons. We were referred to the statement of Kristina Harrison, a trans woman who professes to hold gender-critical beliefs. That evidence was before the tribunal and is referred to at para 16 of the judgment.

What approach should the tribunal take in determining whether the claimant's belief was a "philosophical belief" within the meaning of section 10 of the Equality Act 2010?

53 Having identified the belief in question, the next task of the tribunal was to determine whether that belief amounted to a philosophical belief within the meaning of section 10 of the EqA. Given that domestic statutory provisions are to be read and understood conformably with the ECHR, it is appropriate to consider the effect of articles 9 and 10 of the ECHR first, as that is likely to inform the analysis of section 10 of the EqA. We note, however, that there is no rule that the analysis should always follow this sequence: see *Page v NHS Trust Development Authority* [2021] ICR 941, para 37.

54 Articles 9 and 10 are set out above. The rights protected by these articles have been described by the ECHR as "closely linked" and the approach to be taken is to consider the case law in relation to the most directly applicable right, interpreted where appropriate in light of the other: see *Ibragimov v Russia* (Application Nos 1413/08 and 28621/11) (unreported) 4 February 2019, at para 78. It is not in dispute that the most directly applicable right here is the article 9 right to freedom of belief.

55 We were referred to numerous authorities emphasising the high importance attached by the ECtHR to diversity or pluralism of thought, belief and expression and their foundational role in a liberal democracy. It is not necessary, in our view, to lengthen this judgment by setting out all of

A them. It is sufficient for present purposes to remind ourselves of the following principles:

(a) Freedom of expression is one of the essential foundations of democratic society:

> "The court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of
B expression constitutes one of the essential foundations of such a society. one of the basic conditions for its progress and for the development of every man. Subject to article 10(2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the
C demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued": *Handyside v United Kingdom* (1976) 1 EHRR 737, para 49.

(b) The paramount guiding principle in assessing any belief is that it is not
D for the court to inquire into its validity:

> "22. It is necessary first to clarify the court's role in identifying a religious belief calling for protection under article 9. When the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure an assertion of
E religious belief is made in good faith: 'neither fictitious, nor capricious, and that it is not an artifice', to adopt the felicitous phrase of Iacobucci J in the decision of the Supreme Court of Canada in *Syndicat Northcrest v Amselem* (2004) 241 DLR (4th) 1, 27, para 52. *But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the*
F *religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion.* Freedom of religion protects the subjective belief of an individual. As Iacobucci J also noted, at p 28, para 54, religious belief is intensely personal and can easily vary from one individual to another. *Each individual is at liberty to hold his own religious beliefs, however irrational*
G *or inconsistent they may seem to some, however surprising.* The European Court of Human Rights has rightly noted that 'in principle, the right to freedom of religion as understood in the Convention rules out any appreciation by the state of the legitimacy of religious beliefs or of the manner in which these are expressed': *Metropolitan Church of Bessarabia v Moldova* (2001) 35 EHRR 13, 335, para 117. The relevance
H of objective factors such as source material is, at most, that they may throw light on whether the professed belief is genuinely held.

> "23. Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of 'manifestation' arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in article 9 of the

European Convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention: see Arden LJ [2003] QB 1300, 1371, para 258": per Lord Nicholls in *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246. (Emphasis added.)

(c) The freedom to hold whatever belief one likes goes hand-in-hand with the state remaining neutral as between competing beliefs, refraining from expressing any judgment as to whether a particular belief is more acceptable than another, and ensuring that groups opposed to one another tolerate each other: *Metropolitan Church of Bessarabia v Moldova* (2001) 35 EHRR 13, paras 115 and 116.

(d) A belief that has the protection of article 9 is one that only needs to satisfy very modest threshold requirements. As stated by Lord Nicholls in *R (Williamson)*, those threshold requirements "should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention". In other words, the bar should not be set too high: see *Harron v Chief Constable of Dorset Police* [2016] IRLR 481, per Langstaff J (President) at para 34 and *Gray v Mulberry Co (Design) Ltd* [2019] ICR 175, para 27.

56 The particular threshold requirement that is relevant for present purposes is that encapsulated in *Grainger* V, namely that the belief must be "worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others".

57 The question is what standard should the court apply in determining whether a particular belief falls foul of that threshold requirement, bearing in mind that the bar is not to be set too high. It is clear from the passage in *Grainger* [2010] ICR 360 cited at para 21 above, that Burton J (President) derived *Grainger* V from certain passages in two earlier decisions: the first is para 36 of the decision of the ECtHR in *Campbell v United Kingdom* 4 EHRR 293. In that case, the issue was whether an objection to the use of corporal punishment in schools (when it was still permitted) amounted to a "philosophical conviction" within the meaning of article 2 of the First Protocol to the ECHR ("A2P1"). A2P1 provides:

A "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

58 In accepting that the applicants' views on corporal punishment did B amount to philosophical convictions, the ECtHR said as follows at para 36 of its judgment:

"Having regard to the Convention as a whole, *including article 17*, the expression 'philosophical convictions' in the present context denotes, in the court's opinion, such convictions as are worthy of respect in a 'democratic society' and are not incompatible with human dignity; in C addition, they must not conflict with the fundamental right of the child to education, the whole of article 2 being dominated by its first sentence. The applicants' views relate to a weighty and substantial aspect of human life and behaviour, namely the integrity of the person, the propriety or otherwise of the infliction of corporal punishment and the exclusion of the distress which the risk of such punishment entails. They are views D which satisfy each of the various criteria listed above; it is this that distinguishes them from opinions that might be held on other methods of discipline or on discipline in general." (Emphasis added.)

59 The ECtHR's reference to article 17 of the ECHR is instructive. Article 17 prohibits the use of the ECHR to destroy the rights of others. It becomes relevant where a state, group or person seeks to rely on Convention E rights in a way that blatantly violates the rights and values protected by the Convention. One cannot, for example, rely on the right to freedom of expression to espouse hatred, violence or a totalitarian ideology that is wholly incompatible with the principles of democracy: see the ECtHR's guide on article 17 of the ECHR at para 26. The level at which article 17 becomes relevant is clearly (and necessarily) a high one. The fundamental freedoms and rights conferred by the Convention would be seriously F diminished if article 17, and the effective denial of a Convention right, could be too readily invoked: see *Vajnai v Hungary* (2008) 50 EHRR 44, paras 21–26. Thus, when the ECtHR refers to article 17 (as it did in *Campbell v United Kingdom*) in considering whether a philosophical conviction is worthy of respect in a democratic society and not in conflict with the fundamental rights of others, it would have had in mind that it is G only a conviction that, e g, challenges the very notion of democracy that would not command such respect. To maintain the plurality that is the hallmark of a functioning democracy, the range of beliefs and convictions that must be tolerated is very broad. It is not enough that a belief or a statement has the potential to "offend, shock or disturb" (see *Vajnai* at para 46) a section (or even most) of society that it should be deprived of protection under article 9 (freedom of thought conscience and belief) or H article 10 (freedom of expression). The stipulation that the conviction or belief must not be in conflict with the fundamental rights of others must also be viewed with regard to article 17. The conflict between rights in this context of satisfying threshold requirements is not merely that which would arise in any case where the exercise of one right might have an impact on the

ECHR rights of another; in order for a conviction or belief to satisfy threshold requirements to qualify for protection, it need only be established that it does not have the effect of destroying the rights of others.

60 The second passage to which Burton J (President) referred was para 23 of *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, where Lord Nicholls of Birkenhead said as follows:

> "Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of 'manifestation' arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in article 9 of the European Convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. *Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection.* The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention: see Arden LJ [2003] QB 1300, 1371, para 258." (Emphasis added.)

61 The reference there to a belief involving "torture or inhuman punishment" is consistent with the principle that only the gravest violations of Convention principles should be denied protection. Such violations go far beyond what might be regarded as potentially justifiable interference with a right: they seek to destroy such rights.

62 The two passages on which Burton J (President) relied in formulating *Grainger* V clearly establish the extremely grave threat to Convention principles that would have to exist in order for a belief not to satisfy that criterion. We do not accept Ms Russell's submission that the claimant has misconstrued these passages in pursuit of her submission that article 17 provides the appropriate standard against which *Grainger* V is to be assessed. Far from being merely one of the factors to be taken into account, it appears to us that article 17 was mentioned because that is the benchmark against which the belief is to be assessed; only if the belief involves a very grave violation of the rights of others, tantamount to the destruction of those rights, would it be one that was not worthy of respect in a democratic society. We do not consider that the ECtHR would have referred to article 17, or the House of Lords to "torture and punishment", if a belief

A involving some lesser violation of others' rights—not sufficiently grave to engage article 17—was also capable of being not worthy of such respect.

63 Two recent decisions of the ECtHR provide further illustration of the kinds of views that must be espoused before article 17 would apply so as to deprive a person of the protection under article 10 of the Convention. The first is *Ibragimov* 4 February 2019. In that case, publications by Muslim
B groups were banned by the state on the grounds that they were extremist and sought to incite religious discord. In response to an application to the ECtHR that rights under article 10 (freedom of expression) had been infringed, the state contended that the article 10 protection should be removed from the applicants by the operation of article 17. The ECtHR rejected that contention stating:

C "62. The court reiterates that, as recently confirmed by the court, *article 17 is only applicable on an exceptional basis and in extreme cases. Its effect is to negate the exercise of the Convention right that the applicant seeks to vindicate in the proceedings before the court. In cases concerning article 10 of the Convention, it should only be resorted to if it is immediately clear that the impugned statements sought to deflect this article from its real purpose by employing the right to freedom of*
D *expression for ends clearly contrary to the values of the Convention* (see *Perinçek v Switzerland* (2015) 63 EHRR 6).

"63. Since the decisive point under article 17—*whether the text in question sought to stir up hatred, violence or intolerance, and whether by publishing it the applicant attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and*
E *freedoms laid down in it*—overlaps with the question whether the interference with the applicant's rights to freedom of expression and freedom of religion was 'necessary in a democratic society', the court finds that the question whether article 17 is to be applied must be joined to the merits of the applicant's complaints under articles 9 and 10 of the Convention (see *Perinçek*, cited above, para 115)."

F "123. Having regard to the above considerations and its case law on the subject, the court finds that the domestic courts did not apply standards which were in conformity with the principles embodied in article 10 and did not provide 'relevant and sufficient' reasons for the interference. In particular, *it is unable to discern any element in the domestic courts' analysis which would allow it to conclude that the book in question incited violence, religious hatred or intolerance*, that the
G context in which it had been published was marked by heightened tensions or special social or historical background in Russia or that its circulation had led or could lead to harmful consequences. The court concludes that it was not necessary, in a democratic society, to ban the book in question.

"124. *The court therefore rejects the Government's preliminary*
H *objection under article 17 and finds that there has been a violation of article 10 of the Convention*." (Emphasis added.)

64 In *Lilliendahl v Iceland* 11 June 2020, the applicant had been convicted under Iceland's General Penal Code for making derogatory remarks about homosexuals during a radio broadcast debating a local council

proposal to strengthen education in schools on LGBT issues. The applicant had referred to homosexuals as "sexual deviants" and used other highly offensive terminology. On the applicant's claim that his article 10 (freedom of expression) rights had been infringed, the ECtHR considered whether the application should be dismissed pursuant to article 17. It held:

"25. *The decisive point under article 17 is whether the applicant's statements sought to stir up hatred or violence and whether, by making them, he attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it* (*Perinçek v Switzerland* 63 EHRR 6, paras 113–115). If applicable, article 17's effect is to negate the exercise of the Convention right that the applicant seeks to vindicate in the proceedings before the court. As the court held in *Perinçek*, *article 17 is only applicable on an exceptional basis and in extreme cases*. In cases concerning article 10 of the Convention, it should only be resorted to if it is immediately clear that the impugned statements sought to deflect this article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention (ibid, para 114).

"26. The court finds that the applicant's statement cannot be said to reach the high threshold for applicability of article 17 as set out in the above-mentioned judgment in *Perinçek* (ibid). *Although the comments were highly prejudicial, as discussed further below, it is not immediately clear that they aimed at inciting violence and hatred or destroying the rights and freedoms protected by the Convention* (compare *Witzsch v Germany (No 1)* (Application No 41448/98) (unreported) 20 April 1999; *Schimanek v Austria* (2000) 29 EHRR CD250; *Garaudy v France* (Application No 65831/01) ECHR 2003-IX; *Norwood v United Kingdom* (2004) 40 EHRR SE11; *Witzsch v Germany (No 2)* (Application No 7485/03) (unreported) 13 December 2005; and *Molnar v Romania* (Application No 16637/06) (unreported) 23 October 2012). The applicant is thus not barred from invoking his freedom of expression in this instance. What remains to be decided is whether his conviction complied with article 10 of the Convention." (Emphasis added.)

65 The ECtHR went on to describe the two categories of "hate speech" considered by the court's case law under article 10:

"33. 'Hate speech', as this concept has been construed in the court's case law, falls into two categories. As discussed above, the Supreme Court held that although the term 'hate speech' was not used in article 233(a) of the General Penal Code, it was clear from the provision's preparatory works and the international legal instruments by which it was inspired that the concept of 'hate speech' was simultaneously a synonym for the sort of expression which the provision penalised and a threshold for the severity which such expression had to reach in order to fall under the provision (see para 13 above).

"34. *The first category of the court's case law on 'hate speech' is comprised of the gravest forms of 'hate speech', which the court has considered to fall under article 17 and thus excluded entirely from the protection of article 10* (see paras 25–26 above and the cases cited

A therein). As explained above, the court does not consider the applicant's comments to fall into this category (see para 26 above).

"35. *The second category is comprised of 'less grave' forms of 'hate speech' which the court has not considered to fall entirely outside the protection of article 10, but which it has considered permissible for the contracting states to restrict* (see, inter alia, *Féret v Belgium* (Application B No 15615/07) (unreported) 16 July 2009, paras 54–92; *Vejdeland v Sweden* (2012) 58 EHRR 479, paras 47–60; *Delfi AS v Estonia* (2015) 62 EHRR 6, paras 153 and 159; and *Beizaras v Lithuania* (2020) 71 EHRR 28, para 125). In the last-mentioned case, the court found a violation of article 14 taken in conjunction with article 8, and of article 13, on account of the authorities' refusal to prosecute authors of serious homophobic comments on Facebook, including undisguised calls for C violence. In *Delfi AS*, the court found no breach of article 10 as regards the domestic courts' imposition of liability on the applicant company, notably due to the insufficiency of the measures taken by the applicant company to remove without delay after publication comments on its news portal amounting to hate speech and speech inciting violence and to ensure a realistic prospect of the authors of such comments being held D liable.

"36. *Into this second category, the court has not only put speech which explicitly calls for violence or other criminal acts, but has held that attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for allowing the authorities to favour combating prejudicial speech within the context of permitted restrictions on freedom of expression* (see *Beizaras v* E *Lithuania*, cited above, para 125; *Vejdeland v Sweden*, cited above, para 55, and *Féret v Belgium*, cited above, para 73). In cases concerning speech which does not call for violence or other criminal acts, but which the court has nevertheless considered to constitute 'hate speech', that conclusion has been based on an assessment of the content of the expression and the manner of its delivery.

F "37. Thus, for example, in *Féret*, the court found no violation of article 10 of the Convention in respect of the conviction of the applicant, chairman of the political party 'Front National', for publicly inciting discrimination or hatred. The court considered it significant that the applicant's racist statements had been made by him in his capacity as a politician during a political campaign, where they were bound to be G received by a wide audience and have more impact than if they had been made by a member of the general public (*Féret v Belgium*, cited above, para 75). Similarly, in *Vejdeland*, the court found no violation of article 10 in respect of the applicants' conviction for distributing leaflets considered by the courts to be offensive to homosexual persons. It emphasised that the leaflets had been distributed in schools, left in the lockers of young people at an impressionable and sensitive age (*Vejdeland* H *v Sweden*, cited above, para 56).

"38. In the present case, the court sees no reason to disagree with the Supreme Court's assessment that the applicant's comments were 'serious, severely hurtful and prejudicial'. As reasoned by the Supreme Court, the use of the terms kynvilla (sexual deviation) and kynvillingar (sexual

deviants) to describe homosexual persons, especially when coupled with the clear expression of disgust, render the applicant's comments ones which promote intolerance and detestation of homosexual persons.

"39. *The court has already found (see para 26 above) that the comments in question did not constitute a manifestation of the gravest form of 'hate speech' thus falling outside the scope of protection of article 10 of the Convention by virtue of article 17*. However, the court considers it clear that the comments in issue, viewed on their face and in substance, fell under the second category of 'hate speech' (see paras 35–36 above) falling to be examined under article 10 of the Convention. The manner of delivery of the comments does not alter this conclusion, although it is true that the comments, which were made publicly, were expressed by the applicant as a member of the general public not expressing himself from a prominent platform likely to reach a wide audience. Moreover, viewing the severity of the comments, as correctly assessed by the Supreme Court, it does not detract from the court's finding above that the comments were not directed, in particular, at vulnerable groups or persons (compare and contrast *Vejdeland*).

"40. The court finally notes that this conclusion, whilst relevant, is not, as such, conclusive for its assessment whether the applicant's conviction fulfilled the requirements of lawfulness, legitimate aim and necessity in a democratic society as required by article 10, paragraph 2 of the Convention." (Emphasis added.)

66 It is clear from these judgments that, in assessing whether a person's rights under article 9 or article 10 have been infringed, there is a preliminary question as to whether the person qualifies for protection at all, or, to use the ECtHR's terminology, as to whether the person "[falls] outside the scope of protection of article 10 of the Convention by virtue of article 17": *Lilliendahl* at para 39. Where the expression amounts to the "gravest form of hate speech" then the protection would not apply, as article 17 would operate to deprive the person of the protection that they seek to invoke. However, if the expression does not fall into that first category, then the question is whether the steps taken by the state to restrict such expression are justified within the meaning of article 10(2). Thus even comments which are "serious, severely hurtful and prejudicial", or which promote intolerance and detestation of homosexuals, would not fall outside the scope of article 10 altogether. However, that does not mean that the individual making such comments has free rein to make them in any circumstance at all. The individual's freedom to express their views is limited to the extent provided for by article 10(2) and it will then be for the court to assess whether any limitation imposed by the state is justified.

67 In many article 9 cases, that two-stage analysis will not arise because it will be obvious that the religion or belief is one which falls within scope of the protection afforded by that article, and the analysis will move swiftly to whether there was an interference with the right and, if so, whether that was justified. However, where it does arise, it is important to bear in mind the extremely limited circumstances in which a belief would be considered so beyond the pale that it does not qualify for protection at all.

68 Of course, the architecture of the EqA does not precisely follow the structure of the ECHR. Section 10 of the EqA focuses on whether a person

A has the protected characteristic of belief. In determining whether a person falls within section 10 of the EqA, the tribunal is essentially undertaking the "first stage" analysis described above in relation to the ECHR. That is to say, the tribunal is considering only whether the person falls within the scope of the relevant protection at all. At this stage, therefore, in order to ensure that section 10 of the EqA is applied compatibly with article 9 of the ECHR, B the question will be whether the belief meets the "modest threshold requirements" as established by the case law, and as encapsulated in the *Grainger* criteria. In relation to *Grainger* V, that means that only those beliefs whose characteristics are such that they would fall outside the scope of article 9 of the ECHR by virtue of article 17 would fail to satisfy that criterion.

69 We do not accept Ms Russell's submission that taking that approach C is to reduce the analysis under section 10 of the EqA only to a consideration of articles 9 and 10 of the ECHR. It is the approach that is required having regard to the obligation under section 3 of the Human Rights Act 1998 to read and give effect to section 10 of the EqA compatibly with the Convention. In any event, it was not suggested that there were any residual or additional threshold conditions under section 10 of the EqA that would D require a different approach to be taken. Instead, reliance is placed on *Grainger* V alone. However, *Grainger* V is, as we have seen, itself derived from case law concerned with Convention rights. Accordingly, it is correct, in our judgment, to apply section 10 of the EqA with article 17 of the ECHR in mind.

70 Ms Russell's further objection to any approach based on article 17 is that it would mean only beliefs akin to Nazism or espousing totalitarianism E would fail to qualify for protection. However, it is clear from Convention case law that that is as it should be; a person is free in a democratic society to hold any belief they wish, subject only to "some modest, objective minimum requirements": per Lord Nicholls in *R (Williamson)* [2005] 2 AC 246. It is only in extreme cases involving the gravest violation of other Convention rights that the belief would fail to qualify for protection at all.

F **71** Ms Russell referred us to *Palomo Sánchez v Spain* [2011] IRLR 934, in which the ECtHR considered whether there had been a breach of article 10 (and article 11 (freedom of association)) in circumstances where employees, who were on the executive of the relevant trade union, had been dismissed for publishing a newsletter containing a highly offensive cartoon depicting a manager and two co-workers in compromising positions. The G Spanish courts dismissed their complaints based on a violation of the right to freedom of expression, considering the restriction of that right in the particular employment context concerned to be justified. The ECtHR held that the Spanish courts were required to balance the applicants' right to freedom of expression "against the right to honour and dignity" of the three impugned colleagues, and had, in the particular employment context concerned, reached decisions that did not amount to a violation of article 10. H We were not assisted by this case (a) because it was not concerned with article 17 and the ouster of article 10 protection; and (b) it appeared to us to be a straightforward application of article 10(2) and the circumstances in which an interference with the right to freedom of expression may be justified. It did not, in our view, establish that qualification for protection

under article 9 or 10 would not be afforded to an individual in any case where their actions might impinge upon the "honour and dignity" of others.

The relevance of manifestation

72 Although article 9(2) refers to the right to the freedom of thought, conscience and religion, it also refers to the freedom to manifest that religion or belief "in worship, teaching, practice and observance". Furthermore, it is the freedom to manifest religion or belief that is subject only to the limitations described in article 9(2). Section 10 of the EqA makes no mention of manifestation. To what extent then, is manifestation relevant in applying section 10 of the EqA? Mr Cooper submits that manifestation may be taken into account but only for the purposes of determining whether the threshold requirements are met in general, rather than whether a particular expression or manifestation is protected.

73 In *Gray v Mulberry Co (Design) Ltd* [2019] ICR 175, at paras 29–30, I said as follows in relation to the application of the *Grainger* criteria and manifestation:

> "29. . . . However, it is important to remember that in an application of the *Grainger* criteria, and the fourth *Grainger* criterion in particular, the focus should be on the manifestation of the belief. As Lord Nicholls stated in *Williamson*, at para 23: 'Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of "manifestation" arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements.'
>
> "30. Lord Walker of Gestingthorpe, at para 64 of *Williamson*, agreed with Lord Nicholls that a focus on manifestation was necessary 'in order to prevent article 9 becoming unmanageably diffuse and unpredictable in its operation' (see para 62): 'I am therefore in respectful agreement with Lord Nicholls that, at any rate by the time that the court has reached the stage of considering the *manifestation* of a belief, it must have regard to the implicit (and not over-demanding) threshold requirements of seriousness, coherence and consistency with human dignity which Lord Nicholls mentions.' (Emphasis in original.)"

74 Although the Court of Appeal [2020] ICR 715 upheld the appeal tribunal judgment in *Gray*, it did so on the basis that there was no causal link between the claimed belief and the detriment relied upon. The Court of Appeal went on to say, at para 30:

> "It is unnecessary in these circumstances for us to consider whether Choudhury J was right to require the focus to be on manifestation when determining whether there is a protected belief by reference to the *Grainger* criteria. Our judgment is not to be taken as endorsing this approach."

75 Ms Monaghan submits that, although the Court of Appeal in *Gray* did not expressly overrule it, this aspect of my judgment in *Gray* was wrong. She submits that manifestation is not a useful touchstone for determining whether a belief meets the *Grainger* criteria, not least because a single belief may be manifested by different people in different ways, or may not be manifested at all. Furthermore, manifestation would be

A meaningless in relation to a lack of belief (which is also protected) since there would usually be no belief to manifest. Ms Monaghan submits that where, in *R (Williamson)*, Lord Nicholls and Lord Walker referred to a focus on manifestation being necessary, this meant no more than that the court or tribunal would probably not be troubled with having to determine whether a belief met the threshold requirements unless and until manifestation becomes
B an issue.

76 Ms Russell submits that whether or not *Gray* (appeal tribunal) was wrong in this regard does not take the claimant's appeal any further since the tribunal considered that the manifestation in question was not separable from the belief itself.

77 We agree with Ms Monaghan that I was wrong to read the remarks of Lord Nicholls and Lord Walker in *R (Williamson)* as meaning that, at the
C stage of applying the *Grainger* criteria, the *focus* should be on manifestation. Manifestation is not irrelevant: the belief may only come to the employer's attention because of some outward manifestation. The claimant's tweets in this case are an example. Had she not sent those tweets or expressed her beliefs in any discernible way, then the issues giving rise to this appeal would not have arisen at all. Moreover, as I said in *Gray*, the manner in which a
D person manifests their belief might, in some cases, be relevant in determining whether the belief has the requisite degree of cogency or cohesion to satisfy *Grainger* IV. However, we accept Ms Monaghan's and Mr Cooper's submission that at this preliminary stage of assessing whether the belief even qualifies for protection, manifestation can be no more than a part of the analysis (assuming that there is any manifestation at all) and should be
E considered only in determining whether the belief meets the threshold requirements in general. It is also right to note that an approach that places the focus on manifestation might lead the tribunal to consider whether a particular expression or mode of expression of the belief is protected, rather than concentrating on the belief in general and assessing whether it meets the *Grainger* criteria.

F 78 That approach follows from the language of section 10 of the EqA which, as we have said, is concerned only with whether a person *has* the protected characteristic by being *of* the religion or belief in question, and not with whether a person *does* anything pursuant to that religion or belief.

79 In our judgment, it is important that in applying *Grainger* V, tribunals bear in mind that it is only those beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism,
G or advocating Nazism, or espousing violence and hatred in the gravest of forms, that should be capable of being not worthy of respect in a democratic society. Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection. However, the manifestation of such beliefs may, depending on circumstances, justifiably be restricted under article 9(2) or
H article 10(2) as the case may be.

Did the tribunal err in its approach?

80 The tribunal was tasked with considering whether the claimant's belief fell within section 10 of the EqA. In terms of article 9 and article 10

rights, the issue was simply whether the claimant fell within the scope of the protection afforded by those articles.

81 It was not the tribunal's task to engage in any evaluation of the claimant's beliefs by any objective standard. Instead, it was to assess that belief on its own terms.

82 In applying *Grainger* V, it was incumbent upon the tribunal to bear in mind that only those beliefs or acts of expression that would fall to be excluded from protection by virtue of article 17 of the ECHR would fall outside the scope of section 10 of the EqA. Thus, the tribunal would, in order to exclude the protection, have to be satisfied that the belief in question or its expression gave rise to the gravest form of hate speech, was inciting violence, or was as antithetical to Convention principles as Nazism or totalitarianism.

83 The tribunal's application of the *Grainger* criteria appears to commence at para 79. There, the tribunal states:

> "Many concerns that the claimant has, such as ensuring protection of vulnerable women, do not, in fact, rest on holding a belief that biological sex is immutable."

84 Similarly, at para 81, the tribunal states:

> "Many of the illustrations the claimant relies on do not, in fact, rely on the belief that men can never become women; but on the analysis that there may be limited circumstances in which it is relevant that a person is a trans woman or trans man, such as when ensuring appropriate medical care is provided, which takes proper account of trans status."

85 The tribunal appears here to be straying into an evaluation of the claimant's belief. In our judgment, it is irrelevant in determining whether a belief qualifies for protection that some of its tenets are considered by the tribunal to be unfounded, or that it might be possible for the claimant's concerns to be allayed without adhering to or manifesting her belief. By expressing the view that it did and by proposing steps that the claimant could take so as not to manifest her belief in a certain way, the tribunal, was, it seems to us, implicitly making a value judgment based on its own view as to the legitimacy of the belief. In doing so, the tribunal could be said to have failed to remain neutral and/or failed to abide by the cardinal principle that everyone is entitled to believe whatever they wish, subject only to a few modest, minimum requirements.

86 At para 82, the tribunal comments that the claimant is "not prepared to consider the possibility that her belief may not be correct". That too seems to us to be an irrelevant consideration. A person who is dogmatic in their belief, even in the face of overwhelming evidence tending to undermine it, is no less entitled to protection for their belief than a person whose belief has the support, say, of the majority of the scientific community. Qualification for protection cannot depend on the quality of open-mindedness or a willingness to accept rational, but opposing, views. As stated in *Metropolitan Church of Bessarabia v Moldova* 35 EHRR 13, the state (here represented by the tribunal) must remain neutral; its role is "not to remove the cause of tensions by doing away with pluralism, but to ensure that groups opposed to one another tolerate each other". Even though this aspect of the tribunal's

A judgment was concerned with *Grainger* III (i e whether the belief is as to a weighty and substantial aspect of human life and behaviour) on which the claimant succeeded, the error in the tribunal's approach is apparent.

87 We see this error of approach again at para 83, where the tribunal considers whether the belief satisfies *Grainger* IV (by attaining a certain level of cogency, seriousness, cohesion and importance). Although, once again, the tribunal finds in the claimant's favour, it does so having expressed doubts as to the scientific basis for the claimant's belief. The tribunal refers to "the fact that biological opinion is increasingly moving away from an absolutist approach [to gender]", despite there being little in the way of expert evidence about that issue and really little more than an article in the *New York Times* referred to at para 44 in support. It is irrelevant that the tribunal might consider the scientific foundations of the claimant's belief to be weak. The belief is to be assessed on its own terms against the very modest threshold requirements established by the case law. The requirement that a belief must attain a certain level of cogency or cohesion should not lead a tribunal, using the tools of logic or science, to challenge the basis for a belief; were that not so then many might consider that no religious belief satisfies *Grainger* IV.

88 It is at para 84 that the tribunal commences its analysis of the claimant's belief by reference to *Grainger* V, and in respect of which the tribunal found against the claimant. The tribunal considers that "the claimant's view, in its absolutist nature, is incompatible with human dignity and fundamental rights of others". It is not entirely clear from the tribunal's judgment what is meant when it describes the claimant's belief as "absolutist". If it meant "absolutist" in the sense that the claimant has an unshakeable conviction that she is right that sex is immutable and that anyone who disagrees with her is wrong, then any person professing to hold a belief (whether religious or philosophical) with which others profoundly disagree or which others do not share could be said to be absolutist. However, as we have said already, the firmness with which one clings to a view (even one that others might consider offensive or irrational) is not a reason to deny that person the protection under section 10 of the EqA. If that were not so, then the more fervently held the belief, the less likely it is to qualify for protection. "Absolutism" in that sense cannot therefore be a valid criterion for determining whether or not a belief falls to be protected under section 10 of the EqA.

89 The other way in which the description "absolutist" appears to have been used is in relation to the tribunal's finding at para 90 that "it is a core component of [the claimant's] belief that she will refer to a person by the sex she considered appropriate even if it violates their dignity and/or creates an intimidating, hostile, degrading, humiliating or offensive environment". In so far as the tribunal is here suggesting that the claimant would always, indiscriminately and gratuitously, "misgender" trans men and women, then that is, as we have said, inconsistent with the tribunal's own earlier findings that the claimant would "generally seek to be polite to trans persons and would usually seek to respect their choice of pronoun but would not feel bound to; mainly if a trans person who was not assigned female at birth was in a 'woman's space' but also more generally". The evidence that we were taken to and which was before the tribunal supported the claimant's case that she would usually use preferred pronouns but reserved the right not

to do so where she considered that to be relevant. The only evidence of "misgendering" appears to have been in relation to an incident described at para 89 of the judgment and concerning Gregor Murray. The claimant explains that her use of the male pronoun when referring to Gregor Murray instead of the preferred "they" and "them" was unintentional. There is nothing to suggest that the tribunal rejected that evidence.

90 Reading the tribunal's judgment as a whole, as we must, we do not read the tribunal's conclusions at para 90 as meaning that the claimant would always, indiscriminately and gratuitously use the wrong or non-preferred pronouns when referring to or communicating with trans persons. On a proper reading of the judgment, the tribunal was stating that the claimant would not use preferred pronouns whenever she considered it appropriate not to do so. That must mean that she would not use them where she considered it to be relevant. If that is correct, then the description "absolutist" would appear to be something of a misnomer as her position was more nuanced and context dependent.

91 The tribunal also relies, at paras 84, 85, 86 and 91, on the claimant's refusal to acknowledge the full effect of a GRC as evidence of the absolutist nature of her views, the tribunal being of the view that the claimant is not entitled to ignore the fact that a trans woman with a GRC is "legally a woman". The question is whether the tribunal was correct to consider that the existence of a GRC means that the claimant is not entitled in any circumstances to refer to a trans woman holding such a certificate as a man.

92 The GRA was enacted following the decision of the ECtHR in *Goodwin v United Kingdom* 35 EHRR 18, in which the court considered whether the absence of any legal recognition of the acquired gender of those who had undergone gender reassignment surgery amounted to a violation of article 8 (right to private and family life) of the ECHR. In holding that there was a violation of article 8, the ECtHR held as follows:

> "77. It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (see, mutatis mutandis, *Dudgeon v United Kingdom* (1981) 4 EHRR 149, para 41). *The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the court's view, be regarded as a minor inconvenience arising from a formality.* A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety."
>
> "90. Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings (see, inter alia, *Pretty v United Kingdom* (2002) 35 EHRR 1, para 62, and *Mikulic v Croatia* [2002] 1 FCR 720, para 53). *In the 21st century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a*

A *matter of controversy* requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable. Domestic recognition of this evaluation may be found in the report of the Interdepartmental Working Group and the Court of Appeal's judgment of *Bellinger v Bellinger* [2003] B 2 AC 467 (see paras 50, 52–53)." (Emphasis added.)

93 The ECtHR thus considered that it was an important aspect of their article 8 rights that trans persons who had undergone gender reassignment surgery should be entitled to *legal* recognition of the acquired gender. The GRA was enacted to address the shortcomings in the law identified in *Goodwin*. Section 9 of the GRA so far as relevant provides:

C "*General*

"(1) Where a full gender recognition certificate is issued to a person, the person's gender *becomes for all purposes* the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)." (Emphasis added.)

D **94** The GRA provides for certain exceptions where, as a matter of law, a person's gender is not the acquired gender. For example, section 12 provides that the fact that a person's gender has become the acquired gender does not affect the status of that person as the father or mother of a child. Whilst the GRA makes it an offence to disclose information acquired in an official capacity as to a person's gender before it became the acquired gender E (section 22 of the GRA), there is nothing in the Act that requires a person acting in any private capacity to refer to a person's acquired gender or to refrain from referring to a person's gender before it became the acquired gender.

95 The GRA was considered by the House of Lords when it was still the Gender Recognition Bill in *Chief Constable of the West Yorkshire Police v* F *A (No 2)* [2004] ICR 806. Baroness Hale of Richmond referred to the Bill as follows (para 42):

"The Gender Recognition Bill is currently before Parliament. This lays down a comprehensive scheme for recognising the reassigned gender of a trans person in defined circumstances. These are wider than the post-operative conditions with which the domestic and European case law has G been concerned. *Once recognised, the reassigned gender is valid for all legal purposes unless specific exception is made*. It will no longer be a genuine occupational qualification that the job may entail the carrying out even of intimate searches. In policy terms, therefore, the view has been taken that trans people properly belong to the gender in which they live." (Emphasis added.)

H **96** More recently, in *R (McConnell) v Registrar General for England and Wales* [2021] Fam 77 the Court of Appeal stated, at para 54:

"On that interpretation (which the High Court accepted and which we also would accept on the natural interpretation of the legislation) the general effect of section 9(1) of the GRA is displaced to the extent that an

exception to it applies. For present purposes the relevant exception is contained in section 12. It follows that, *although for most purposes a person must be regarded in law as being of their acquired gender* after the certificate has been issued, where an exception applies, they are still to be treated as having their gender at birth."

97 Although section 9 of the GRA refers to a person becoming "for all purposes" the acquired gender, it is clear from these references in decisions of the House of Lords and the Court of Appeal, that this means for all "legal purposes". That the effect of section 9 of the GRA is not to erase memories of a person's gender before the acquired gender or to impose recognition of the acquired gender in private, non-legal contexts is confirmed by the comments of Baroness Hale PSC in *R (C) v Secretary of State for Work and Pensions* [2017] 1 WLR 4127. The issue in that case was whether the Department for Work and Pensions had breached the GRA by keeping records of a trans person's gender before the acquired gender and operating a special customer records policy for customers seeking extra privacy, which had the effect of alerting front-line staff to the possibility that a customer had a GRC. Baroness Hale PSC begins her judgment with a powerful account of the traumas faced by trans persons and the importance to them of being acknowledged in their acquired gender (para 1):

"'We lead women's lives: we have no choice'. Thus has the Chief Justice of Canada, the Rt Hon Beverley McLachlin, summed up the basic truth that women and men do indeed lead different lives. How much of this is down to unquestionable biological differences, how much to social conditioning, and how much to other people's views of what it means to be a woman or a man, is all debatable and the accepted wisdom is perpetually changing. But what does not change is the importance, even the centrality, of gender in any individual's sense of self. Over the centuries many people, but particularly women, have bitterly resented and fought against the roles which society has assigned to their gender. Genuine equality between the sexes is still a work in progress. But that does not mean that such women or men have not felt entirely confident that they are indeed a woman or a man. Gender dysphoria is something completely different—the overwhelming sense that one has been born into the wrong body, with the wrong anatomy and the wrong physiology. Those of us who, whatever our occasional frustrations with the expectations of society or our own biology, are nevertheless quite secure in the gender identities with which we were born, can scarcely begin to understand how it must be to grow up in the wrong body and then to go through the long and complex process of adapting that body to match the real self. But it does not take much imagination to understand that this is a deeply personal and private matter; that a person who has undergone gender reassignment will need the whole world to recognise and relate to her or to him in the reassigned gender; and will want to keep to an absolute minimum any unwanted disclosure of the history. This is not only because other people can be insensitive and even cruel; the evidence is that transphobic incidents are increasing and that transgender people experience high levels of anxiety about this. It is also because of their

A deep need to live successfully and peacefully in their reassigned gender, something which non-transgender people can take for granted."

98 Baroness Hale PSC went on to acknowledge, however, that the GRA does not erase history:

"22. The appellant accepts that section 9 'does not rewrite history'. Thus, in *J v C* [2007] Fam 1 the issue of a full GRC in the male gender to a B person who was previously female did not retrospectively validate his prior marriage to another female (at a time when the law did not provide for same sex marriages), with the result that he did not become the father of a child born to the other female as a result of artificial insemination by donor ('AID') (as would otherwise have been the case under section 27 of the Family Law Reform Act 1987, which provided that the husband of a C woman who gives birth as a result of AID was to be treated for all purposes as the father of the child). But she argues that section 9(1) does require her now to be treated for all purposes as a woman and this includes how she is treated by the DWP for the purpose of claiming and receiving [jobseeker's allowance]. Section 22(1) is not an exception to the general principle in section 9(1). Rather it is an additional protection. It D does not follow from the fact that no offence is committed under section 22 that a policy which is in breach of section 9(1) is lawful.

"23. The problem with this argument is that section 9(1) clearly contemplates a change in the state of affairs: before the issue of the GRC a person was of one gender and after the issue of the GRC that person 'becomes' a person of another gender. The sections which follow section 9 are designed, in their different ways, to cater for the effect of that E change. Thus, for example, section 12 provides that the acquisition of a new gender does not affect that person's status as the father or mother of a child; section 15 provides that it does not affect the disposal or devolution of property under a will or other instrument made before the appointed day (thus section 9 will apply to dispositions made after that date); section 16 provides that the acquisition of a new gender does not affect F the descent of any peerage or dignity or title of honour or property limited to descend with it (unless a contrary intention is expressed in the will or instrument).

"24. *There is nothing in section 9 to require that the previous state of affairs be expunged from the records of officialdom. Nor could it eliminate it from the memories of family and friends who knew the person in another life.* Rather, sections 10 and 22 provide additional G protection against inappropriate official disclosure of that prior history." (Emphasis added.)

99 The effect of a GRC, whilst broad as a matter of law, does not mean that a person who, like the claimant, continues to believe that a trans woman with a GRC is still a man, is necessarily in breach of the GRA by doing so; the GRA does not compel a person to believe something that they H do not, any more than the recognition by the state of civil partnerships can compel some persons of faith to believe that a marriage between anyone other than a man and a woman is acceptable. That is not to say, of course, that the claimant can, as a result of her belief, disregard the GRC; clearly, she cannot do so in circumstances where the acquired gender is legally relevant,

e g in a claim of sex discrimination or harassment. Referring to a trans person by their pre-GRC gender in any of the settings in which the EqA applies could amount to harassment related to one or more protected characteristics;[1*] whether or not it does will depend, as in any claim of harassment, on a careful assessment of all relevant factors, including whether the conduct was unwanted, the perception of the trans person concerned and whether it is reasonable for the impugned conduct to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the trans person. A simple example of a situation where referring to a trans person by their pre-GRC gender would probably not amount to harassment is where the trans person in question is happy to discuss their trans status or is sympathetic to or shares the claimant's gender-critical belief. The tribunal itself acknowledged that "Many trans people are happy to discuss their trans status" and had before it the uncontested evidence of Kristina Harrison, a gender-critical trans woman, who, presumably, would not have felt harassed by being referred to as a man in some circumstances. It is difficult, therefore, to understand the tribunal's conclusion that the claimant's belief "*necessarily* harms the rights of others through her refusal to accept the full effect of a GRC". Not only is this conclusion predicated on the incorrect assumption that the claimant would always misgender trans persons, irrespective of the circumstances, and that the full effect of a GRC goes beyond legal purposes, but it also fails to recognise that whether there is harassment in a given situation is a highly fact-sensitive question.

100 Some beliefs, for example a belief that all non-white people should be forcibly deported for the good of the nation, are such that any manifestation of them would be highly likely to espouse hatred and incitement to violence. In such cases, it would be open to the tribunal to say that the belief fails to satisfy *Grainger* V. However, the rationale for doing so would be that it is the kind of case to which article 17 might be applied because of the inevitability that the rights of others would be destroyed. The claimant's belief is not comparable.

101 At para 91, the tribunal states:

> "The claimant could generally avoid the huge offence caused by calling a trans woman a man without having to refer to her as a woman, as it is often not necessary to refer to a person's sex at all. However, where it is, I consider requiring the claimant to refer to a trans woman as a woman is justified to avoid harassment of that person. Similarly, I do not accept that there is a failure to engage with the importance of the claimant's qualified right to freedom of expression, as it is legitimate to exclude a belief that necessarily harms the rights of others through refusal to accept the full effect of a gender recognition certificate or causing harassment to trans women by insisting they are men and trans men by insisting they are women. The human rights balancing exercise goes against the claimant because of the absolutist approach she adopts."

102 In our judgment, the tribunal fell into error in two respects here. First, the tribunal's only task at this preliminary stage was to determine if the claimant's belief fell within section 10 of the EqA. That analysis was

* *Reporter's note*. The superior figure refers to a note which can be found at the end of the judgment, on p 48.

A confined, in Convention terms, to the first stage of determining whether the belief qualified for protection under article 9 of the ECHR at all. There is no balancing exercise between competing rights at this first stage, because it is only a belief that involves in effect the destruction of the rights of others that would fail to qualify. The balancing exercise only arises under the second stage of the analysis under article 9(2) (or article 10(2)) in determining B whether any restriction on the exercise of the right is justified. That exercise is context specific.

103 The second error was in imposing a requirement on the claimant to refer to a trans woman as a woman to avoid harassment. In the absence of any reference to specific circumstances in which harassment might arise, this is, in effect, a blanket restriction on the claimant's right to freedom of expression in so far as they relate to her beliefs. However, that right applies C to the expression of views that might "offend, shock or disturb". The extent to which the state can impose restrictions on the exercise of that right is determined by the factors set out in article 10(2), i e restrictions that are "prescribed by law and are necessary in a democratic society . . . for the protection of the reputation or rights of others". It seems that the tribunal's justification for this blanket restriction was that the claimant's belief D "necessarily harms the rights of others". As discussed above, that is not correct: whilst the claimant's beliefs, and her expression of them by refusing to refer to a trans person by their preferred pronoun, or by refusing to accept that a person is of the acquired gender stated on a GRC, could amount to unlawful harassment in some circumstances, it would not always have that effect: see para 99 above. In our judgment, it is not open to the tribunal to impose in effect a blanket restriction on a person not to express those views E irrespective of those circumstances.

104 That does not mean that in the absence of such a restriction the claimant could go about indiscriminately "misgendering" trans persons with impunity. She cannot. The claimant is subject to the same prohibitions on discrimination, victimisation and harassment under the EqA as the rest of society. Should it be found that her misgendering on a particular occasion, F because of its gratuitous nature or otherwise, amounted to harassment of a trans person (or of anyone else for that matter), then she could be liable for such conduct under the EqA. The fact that the act of misgendering was a manifestation of a belief falling with section 10 of the EqA would not operate automatically to shield her from such liability. The tribunal correctly acknowledged, at para 87 of the judgment, that calling a trans woman a man "may" be unlawful harassment. However, it erred in concluding that that G possibility deprived her of the right to do so in any situation.

105 At paras 58, 92 and 93 of the judgment, the tribunal analysed the position from the perspective of a "lack of belief" within the meaning of section 10(2) of the EqA. The tribunal considered that the *Grainger* criteria are to be applied to the lack of philosophical belief just as they would to a belief. At para 58, the tribunal said as follows:

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> "While the position is reasonably clear for religion and lack of religion—as they are specifically provided for in section 10(1) of the EqA, I consider the position is less clear for lack of belief. Section 10(2) provides that 'reference to belief includes a reference to a lack of belief'. On that basis if one replaces the word 'belief' with 'lack of belief', subsection (2)

could be considered to protect any 'religious or philosophical lack of belief'—i e the lack of belief must be religious or philosophical, rather than the protection applying to anyone who does not hold a particular religious or philosophical belief. On that analysis the *Grainger* criteria are to be applied to the lack of belief. I consider this is a more logical analysis, at least in some cases. A person might well hold a religious or philosophical belief that murder is wrong. It would be surprising if not holding that belief was also protected, so, in effect, believing there is nothing wrong with murder is a protected characteristic. On my suggested analysis such a lack of belief in murder being wrong would not comply with the *Grainger* criteria and so would not be protected. Similarly, atheism would be protected because it is a philosophical lack of belief that corresponds with the *Grainger* criteria rather than merely because atheist are not adherents of the large number of protected religions."

106 In our judgment, the flaw in this analysis is that it assumes that the lack of belief necessarily denotes holding a positive view that is opposed to the belief in question. However, a lack of belief under section 10 of the EqA is merely the *absence* of belief: see *Grainger* [2010] ICR 360 at para 31. A lack of belief may arise from simply not having any view on the issue at all, either because of indifference, indecision or otherwise. It would also include a person who has some views on the issue but would not claim to have a developed philosophical belief to that effect. Thus, in the example postulated by the tribunal of a person having a belief that murder is wrong, the protection conferred on those who lack that belief would not mean that persons who positively believed that murder was not wrong would be protected under the EqA. Those who held a positive belief to that effect would be deemed to have a belief, not a lack of belief. Those who had a lack of belief that murder is wrong would include those who had never given the matter any thought and those who think that there might be some situations in which murder is acceptable. That lack of belief is protected under section 10(2) of the EqA irrespective of whether the *Grainger* criteria could be applied to it. Indeed, it is difficult to see how the *Grainger* criteria could be applied to a person who held no view on an issue at all.

107 The claimant had also put her claim in her ET1 on the alternative basis of a lack of belief. The belief that she did not subscribe to was described by the tribunal as follows at para 92 of the judgment: "everyone has a gender which may be different to their sex at birth and which effectively trumps sex so that trans men are men and trans women are women."

108 We refer to this as the "gender identity belief". The claimant accepted that the gender identity belief was a philosophical belief qualifying for protection under section 10 of the EqA. However, instead of treating the claimant's lack of the gender identity belief as also qualifying for protection, the tribunal treated the claimant's lack of that belief as necessarily equating to a positive belief that trans women are men (which the tribunal considered to be a belief not worthy of protection). In our judgment, that approach was wrong. The fact that the claimant did not share the gender identity belief is enough in itself to qualify for protection. If a person, A, is treated less favourably by her employer, B, because of A's failure to profess support for

A B's gender identity belief then that could amount to unlawful discrimination because of a lack of belief.

109 There was no "sleight of hand" here as suggested by the tribunal in putting the claim on the basis of a lack of belief. That is a valid course open to putative claimants and its efficacy should not be undermined by treating any lack of belief as necessarily amounting to a positive opposing belief.

B

Does the claimant's belief fall within section 10 of the EqA?

110 On a proper application of *Grainger* V, as analysed above, it seems to us that the only possible conclusion is that the claimant's belief does fall within section 10 of the EqA.

111 Most fundamentally, the claimant's belief does not get anywhere C near to approaching the kind of belief akin to Nazism or totalitarianism that would warrant the application of article 17. That is reason enough on its own to find that *Grainger* V is satisfied. The claimant's belief might well be considered offensive and abhorrent to some, but the accepted evidence before the tribunal was that she believed that it is not "incompatible to recognise that human beings cannot change sex whilst also protecting the D human rights of people who identify as transgender": see para 39.2 of the judgment. That is not, on any view, a statement of a belief that seeks to destroy the rights of trans persons. It is a belief that might in some circumstances cause offence to trans persons, but the potential for offence cannot be a reason to exclude a belief from protection altogether.

112 In the present case, there are two further factors which, upon analysis, are wholly at odds with the view that the belief is not one worthy of E respect in a democratic society.

113 First, there is the evidence that the gender-critical belief is not unique to the claimant, but is widely shared, including amongst respected academics. The popularity of a belief does not necessarily insulate it from being one that gravely undermines the rights of others; history is replete with instances where large swathes of society have succumbed to philosophies F that seek to destroy the rights of others. However, a widely shared belief demands particular care before it can be condemned as being not worthy of respect in a democratic society.

114 Second, the claimant's belief that sex is immutable and binary is, as the tribunal itself correctly concluded, consistent with the law: see para 83. The leading case is still *Corbett v Corbett* [1971] P 83, 104D–G, 106B–D and 107A, per Ormrod J. Its effect was considered by the House of Lords in G *Chief Constable of the West Yorkshire Police v A (No 2)* [2004] ICR 806:

> "3. The advice given to the chief constable on English domestic law, summarised in (1) above, was correct. Such was the effect of *Corbett v Corbett* [1971] P 83. That case, it is true, concerned the capacity of a male-to-female transsexual to marry. But the Court of Appeal (Criminal Division) applied the same rule to gender-specific criminal offences in *R v* H *Tan* [1983] QB 1053. Both decisions have been heavily criticised, and other jurisdictions have adopted other rules. But there was nothing in English domestic law to suggest that a person could be male for one purpose and female for another, and there was no rule other than that laid down in *Corbett* and *R v Tan*." (Per Lord Bingham of Cornhill.)

"19. In March 1998 the chief constable had been advised that, even though she had successfully undergone all the usual treatment, including surgery, in law Ms A's sex was still male. In my view that advice on the domestic law of the United Kingdom was, and remains, correct: *Bellinger v Bellinger* [2003] 2 AC 467, especially at p 480, para 45 per Lord Nicholls of Birkenhead. Section 54(9) of the Police and Criminal Evidence Act 1984 ('PACE') provides: 'The constable carrying out a search shall be of the same sex as the person searched.' Parliament's laudable aim is to afford protection to the dignity and privacy of those being searched in a situation where they may well be peculiarly vulnerable. While her application to join the force was pending, Ms A herself very properly drew attention to the possible problem posed by this provision. On the basis of the legal advice given to him, the chief constable considered that, because of section 54(9), Ms A could not lawfully search female suspects. And, in practice, she could not search male suspects. Nor could the chief constable arrange for Ms A not to have to carry out searches without it becoming known why he was doing so. Since he understood that she was not willing for this to happen, the chief constable decided that he could not accept her application to join the force." (Per Lord Rodger of Earlsferry.)

"30. In the well-known case of *Corbett v Corbett* [1971] P 83, Ormrod J held that, for the purpose of the law of capacity to marry, the sex of a person was fixed at birth. Accordingly a purported marriage in 1963 between a man and a male to female trans person was void ab initio. Shortly after this, the Nullity of Marriage Act 1971 provided that a marriage taking place after 31 July 1971 is void on the ground 'that the parties are not respectively male and female'. This was later consolidated as section 11(c) of the Matrimonial Causes Act 1973. The same approach was adopted by the Court of Appeal in *R v Tan* [1983] QB 1053 for the gender specific offences in the Sexual Offences Acts. The court considered that 'both common sense and the desirability of certainty and consistency' demanded that the *Corbett* decision should apply in both contexts. Since then, it has been assumed that a person's gender is fixed at birth for the purpose of all legal provisions which make a distinction between men and women. *Corbett* was followed without challenge in *S-T (formerly J) v J* [1998] Fam 103." (Per Baroness Hale.)

115 Where a belief or a major tenet of it appears to be in accordance with the law of the land, then it is all the more jarring that it should be declared as one not worthy of respect in a democratic society. Ms Russell sought to persuade us that the decision in *Corbett* is outdated and should not be followed, particularly in light of the GRA under which a person who obtains a GRC does "become for all purposes" the acquired gender. We cannot see any real basis on which this appeal tribunal could disregard *Corbett* especially given that the House of Lords' comments in *Chief Constable of West Yorkshire v A* were made having regard to the Gender Recognition Bill: see para 42 of *Chief Constable of West Yorkshire v A*. Society has, of course, moved on considerably since 1971, and, as stated in the *Equal Treatment Bench Book*, "awareness, knowledge and acceptance of transgender people has greatly increased over the last decade". However, the position under the common law as to the immutability of sex remains the same; and it would be a matter for Parliament, not a court or tribunal

considering whether a belief is protected under section 10 of the EqA, to declare otherwise.

116 Just as the legal recognition of civil partnerships does not negate the right of a person to believe that marriage should only apply to heterosexual couples, becoming the acquired gender "for all purposes" within the meaning of the GRA does not negate a person's right to believe, like the claimant, that as a matter of biology a trans person is still their natal sex. Both beliefs may well be profoundly offensive and even distressing to many others, but they are beliefs that are and must be tolerated in a pluralist society.

Conclusion

117 For these reasons, and notwithstanding Ms Russell's powerful submissions to the contrary, it is our judgment that the tribunal erred in law. In relation to the preliminary issue of whether the claimant's belief falls within section 10 of the EqA, we substitute a finding that it does. The matter will now be remitted to a freshly constituted tribunal to determine whether the treatment about which the claimant complains was because of or related to that belief.

118 We acknowledge that some trans persons will be disappointed by this judgment. Ms Russell submitted that it would create a "two-tier" system between natal women and trans women, with some trans women fearing that it will give licence to people seeking to harass them. We do not agree that that is the effect of deciding that the claimant's belief is a philosophical belief within the meaning of section 10 of the EqA. We take this opportunity to reiterate, once more, what this judgment does not mean:

(a) This judgment does not mean that the appeal tribunal has expressed any view on the merits of either side of the transgender debate and nothing in it should be regarded as so doing.

(b) This judgment does not mean that those with gender-critical beliefs can "misgender" trans persons with impunity. The claimant, like everyone else, will continue to be subject to the prohibitions on discrimination and harassment under the EqA. Whether or not conduct in a given situation does amount to harassment or discrimination within the meaning of the EqA will be for a tribunal to determine in a given case.

(c) This judgment does not mean that trans persons do not have the protections against discrimination and harassment conferred by the EqA. They do. Although the protected characteristic of gender reassignment under section 7 of the EqA would be likely to apply only to a proportion of trans persons, there are other protected characteristics that could potentially be relied upon in the face of such conduct: see note 1.

(d) This judgment does not mean that employers and service providers will not be able to provide a safe environment for trans persons. Employers would be liable (subject to any defence under section 109(4) of the EqA) for acts of harassment and discrimination against trans persons committed in the course of employment.

Note on procedure

119 Finally, we note that the preliminary hearing below took some six days to conclude with the tribunal being presented with hundreds of pages of

evidence as to the nature of the claimant's belief and on the transgender debate more generally. It is perhaps unsurprising in these circumstances that the tribunal was effectively drawn into an adjudication of the merits and validity of the claimant's belief, rather than limiting itself to a determination of the question whether the belief fell within section 10 of the EqA. In our view, that question should not ordinarily take up more than a day of the tribunal's time. Beliefs which appear trivial or flippant (i e not satisfying *Grainger* III or IV) for example ought to be capable of being dealt with fairly quickly. Given that *Grainger* V has now been clarified as being apt only to exclude the most extreme beliefs akin to Nazism or totalitarianism or which incite hatred or violence, very few beliefs will fall at that hurdle, and, once again, it should not take long to determine whether a belief falls into that category. It seems to us that it would only be in very rare cases that it would be necessary for there to be a hearing of several days' length to determine that preliminary issue. In most cases, the real issue will be whether there was discrimination because of the belief in question. Where it appears to the tribunal that the analysis of any preliminary issue in this context is likely to take longer than a day or so, the better approach might be to consider whether all issues, including liability, should be determined together.

Note

1. A trans person could potentially bring a claim for harassment related to gender reassignment (where the definition under section 7(2) is satisfied), sex (see e g *P v S* (Case C-13/94) [1996] ICR 795; [1996] ECR I-2143, paras 17–22), disability based on the conditions of gender dysphoria or gender identity disorder (see EHRC Code at para 2.28), or even a philosophical belief that gender identity is paramount and that a trans woman is a woman.

Appeal allowed.
Case remitted to a different tribunal.

JENNIFER WINCH, Barrister

A

Court of Appeal

*Secretary of State for Transport and another *v* Cuciurean

[2022] EWCA Civ 661

2022 May 5; 16 Lewison, Asplin, Edis LJJ

B

Costs — Discretion of court — Contempt of court — Protestor committed to prison for breach of injunction — Proper approach to costs of committal proceedings — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 10, 11

The claimants applied to commit the defendant for contempt of court, alleging that he had breached an injunction restraining trespass on woodland that was held by the claimants for the purposes of the HS2 high speed railway. The judge found the C contempt proven and imposed a suspended term of imprisonment, concluding that the defendant had known of the injunction and had decided consciously and deliberately to break its terms with the intention of furthering the protest against the HS2 scheme and to inhibit or thwart it to the best of his ability. At a subsequent hearing, the judge ordered the defendant to pay the claimants' costs in the sum of £25,000, although the claimants had incurred costs of some £80,000 and claimed a contribution of some £39,900. The defendant appealed against the costs order, contending among other D things that the judge ought to have regarded the suspended sentence and the costs order as together amounting to an interference with the defendant's rights to freedom of expression and to peaceful assembly under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms[1] and to have asked himself whether, taken together, the interference was proportionate.

On the appeal—

Held, dismissing the appeal, that, where a contemnor's rights to freedom of E expression and to peaceful assembly under articles 10 and 11 of the Convention were engaged, the combination of any penal measure and any costs order made against the contemnor would be required to amount to a proportionate interference with such rights; that, thus, when a court was deciding whether to make an order for costs against a person who had been found to be in contempt of court by disobeying an injunction granted in the context of political or environmental protest, the court would be well advised to ask (i) whether what the contemnor did was in exercise of F one of the rights in articles 10 and 11 of the Convention, (ii), if so, whether there was an interference by a public authority with that right, (iii), if so, whether that interference was "prescribed by law" for the purposes of articles 10(2) or 11(2), (iv), if so, whether the interference was in pursuit of a legitimate aim as set out in articles 10(2) or 11(2), for example the protection of the rights of others, and (v), if so, whether the interference was "necessary in a democratic society" to achieve that legitimate aim; that, in the present case, the defendant had exercised rights under articles 10 and 11 in so far as he had breached the injunction, and both the initial G grant of the injunction and the sanctions imposed for its breach amounted to an interference with those rights; that, however, such interference was prescribed by law, in that it was prescribed by the original injunction, was in pursuit of at least two legitimate aims, namely the vindication of the claimants' own rights and the maintenance of the rule of law and the upholding of the authority of the judiciary, and was necessary in a democratic society to achieve those legitimate aims, since

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[1] Human Rights Act 1998, Sch 1, Pt I, art 10(1): "Everyone has the right to freedom of expression . . ."

Art 10(2): see post, para 28.

Art 11(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."

Art 11(2): see post, para 29.

(a) the aims were sufficiently important to justify interference with the defendant's rights, (b) there was a rational connection between the means chosen and the aims in view, (c) there were no less restrictive alternative means available to achieve those aims and (d) there was a fair balance between the rights of the defendant and the general interest of the community; and that, accordingly, the judge's exercise of his discretion to make the award of costs which he had could not be impugned (post, paras 13, 48, 53, 55, 64, 68, 69, 70, 71).

Director of Public Prosecutions v Ziegler [2020] QB 253, DC; [2022] AC 408, SC(E) and *Attorney General v Crosland* [2022] 1 WLR 367, SC(E) applied.

National Highways Ltd v Heyatawin [2022] 1 WLR 1521, DC considered.

Constantinescu v Romania (Application No 32563/04) (unreported) 11 December 2012, ECtHR distinguished.

Quaere. Whether a decision of a panel of the Supreme Court hearing an appeal against one of its own first instance decisions is binding on the Court of Appeal (post, para 43).

Order of Marcus Smith J affirmed.

The following cases are referred to in the judgment of Lewison LJ:

Allen v Bloomsbury Publishing Ltd [2011] EWCA Civ 943, CA
Appleby v United Kingdom (Application No 44306/98) (2003) 37 EHRR 38, ECtHR
Attorney General v Crosland [2021] UKSC 15; [2021] 4 WLR 103, SC(E); [2021] UKSC 58; [2022] 1 WLR 367; [2022] 2 All ER 401; [2022] 1 Cr App R 15, SC(E)
Chief Constable of Essex Police v Douherty [2020] EW Misc 9 (CC)
City of London Corpn v Samede [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA
Constantinescu v Romania (Application No 32563/04) (unreported) 11 December 2012, ECtHR
Director of Public Prosecutions v Cuciurean [2022] EWHC 736 (Admin); [2022] 3 WLR 446, DC
Director of Public Prosecutions v Ziegler [2019] EWHC 71 (Admin); [2020] QB 253; [2019] 2 WLR 1451; [2019] 1 Cr App R 32, DC; [2021] UKSC 23; [2022] AC 408; [2021] 3 WLR 179; [2021] 4 All ER 985; [2021] 2 Cr App R 19, SC(E)
Haringey London Borough Council v Brown [2015] EWCA Civ 483; [2017] 1 WLR 542; [2016] 4 All ER 754, CA
Hashman and Harrup v United Kingdom (Application No 25594/94) (1999) 30 EHRR 241, ECtHR (GC)
Johnsey Estates (1990) Ltd v Secretary of State for the Environment [2001] EWCA Civ 535; [2001] L & TR 32, CA
King's Lynn and West Norfolk Borough Council v Bunning [2013] EWHC 3390 (QB); [2015] 1 WLR 531; [2014] 2 All ER 1095
Ladd v Marshall [1954] 1 WLR 1489; [1954] 3 All ER 745, CA
National Highways Ltd v Buse [2021] EWHC 3404 (QB), DC
National Highways Ltd v Heyatawin [2021] EWHC 3078 (QB); [2022] Env LR 17, DC
National Highways Ltd v Heyatawin [2021] EWHC 3093 (QB); [2022] 1 WLR 1521, DC
National Highways Ltd v Persons Unknown [2021] EWHC 3081 (QB)
Phillips v Symes (No 3) [2005] EWCA Civ 663; [2005] 1 WLR 2986, CA
Practice Direction (Costs in Criminal Proceedings) [2015] EWCA Crim 1568, CA
R v F Howe & Son (Engineers) Ltd [1999] 2 All ER 249; [1999] 2 Cr App R (S) 37, CA
R v Northallerton Magistrates' Court, Ex p Dove [2000] 1 Cr App R (S) 136, DC
R v Rimmington [2005] UKHL 63; [2006] 1 AC 459; [2005] 3 WLR 982; [2006] 2 All ER 257; [2006] 1 Cr App R 17, HL(E)
Samsung Electronics Co Ltd v LG Display Co Ltd [2022] EWCA Civ 423, CA
Secretary of State for Transport v Cuciurean [2020] EWHC 2614 (Ch); [2020] EWHC 2723 (Ch); [2021] EWCA Civ 357, CA

UK Oil & Gas Investments plc v Persons Unknown [2018] EWHC 2252 (Ch); [2019] JPL 161

The following additional cases were cited in argument or referred to in the skeleton arguments:

Balçik v Turkey (Application No 25/02) (unreported) 29 November 2007, ECtHR
Canada Goose UK Retail Ltd v Persons Unknown [2020] EWCA Civ 303; [2020] 1 WLR 2802; [2020] 4 All ER 575, CA
Cindrić and Bešlić v Croatia (Application No 72152/13) (unreported) 6 September 2016, ECtHR
Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA
Ezelin v France (Application No 11800/85) (1991) 14 EHRR 362, ECtHR
General Mediterranean Holdings SA v Patel [2000] 1 WLR 272; [1999] 3 All ER 673
Kudrevičius v Lithuania (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)
Lambeth London Borough Council v Grant [2021] EWHC 1962 (QB)
Lawrence v Fen Tigers Ltd (No 3) [2015] UKSC 50; [2015] 1 WLR 3485; [2016] 2 All ER 97, SC(E)
MGN Ltd v United Kingdom (Application No 39401/04) (2011) 53 EHRR 5, ECtHR
Manchester Ship Canal Developments Ltd v Persons Unknown [2014] EWHC 645 (Ch)
R v Mountain (1978) 68 Cr App R 41, CA
R v Nottingham Justices, Ex p Fohmann (1986) 84 Cr App R 316, DC
R v Nuthoo [2010] EWCA Crim 2383; [2011] 1 Costs LR 87, CA
R v Whalley (1972) 56 Cr App R 304, CA
R v Wright (unreported) 12 November 1976, CA
R (Leigh) v Comr of Police of the Metropolis [2022] EWHC 527 (Admin); [2022] 1 WLR 3141
Rai and Evans v United Kingdom (Application Nos 26258/07, 26255/07) (unreported) 17 November 2009, ECtHR
Rayner v Lord Chancellor [2015] EWCA Civ 1124; [2015] 6 Costs LR 957, CA
Stankov v Bulgaria (Applications Nos 29221/95, 29225/95) (1998) 26 EHRR CD 103, ECtHR
Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23; The Times, 25 February 2009, CA
United Macedonian Organisation Ilinden v Bulgaria (Application No 37586/04) (unreported) 18 October 2011, ECtHR
Yilmaz Yıldız v Turkey (Application No 4524/06) (unreported) 14 October 2014, ECtHR

APPEAL from Marcus Smith J

By an application dated 9 June 2020 the claimants, the Secretary of State for Transport and High Speed Two (HS2) Ltd, issued an application to commit the defendant, Elliot Cuciurean, to prison for contempt of court, alleging that on at least 17 occasions he had wilfully broken an injunction which had been granted by Andrews J [2020] EWHC 671 (Ch) on 17 March 2020 on the claimants' application and which restrained persons unknown from entering or remaining without the consent of the claimants on land at Crackley Wood, Birches Wood and Broadwells Wood, Kenilworth, Warwickshire.

By a judgment dated 13 October 2020 Marcus Smith J [2020] EWHC 2614 (Ch) found the defendant in breach of the injunction in 12 respects. By an order dated 16 October 2020 Marcus Smith J [2020] EWHC 2723 (Ch) made, in respect of each breach, an order for committal to prison for six months, suspended for 12 months, all such orders to run concurrently. The defendant appealed against both liability and sanction. By a judgment dated

16 March 2021 the Court of Appeal (Lewison, Edis and Warby LJJ) [2021] EWCA Civ 357 dismissed the appeal against liability but allowed the appeal against sanction to the extent of reducing the sanction to one of committal for three months, suspended on the terms and for the period identified by Marcus Smith J.

By an order dated 28 March 2021 Marcus Smith J ordered the defendant to pay the claimants' costs in the sum of £25,000.

By an appellant's notice and pursuant to permission granted by the Court of Appeal (Lewison LJ) on 4 October 2021 the defendant appealed on the grounds that the judge had erred: (1) in refusing to make an order which gave the defendant protection equivalent to section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012; or (2) by not making some other proportionate costs order.

The facts are stated in the judgment of Lewison LJ, post, paras 2–3.

Adam Wagner and *Pippa Woodrow* (instructed by *Robert Lizar Solicitors Ltd, Manchester*) for the defendant.

Michael Fry and *Michael Brett* (instructed by *DLA Piper UK LLP*) for the claimants.

The court took time for consideration.

16 May 2022. The following judgments were handed down.

LEWISON LJ

Introduction

1 The issue on this appeal is the approach which the court should take when deciding whether to make an order for costs, and if so what order, against a person who has been found to be in contempt of court by disobeying an injunction granted in the context of political or environmental protest.

The facts

2 Mr Cuciurean is an adamant opponent of HS2. On 17 March 2020 Andrews J granted an order in the form of an injunction restraining trespass on certain woodland in Warwickshire, including an area known as the Crackley Land. The order was made against certain named defendants (not including Mr Cuciurean) and persons unknown. But the effect of the order was that Mr Cuciurean would become bound by the order simply by entering on the Crackley Land. The order contained the usual penal notice which stated that disobedience to the order might be held to be a contempt of court; and could lead to imprisonment, a fine, or seizure of assets. It also contained elaborate provisions about service. On an application for committal for contempt Marcus Smith J found that Mr Cuciurean had made 12 incursions into the Crackley Land between 4 and 14 April 2020; and had done so consciously and deliberately. He also found that Mr Cuciurean knew of the order and that he fully understood that he was not to enter the Crackley Land. His subjective intention in doing what he did was to further the protest against HS2; and to inhibit or thwart the HS2 scheme to the best of his ability.

A **3** Having found the contempts established, Marcus Smith J imposed a suspended custodial sanction upon Mr Cuciurean. The length of the sentence was subsequently reduced by this court, but the penalty otherwise stood. At a subsequent hearing, Marcus Smith J ordered Mr Cuciurean to pay the claimants' costs. Although the claimants had put forward the figure of £39,905 as the summary assessment for which they contended, the judge ultimately ordered Mr Cuciurean to pay £25,000. The various judgments
B are at *Secretary of State for Transport v Cuciurean* [2020] EWHC 2614 (Ch) (Liability); [2020] EWHC 2723 (Ch) (Sanction) and [2021] EWCA Civ 357 (the Liability and Sanction Appeal).

4 With my permission, Mr Cuciurean now appeals. Since the grant of permission to appeal, there have been two cases decided which bear directly on the question in issue, *Attorney General v Crosland* [2021] 4 WLR 103;
C [2022] 1 WLR 367 and *National Highways Ltd v Heyatawin* [2022] 1 WLR 1521, which I shall come to in due course.

The nature of the appeal

5 As provided by CPR r 52.21(1) an appeal is limited to a review of the decision of the lower court. Where, as here, the judge was exercising a discretion in making a costs order, with arguments from competent counsel
D on each side, a review of his decision is not the occasion for running new points or introducing fresh material. In *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 423 (a case about service out of the jurisdiction) Males LJ (with whom Snowden LJ and I agreed) put it this way at para 5:

> E "Further, it is important to say that the function of this court is to review the decision of the court below. The question is whether the judge has made a significant error having regard to the evidence adduced and the submissions advanced in the lower court. Just as the trial of an action is not a dress rehearsal for an appeal (see the well-known metaphor of Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] ETMR 26, para 114), neither is an application to set aside an order for service out of
> F the jurisdiction. In general an appellant will not be permitted to rely on material which the judge was not invited to consider or to advance an entirely new basis for saying that the judge's evaluation on the issue of appropriate forum was wrong. A judge can hardly be criticised for not taking something into account if he was never asked to do so. Although no doubt this principle will be applied with some flexibility, bearing in mind that the ultimate *Spiliada* question is concerned with 'the interests
> G of all the parties and . . . the ends of justice', good reason will be required for taking a different approach."

6 To similar effect, Lloyd LJ said in *Allen v Bloomsbury Publishing Ltd* [2011] EWCA Civ 943 at [17]:

> H "In our adversarial system of litigation, in a case where each party was professionally represented with plenty of opportunity to formulate and put to the court all points considered to be relevant on a particular point, it seems to me questionable for a judge to be criticised for having failed to take into account a factor which, if relevant, was known or available to all parties and which no party invited him to consider as part of the process of exercising his discretion. It would be one thing if, through

inadvertence, the judge overlooked a point of law which should affect his reasoning . . . but otherwise what is said here is that there was a relevant consideration which the judge failed to take into account. It does not seem to me to be fair either to the judge or to the opposing party or parties for an unsuccessful litigant to be able to challenge the exercise of the court's discretion for failure to take account of a factor which was not in any way hidden and which, if it really is relevant, the exercise of reasonable professional diligence could have brought to light but which was not suggested to the judge as being relevant. This strikes me as being wrong in principle."

The arguments

7 Mr Wagner, for Mr Cuciurean, in essence puts forward two arguments. They are said to apply, not in all cases of contempt of court, but in cases where the contemnor's right to free expression and his right to peaceful assembly are engaged, particularly where he exercises those rights by way of protest or in furtherance of some political cause.

8 First, he says, the judge ought to have made an order which gave Mr Cuciurean protection equivalent to an order under section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO"). The effect of such an order would be (a) that any costs ordered would not exceed the amount (if any) which it is reasonable for the contemnor to pay and (b) the costs order would not be enforceable without a further order of the court.

9 Alternatively, he says, the judge ought to have regarded both the formal sanction (i e the suspended sentence) and also the costs order as together amounting to an interference with Mr Cuciurean's right to freedom of expression; and to have asked himself whether, taken together, the interference was disproportionate.

10 Underpinning Mr Wagner's argument was his submission that at every stage of the proceedings, the court had to ask itself and answer the questions formulated by the Divisional Court in *Director of Public Prosecutions v Ziegler* [2020] QB 253 and approved by the Supreme Court on appeal: [2022] AC 408 at paras 16 and 58:

"(1) Is what the defendant did in exercise of one of the rights in articles 10 or 11?

"(2) If so, is there an interference by a public authority with that right?

"(3) If there is an interference, is it 'prescribed by law'?

"(4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph 2 of article 10 or article 11, for example the protection of the rights of others?

"(5) If so, is the interference 'necessary in a democratic society' to achieve that legitimate aim?"

11 The last question can be broken down into sub-questions:

"That last question will in turn require consideration of the well-known set of sub-questions which arise in order to assess whether an interference is proportionate:

"(1) Is the aim sufficiently important to justify interference with a fundamental right?

A "(2) Is there a rational connection between the means chosen and the aim in view?

"(3) Are there less restrictive alternative means available to achieve that aim?

"(4) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?"

B **12** It is necessary to consider these questions at every stage, he says, because in *Ziegler* the Supreme Court said at para 57:

"Article 11(2) states that 'No restrictions shall be placed' except 'such as are prescribed by law and are necessary in a democratic society'. In *Kudrevičius v Lithuania* (2015) 62 EHRR 34, para 100 the European Court of Human Rights ('ECtHR') stated that 'The term "restrictions" in
C article 11(2) must be interpreted as including both measures taken before or during a gathering and those, such as punitive measures, taken afterwards' so that it accepted at para 101 'that the applicants' conviction for their participation in the demonstrations at issue amounted to an interference with their right to freedom of peaceful assembly'. Arrest, prosecution, conviction, and sentence are all 'restrictions' within both articles."

D

13 Let me say at once that the judge did not follow this structured approach to his costs order. The reason is a simple one. He was not asked to. Nor was this structured approach foreshadowed in Mr Wagner's skeleton argument for this appeal. It emerged only in the course of his oral submissions. In future cases a judge would be well-advised to follow this structure although, as I shall explain, in cases of breach of an injunction such
E as this one some of these questions will have been asked and answered at an earlier stage. In my judgment the judge in this case cannot be criticised for not having followed a structure that he was not asked to follow.

Legal aid

14 The first argument can be dealt with relatively briefly. The
F availability of legal aid is governed by LASPO. The relevant provisions were considered in detail by Blake J in *King's Lynn and West Norfolk Borough Council v Bunning* [2015] 1 WLR 531 (subsequently approved by this court in *Haringey London Borough Council v Brown* [2015] 1 WLR 542). In short, the combination of section 14(h) of LASPO and regulation 9(v) of the Criminal Legal Aid (General) Regulations 2013 has the effect that an application for committal for contempt is classified as "the determination of
G a criminal charge" for the purposes of the grant of legal aid. An alleged contemnor is therefore entitled to legal aid under section 16 of LASPO.

15 Despite the fact that an application for committal for contempt is classified as "criminal proceedings" for the purposes of legal aid (and in certain other respects, such as the burden and standard of proof), such an application does not amount to criminal proceedings for all purposes. Such
H an application is heard in the civil courts and the procedure is governed by the Civil Procedure Rules. Hearsay evidence (which might not be admissible in a criminal trial) is admissible.

16 LASPO itself draws a sharp distinction between criminal proceedings and civil proceedings. Section 1(2) provides that legal aid is "(a) civil legal services to be made available under section 9 or 10 or paragraph 3 of

Schedule 3 (civil legal aid), and (b) services consisting of advice, assistance and representation required to be made available under section 13, 15 or 16 or paragraph 4 or 5 of Schedule 3 (criminal legal aid)". "Civil legal services" are defined by section 8(3) as "any legal services other than the types of advice, assistance and representation that are required to be made available under sections 13, 15 and 16) (criminal legal aid)".

17 But as we have seen, legal aid for an alleged contemnor is granted under section 16, and therefore falls outside the definition of civil legal aid.

18 Section 26 of LASPO relevantly provides:

> "(1) Costs ordered against an individual in relevant civil proceedings must not exceed the amount (if any) which it is reasonable for the individual to pay having regard to all the circumstances, including— (a) the financial resources of all of the parties to the proceedings, and (b) their conduct in connection with the dispute to which the proceedings relate.
>
> "(2) In subsection (1) 'relevant civil proceedings', in relation to an individual, means— (a) proceedings for the purposes of which civil legal services are made available to the individual under this Part, or (b) if such services are made available to the individual under this Part for the purposes of only part of proceedings, that part of the proceedings.
>
> "(3) Regulations may make provision for exceptions from subsection (1)."

19 Because the grant of legal aid to an alleged contemnor does not fall within the definition of "civil legal services", the application for committal cannot be "relevant civil proceedings". The costs protection afforded by section 26 does not, therefore, apply.

20 In *Chief Constable of Essex Police v Douherty* [2020] EW Misc 9 (CC) Judge Lewis drew attention to what he described as a "lacuna". As he explained at para 14:

> "There are mechanisms in place to protect impecunious parties facing costs orders in the criminal courts, and legally aided parties in the civil courts. The exception seems to be civil committal proceedings. There is nothing to suggest such an omission is intentional, rather it appears to have come about because of the general confusion in 2012 about the type of legal aid that respondents to civil committal applications should receive, as outlined in *Bunning* (supra). It does, however, seem unfair to those defendants who are impecunious that in certain respects they are put in a worse position by the decision that they should receive criminal, rather than civil legal aid."

21 Nevertheless, he went on to make an order for costs applying the ordinary principles in CPR Pt 44. As he also said at para 18:

> "The ability of a person to pay costs is not usually considered during civil costs assessment. Where there are policy reasons for managing costs exposure, rules or regulations either limit the level of costs (e g small claims, possession cases with fixed costs, etc), refer in explicit terms to means (e g CPR r 52.19) or introduce an alternative assessment procedure (e g section 26 of LASPO). So far, no such rules have been made in respect of civil committals."

22 He might also have added a reference to Aarhus Convention claims (CPR rr 45.43 to 45.45 and CPR r 52.19A). The court also has power to make a costs capping order under CPR rr 3.19 and 3.20.

23 In the costs ruling that this court made following Mr Cuciurean's appeal on liability and sanction, it was stated:

> "On the appellant's own case, he does not benefit from the costs protection afforded by LASPO, and the applicable regulations. In other words, Parliament has legislated in such a way as to exclude this appellant from the protective regime conferred by those provisions. We are not, at present, attracted by the submission that this is a legislative 'lacuna' which the court should fill by a creative and novel costs order which replicates the effect of the provisions that do not apply. We note that this is not a step that Judge Lewis felt willing or able to take in *Chief Constable of Essex Police v Douherty* [2020] EW Misc 9 (CC), the appellant's strongest case. Judge Lewis was not prepared to make an order that took account of the defendant's means 'without reference to any legal authority', any clear support from the rules or case law, or any evidence that the defendant would have qualified for protection if it were available."

24 I appreciate that because of the way in which LASPO is drafted Mr Cuciurean does not have the protection of section 26 or any of the specific provisions of the CPR that limit liability to pay costs. But that, in my judgment, is a matter for Parliament or the Civil Procedure Rule Committee to consider.

Costs in criminal cases

25 In his skeleton argument, Mr Wagner also drew an analogy with the practice of awarding costs in criminal cases. He recognised, of course, that an application for committal for contempt of court on the ground of breach of an injunction does not amount to criminal proceedings (even though such an application is classified as a criminal charge for the purposes of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR")).

26 In criminal cases, where a costs order is made against a defendant, a long line of authority shows that in imposing a financial penalty (including a liability to pay costs) the defendant's ability to pay is always taken into account. That long-standing approach is reflected in the *Practice Direction (Costs in Criminal Proceedings)* [2015] EWCA Crim 1568.

27 As we will see, however, this analogy was rejected by the Supreme Court in *Crosland* [2022] 1 WLR 367 and Mr Wagner did not press this analogy in oral submissions.

The competing rights

28 As is so often the case, there are rights that pull in different directions. It has also been authoritatively decided that there is no hierarchy as between the various rights in play. On the one hand, then, there are Mr Cuciurean's rights to freedom of expression and freedom of peaceful assembly contained in articles 10(1) and 11(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). On the other, there are the claimants' rights to the peaceful enjoyment of

their property. There was some debate about whether these were themselves Convention rights (given that the Secretary of State for Transport is himself a public authority and cannot therefore be a "victim" for the purposes of the Convention, and HS2 Ltd may not be regarded as a "non-governmental" organisation for that purpose). But whether or not they are Convention rights, they are clearly legal rights (either proprietary or possessory) recognised by national law. Articles 10(2) and 11(2) of the ECHR qualify the rights created by articles 10(1) and 11(1) respectively. Article 10(2) relevantly provides that:

> "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, . . . for the protection of health or morals, for the protection of the reputation or rights of others . . . or for maintaining the authority . . . of the judiciary."

29 Article 11(2) relevantly provides:

> "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 . . . for the protection of the rights and freedoms of others."

30 There is no doubt that the right to freedom of expression and the right of peaceful assembly both extend to protesters. In *Hashman and Harrup v United Kingdom* (1999) 30 EHRR 241, for example, the European Court of Human Rights held that the activity of hunt saboteurs in disrupting a hunt by the blowing of hunting horns fell within the ambit of article 10 of the ECHR. In *City of London Corpn v Samede* [2012] PTSR 1624 protesters who were part of the "Occupy London" movement set up a protest camp in the churchyard of St Paul's Cathedral. This court held that their activities fell within the ambit of both article 10 and also article 11.

31 On the other hand, articles 10 and 11 do not entitle a protester to protest on any land of his choice. They do not, for example, entitle a protester to protest on private land: *Appleby v United Kingdom* (2003) 37 EHRR 38; *Samede* at para 26. The Divisional Court so held in another HS2 protest case, involving Mr Cuciurean himself who at that time was living in a tunnel for the purpose of disrupting HS2: *Director of Public Prosecutions v Cuciurean* [2022] 3 WLR 446. In that case the court (Lord Burnett of Maldon CJ and Holgate J) said at para 45:

> "We conclude that there is no basis in the Strasbourg jurisprudence to support the respondent's proposition that the freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg court has not made any statement to that effect. Instead, it has consistently said that articles 10 and 11 do not 'bestow any freedom of forum' in the specific context of interference with property rights (see *Appleby* [*Appleby v United Kingdom* (2003) 37 EHRR 38] at paras 47 and 52). There is no right of entry to private property or to any publicly owned property. The furthest that the Strasbourg court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of destroying the essence of those

A rights, then it would not exclude the possibility of a state being obliged to protect them by regulating property rights."

32 Even the right to protest on a public highway has its limits. In *Director of Public Prosecutions v Ziegler* [2022] AC 408 protesters were charged with obstructing the highway without lawful excuse. The Supreme Court held that whether there was a "lawful excuse" depended on the proportionality of any
B interference with the protesters' rights under articles 10 and 11. Lord Hamblen and Lord Stephens JJSC said at para 70:

> "It is clear from those authorities that intentional action by protesters to disrupt by obstructing others enjoys the guarantees of articles 10 and 11, but both disruption and whether it is intentional are relevant factors in relation to an evaluation of proportionality. Accordingly, intentional
C action even with an effect that is more than de minimis does not automatically lead to the conclusion that any interference with the protesters' articles 10 and 11 rights is proportionate. Rather, there must be an assessment of the facts in each individual case to determine whether the interference with article 10 or article 11 rights was 'necessary in a democratic society'."

D **33** But that proportionality exercise does not apply in a case in which the protest takes place on private land. In *Director of Public Prosecutions v Cuciurean* [2022] 3 WLR 446 the court said:

> "66. Likewise, *Ziegler* was only concerned with protests obstructing a highway where it is well established that articles 10 and 11 are engaged. The Supreme Court had no need to consider, and did not address in their
E judgments, the issue of whether articles 10 and 11 are engaged where a person trespasses on private land, or on publicly owned land to which the public has no access. Accordingly, no consideration was given to the statement in *Richardson* [*Richardson v Director of Public Prosecutions* [2014] AC 635] at para 3 or to cases such as *Appleby*.
>
> "67. For these reasons, it is impossible to read the judgments in *Ziegler*
F as deciding that there is a general principle in our criminal law that where a person is being tried for an offence which does engage articles 10 and 11, the prosecution, in addition to satisfying the ingredients of the offence, must also prove that a conviction would be a proportionate interference with those rights."

34 Where a land owner, such as the claimants in the present case, seeks
G an injunction restraining action which is carried on in the exercise of the right of freedom of expression or the right of peaceful assembly (or both) on private land, the time for the proportionality assessment (to the extent that it arises at all) is at the stage when the injunction is granted. Any "chilling effect" will also be taken into account at that stage: see for example the decision of John Male QC sitting as a deputy judge of the Chancery Division in *UK Oil & Gas Investments plc v Persons Unknown* [2019] JPL 161,
H especially at paras 104–121, 158–167 and 176 (another case of protest predominantly on the highway); and the decision of Lavender J in *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (QB) (also a case of protest on the highway). Once the injunction has been granted then, absent any appeal or application to vary, the balance between the competing rights

has been struck: see *National Highways Ltd v Heyatawin* [2022] Env LR 17, para 44; *National Highways Ltd v Buse* [2021] EWHC 3404 (QB) at [30].

35 Accordingly, what differentiates this case from many of the authorities to which we were referred is that in the present case the court had made an order, of which Mr Cuciurean was aware, protecting land to which the public had no right of access, and spelling out what was not permitted, before he decided deliberately and consciously to break its terms.

Attorney General v Crosland

36 On 9 December 2020 the Supreme Court circulated a draft judgment in an appeal relating to the expansion of Heathrow Airport. The rubric on the draft stated:

> "IN CONFIDENCE
> "This is a judgment to which paragraphs 6.8.3 to 6.8.5 of Practice Direction 6 apply. The contents of this draft are confidential initially to the parties' legal representatives and, when disclosed to the parties in the 24 hours prior to delivery, also to the parties themselves. Those to whom the contents are disclosed must take all reasonable steps to preserve their confidentiality. No action is to be taken in response to them before judgment is formally pronounced unless this has been authorised by the court. A breach of any of these obligations may be treated as a contempt of court."

37 Before formal hand down Mr Crosland publicised the result of the appeal. In so doing, he breached the terms on which the draft judgment had been circulated. A panel of the Supreme Court found that that amounted to contempt. They imposed a fine on Mr Crosland of £5,000. The panel also considered the question of costs in a separate judgment: [2021] UKSC 15 (not reported at [2021] 4 WLR 103). At para 5 they rejected the argument that the practice in criminal cases applied to a civil contempt. But they went on to say:

> "8. Costs normally follow the event in committal proceedings and a respondent who is found to be in contempt will normally be ordered to bear the costs of the proceedings in addition to any penalty imposed (*Arlidge, Eady & Smith on Contempt* ('*Arlidge*') at para 14-154 and *Attorney General v Yaxley-Lennon* (QB-2019-000741) (unreported) 11 September 2019). However, the court will seek to make an order which is fair, just and reasonable in all the circumstances (*Solicitor General v Jones* [2014] 1 FLR 852, para 41 per Sir James Munby P).
> "9. When a respondent is found to be in contempt of court, there will usually be no principled basis for opposing a costs order. (See generally *Calderdale and Huddersfield NHS Foundation Trust v Atwal* [2018] Med LR 526, per Spencer J at para 14; *LTE Scientific Ltd v Thomas* [2005] EWHC 7 (QB), per Richards J at paras 105–109.) Normally, the sole question will be whether the costs claimed in relation to a contempt application are reasonable and proportionate (*Solanki v Intercity Telecom Ltd* [2018] 1 Costs LR 103, paras 56, 69–70 per Gloster LJ; *Calderdale* at para 14).
> "10. In determining whether the claimed amount is reasonable and proportionate, the court may take into account the respondent's means (*Yaxley-Lennon*). The court may also consider the relationship between

A the value of any costs order and the level of any fine which has been or is due to be imposed. (See generally *Deputy Chief Legal Ombudsman v Young* [2012] 1 WLR 3227, para 55 per Lindblom J, citing *LTE Scientific* at para 105.)

"11. The court may summarily assess costs or, if appropriate, order that they are subject to a detailed assessment (*Arlidge*, at para 14-154, citing *Taylor Made Golf Co Inc v Rata & Rata* [1996] FSR 528, 536–537 B per Laddie J). The court may, if appropriate, order costs on an indemnity basis rather than the standard basis (*Arlidge* at para 14-155).

"12. As the respondent's rights under article 10 ECHR are engaged in the present case, the combination of any penal measure and any costs order must be a proportionate interference with such rights (see, for example, *Constantinescu v Romania* (Application No 32563/04) (unreported) C 11 December 2012, para 49)."

38 Mr Crosland was ordered to pay £15,000 by way of costs in addition to the fine. It is to be noted that at para 10 the panel said that the court may (not must) take into account the respondent's means. But I should also note that at para 12 the panel referred to the proportionality of "any" penal measure and any costs order. Although on the facts the only penal measure D imposed in that case was the fine, the statement of principle went beyond that.

39 The case of *Constantinescu v Romania* (Application No 32563/04) (unreported) 11 December 2012 to which the panel referred was a case of defamation. The complainant (who was the unsuccessful defendant in the action) was ordered to pay a fine, and, in addition, damages and interest and legal costs. The amount of the costs was a very small part of the total E financial package (2%). The European Court of Human Rights held that the totality of the award was disproportionate in order to protect the reputation or rights of others. What they said in the paragraph to which the Supreme Court referred was this:

"Enfin, compte tenu de la sévérité d'une sanction pénale doublée d'une condamnation à des dommages et intérêts, auxquels s'ajoute le F remboursement des frais de justice, la Cour estime que les moyens employés ont été disproportionnés par rapport au but visé, à savoir la protection de la réputation ou des droits d'autrui."

40 It is important to note that the court looked at the question from the perspective of protecting the person whose reputation and rights were to be protected; not from the perspective of whether the person against whom the G sanctions were imposed was able to meet them. It is also important to note that the court was not concerned simply with costs but with the totality of the package of financial sanctions imposed. Of the three components which made up the aggregate financial penalty the court did not single out any particular one. In addition, *Constantinescu* was, in effect, a case in which the complainant had been under no court-imposed tailored restriction prior to the publication of the defamatory material. The sanctions imposed upon H her were entirely retrospective.

41 Mr Crosland appealed against the decision of the panel. His appeal was dismissed by a further panel of the Supreme Court: [2022] 1 WLR 367. One of his grounds of appeal concerned the costs order. The appeal panel also rejected the argument that the practice in criminal cases ought to be

applied by analogy. At para 90 the appeal panel summarised the principles as set out by the first instance panel (including the reference at para 12 to the proportionality of "any" penal measure and any costs order). They went on to say:

> "92. . . . The award of costs is a matter for the discretion of the court making the order and an appeal court should interfere only if there has been an error of legal principle. We can detect no such error. The principles governing the award of costs in contempt proceedings are not the same as those in other criminal law cases and the First Instance Panel correctly identified those principles and applied them in a manner that cannot be faulted.
>
> "93. In particular, as we have seen in para 90 above, the First Instance Panel explicitly referred to Mr Crosland's means and the relationship between the value of any costs order and the level of fine. And again, at para 18 of the Costs Judgment, the Panel made clear that it had had regard to Mr Crosland's means; and that it had also had regard to 'the requirement that the combined effect of any fine and costs order must, to the extent that it interferes with the respondent's rights under article 10, . . . be proportionate'. In paras 20–23 it then explained the 'limited' information (see para 20), it had had about Mr Crosland's means and the opportunity it had given him to provide the relevant information."

42 I observe that neither the first instance panel in *Crosland*, nor the appeal panel followed the structured approach that Mr Wagner advocates when considering the question of costs. In both decisions, the focus of the structured approach was in deciding whether there had been a contempt of court at all.

43 There may be an interesting debate to be had about the precedential status of *Crosland*. The first instance panel was, in effect, acting as a court of first instance, and the appeal panel was an internal appeal within the same court, rather than an appeal from this court or its equivalent in other jurisdictions. Whether a decision of that kind is binding on this court may be open to question. But be that as it may, I consider that a decision of no fewer than eight Justices of the Supreme Court is (at least) of high persuasive authority, and that we should follow it.

National Highways v Heyatawin

44 Between the decision of the first panel in *Crosland* and the decision of the appeal panel, the Divisional Court (Dame Victoria Sharp P and Chamberlain J) considered the question of costs in another protest case involving breach of an injunction: *National Highways Ltd v Heyatawin* [2022] 1 WLR 1521. The defendants in that case were members of the "Insulate Britain" movement who had breached an injunction by disrupting traffic on the M25. The court set out some of the relevant provisions dealing with costs in CPR Pt 44. They noted that the means of the paying party are not among the factors that the court is required to take into account. Having referred to authority cited by the Supreme Court in *Crosland*, they said:

> "9. These cases show that the costs order may be relevant to sanction in a case where the court is considering imposing a financial sanction. *Crosland* was such a case. In our judgment, however, they do not show,

A as a general proposition, that the means of the contemnor are relevant to the proportionality or reasonableness of the costs claimed."

45 Having referred to *Constantinescu* the court continued:

"12. We doubt that much can be drawn from this judgment of the Chamber of the Strasbourg court in this factually very different case. We would not rule out that, in an extreme case, the imposition on a contemnor B in a protest case of an order to pay a large sum of costs might be part of a package of measures that would render the interference with his Convention rights under articles 10 and 11 disproportionate. However, in most cases, the application of the usual costs rules to contemnors in protest cases is unlikely to give rise to an unjustified interference with the protestor's rights under articles 10 and 11 of the Convention, given that: C (a) those who deliberately breach orders of the court know in advance that doing so may give rise to contempt proceedings (the order contains a notice to this effect) and the costs consequences of such proceedings are well known; (b) costs are recoverable on the standard basis if and only if they are proportionately and reasonably incurred and proportionate and reasonable in amount, having regard to (among other things) the conduct of the parties, the importance of the matter and the particular complexity D of the matter or the difficulty or novelty of the questions raised; (c) if these conditions are met, any interference with the contemnor's rights under articles 10 and 11 is likely to be proportionate to a legitimate aim."

46 Nevertheless, as the Divisional Court also said, in such cases the court must be careful to ensure that costs claimed have been proportionately and reasonably incurred and are proportionate and reasonable in amount.

E **47** As Edis LJ pointed out in argument, there are two concepts of proportionality in play. There is the question of proportionality of the costs claimed which will be assessed under CPR Pt 44. CPR r 44.3(2)(a) says that in an assessment on the standard basis the court will only allow costs which are "proportionate to the matters in issue". That is amplified by CPR r 44.3(5) which provides:

F "(5) Costs incurred are proportionate if they bear a reasonable relationship to— (a) the sums in issue in the proceedings; (b) the value of any non-monetary relief in issue in the proceedings; (c) the complexity of the litigation; (d) any additional work generated by the conduct of the paying party; (e) any wider factors involved in the proceedings, such as reputation or public importance; and (f) any additional work undertaken or expense incurred due to the vulnerability of a party or any witness." G

48 That rule states in terms what costs are to be regarded as proportionate, and with the exception of factor (e) the various factors are entirely concerned with the nature and conduct of the proceedings. Proportionality in the Convention sense is a broader concept. The latter is the kind of proportionality to which the Supreme Court referred in *Crosland*. In H my judgment, therefore, it does not necessarily follow that costs which are proportionate in the CPR sense will necessarily be proportionate in the Convention sense. Moreover, I do not consider that the Divisional Court was correct in confining *Crosland* to cases in which the only sanction was a financial one, given that both the first instance panel and the appeal panel referred to the combination of a costs order and "any" penal sanction.

49 Nevertheless, I consider that *Heyatawin* was correctly decided, although for slightly different reasons, as I shall try to explain.

Breach of an injunction

50 As a broad generality, the approach of the court to an award of costs in a case of contempt of court is the same as in any other form of civil proceedings: *Phillips v Symes (No 3)* [2005] 1 WLR 2986, para 6.

51 Jeremy Bentham famously said in *Truth versus Ashhurst*:

> "It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he should not do—they won't so much as allow of his being told: they lie by till he has done something which they say he should not have done, and then they hang him for it." (Quoted in *R v Rimmington* [2006] 1 AC 459, para 33.)

52 By contrast, in a breach of injunction case, the court will have made it perfectly clear what cannot lawfully be done. In devising the terms of the injunction, the court will already have considered the question of interference with rights under articles 10 and 11 to the extent that it was necessary to do so. It will have struck the balance between competing rights, tailored to the peculiar facts of the case in question. A person who, with knowledge of the order, chooses consciously and deliberately to disobey it knows beforehand what it is he should not do. In my judgment that is one of the critical differences between a case like this and a case like *Constantinescu*.

53 In addition, the approach of the court in *Constantinescu* was to ask itself whether the sanctions imposed on Ms Constantinescu went beyond what was proportionate in order to protect the rights of the person whom she defamed; not whether they were penalties that she could afford to pay. To that extent, the Divisional Court in *Heyatawin* [2022] 1 WLR 1521 were correct to say that as a general proposition the means of the contemnor are not relevant to proportionality. In a case such as this, the rights of the claimants are two-fold. In the first place they have their rights to the peaceful enjoyment of property, which, as the Divisional Court held in *Cuciurean* [2022] 3 WLR 446 and this court held in the liability appeal, are not overridden by articles 10 or 11. But second, and equally important, they have sought and obtained the protection of the court in protecting and enforcing those rights. In order to vindicate those rights and that protection, they have been compelled to incur legal costs. Some of those costs (perhaps a considerable proportion of them) could have been avoided if Mr Cuciurean had admitted the contempt, rather than contesting his liability. He exercised his right of protest by breaching the injunction in the first place. Whether his unsuccessful defence to the committal application was itself the exercise of rights under articles 10 and 11 (rather than, say, the exercise of rights under article 6) is highly debatable. In a case brought under the law of England and Wales, the principal sanctions involved (a fine or a prison sentence) are essentially matters between the contemnor and the state, and do not directly benefit or compensate the applicant for committal.

A Only the costs award does that. Not to award the claimants their costs reasonably and proportionately incurred in vindicating their rights would be to derogate from those rights. Moreover, in bringing the application for committal the applicants are seeking to uphold both the rule of law and the authority of the court. Mr Wagner accepted that both were legitimate aims which were capable of justifying an interference with rights under articles 10 and 11. Quite apart from that it is highly likely that any claimant will be out B of pocket on any assessment of costs on the standard basis. In this case, for example, the claimants incurred costs of some £80,000, claimed a contribution of some £39,900 and were ultimately awarded £25,000 inclusive of VAT.

54 In addition, of course, the only financial sanction imposed on Mr Cuciurean was his liability to pay costs.

C **55** If, therefore, one asks whether Mr Cuciurean's liability to make partial compensation to the claimants in vindicating their legal rights goes beyond what is necessary to protect those rights, I consider that the answer is "no". Like the Divisional Court in *Heyatawin*, although for slightly different reasons, I do not consider that an award of proportionate costs in the claimants' favour goes beyond what is necessary in a democratic society for the protection of the rights of others or maintaining the authority of the D judiciary.

The judge's judgment

56 The judge's reasoning is contained in his order of 28 March 2021. It is admirably concise, so I set it out in full:

E "4.1 It seems to me that there is no general rule that (civil) contempt proceedings are—in general terms—to be treated differently from other civil litigation. Certainly that is not the general practice, where (in the ordinary case) a costs order is made in favour of the successful applicant on the indemnity basis. To be clear, I do not consider the indemnity basis to be the appropriate basis for assessment in this case (and it was not contended for by the claimants) the correct starting point is that costs F should follow the event, and in this regard the claimants have clearly won.

"4.2 It does, however, seem to me to be relevant that this case turned on a number of important points of principle and did involve the right of protest and free speech. That, to my mind, means that I must be careful in avoiding any kind of disproportionate costs order against the fifth defendant. However, it would be wrong not to make any costs order at G all. In the first place, costs orders are intended to be compensatory and no more. There is no punitive element. Secondly, the chilling effect on the right of protest can—and in this case is—overstated. This case, as both Andrews J and I have made clear, is about deliberate breaches of court orders protecting property rights (also, I would note, a protected human right).

H "4.3 I have not been vouchsafed any insight into the fifth defendant's ability to pay or the hardship that a costs order would impose, beyond general statements that huge costs orders are a burden (which, of course, I accept).

"4.4 Although the claimants put forward the sum of £39,905.12 as the endpoint for costs, I use it as the starting-point. I recognise that—for a

complex four-day witness action, involving difficult points of fact and law—this is a reasonable and proportionate starting point. But I must factor in the conduct of Mr Sah and the fact that, on a number of allegations, the claimants simply failed. That said, viewed in the round, the claimants have succeeded and the general attack mounted by the fifth defendant on 'persons unknown' orders has failed.

"4.5 Taking fully into account section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which (whilst not directly applicable) clearly must inform the exercise of my discretion, I order that costs summarily assessed in the amount of £25,000 (inclusive of any VAT) be paid within 28 days of the date of this order."

57 Para 4.1 of the judge's reasons mirrors what the first instance Supreme Court panel said in *Crosland* [2021] 4 WLR 103, para 8. Para 4.2 of the reasons mirrors what the panel said at para 12.

58 As far as para 4.3 is concerned, the judge had no evidence before him of Mr Cuciurean's ability to pay or of the hardship that any costs order would impose on him. I do not consider that it was incumbent on the judge to initiate his own inquiries. In that respect I agree with what Lady Arden JSC sitting with the appeal panel in *Crosland* [2022] 1 WLR 367 said at para 152, that it was up to the defendant to provide satisfactory evidence of his lack of means. Much the same approach applies even in criminal cases, where the court does take into account the means of the defendant: *R v F Howe & Son (Engineers) Ltd* [1999] 2 All ER 249; *R v Northallerton Magistrates' Court, Ex p Dove* [2000] 1 Cr App R (S) 136, 142 at point (5). In the latter case Lord Bingham of Cornhill CJ quoted with approval a statement in an earlier case:

"It is of course a fundamental principle of sentencing that financial obligations must be matched to the ability to pay, and there is an overriding consideration that financial obligations are to be subjected to that test. But that does not mean that the court has to set about an inquisitorial function and dig out all the information that exists about the appellant's means. The appellant knows what his means are and he is perfectly capable of putting them before the court on his own initiative. If, as happened here, the court is only given the rather meagre details of the appellant's means, then it is the appellant's fault."

59 The *Northallerton* case was referred to with approval by the appeal panel in *Crosland* [2022] 1 WLR 367.

60 We have since been shown a witness statement made on 20 April 2021 by Ms Hall, Mr Cuciurean's solicitor. That statement was made after the judge had made his order. She said that she had spoken to him and had been told that he was unemployed and not in receipt of benefit; that he had no property and no savings; that he survived on donations given to protest camps, and that his monthly mobile telephone bill was paid by his mother. We have also been shown an updating witness statement made on 21 March 2022 by Mr Cuciurean himself. But reliance on materials that were not before the judge cannot impugn the exercise of his discretion on the materials before him. Moreover, there is no application to admit fresh evidence on appeal; and even if there had been it is not easy to see how evidence about Mr Cuciurean's means would have satisfied the guidelines in *Ladd v Marshall* [1954] 1 WLR 1489. Although Ms Hall's statement was

A apparently before the judge when he came to consider an application for permission to appeal, by that time he had made his decision; and I do not consider that he was compelled to revisit it.

61 Para 4.4 of the judge's reasons reflects the general approach under CPR Pt 44 where the successful party has not succeeded on the whole of his case. I observe parenthetically that it is not entirely clear from the judge's reasons whether the £39,900-odd which the claimants put forward was
B itself a discounted figure to take account of the claimants' partial failure. Para 3 of the judge's reasons suggests that it was, in which event the judge appears to have made a double discount. But the claimants do not complain about that.

62 I accept that the reference to section 26 of LASPO in para 4.5 is a little cryptic, but what I think the judge must have meant is that he had in
C mind the principle that the amount of costs should not exceed the amount which, on the materials he had before him, it was reasonable for Mr Cuciurean to pay. Although this was not a case in which section 26 applied directly, it was something that the judge took into account.

63 That is borne out by the fact that the judge reduced the sum claimed from £39,905 to £25,000. Leaving aside the question of Mr Cuciurean's means (of which there was no evidence before the judge) and the alleged
D chilling effect, it is not suggested that the judge's final award was disproportionate in the sense that it overcompensated the claimants.

The structured approach

64 By way of cross-check, I turn to Mr Wagner's suggested structured approach which, as I have said, was not the way in which the application
E was argued before the judge. To the extent that the questions posed by that approach need to be answered at the costs stage they are, in my judgment, to be answered as follows:

(i) Did Mr Cuciurean exercise rights under articles 10 and 11? Yes, in so far as he breached the injunction, although whether he did so in contesting the committal on grounds that failed is much more debatable.

F (ii) Was there an interference with those rights? Yes, both the initial grant of the injunction and the sanctions imposed for its breach amounted to an interference with those rights.

(iii) If there was an interference, was it "prescribed by law"? Yes, it was prescribed by the original injunction.

(iv) Was the interference in pursuit of a legitimate aim? Yes: there were at least two legitimate aims pursued: the vindication of the claimants' own
G rights (the protection of rights of others) and the maintenance of the rule of law and the authority of the judiciary. The maintenance of the rule of law and the upholding of the authority of the judiciary are particularly important at the sanction stage.

(v) Was the interference necessary in a democratic society? This question is broken down into sub-questions:

H (a) Is the aim sufficiently important to justify interference with the rights? Yes, both the protection of the rights of others, and the upholding of the rule of law and the authority of the judiciary justify the interference at all stages of the proceedings.

(b) Is there a rational connection between the means chosen and the aim in view? The aim in view is the compensation of the claimants for the costs

they have incurred in vindicating their rights and upholding the rule of law. There was no adequate material before the judge that would have justified a finding that Mr Cuciurean was so destitute and so lacking in other sources of finance (e g from well wishers, crowd funding and the like) that the making of the order was futile. Nor does the fact that the claimants were not "presently" minded to enforce the order make it irrational.

(c) Are there less restrictive alternative means available to achieve the aim? The aim is to compensate the claimants. The judge's order does not in fact achieve that aim, because it only partially compensates them. A lesser order would not have achieved the aim. On the contrary it would have fallen even further short of the aim than the judge's order.

(d) Is there a fair balance between Mr Cuciurean's rights and the general interest of the community including the rights of others? The balance between conflicting rights was struck by the terms of the original injunction. The community has a general interest in the rule of law and maintaining the authority of the judiciary, and the claimants have their own interests in vindicating their proprietary or possessory rights. Mr Cuciurian chose deliberately and intentionally to flout those rights, and to undermine the authority of the judiciary. Partial compensation of the claimants in upholding both strikes a fair balance between the two. Mr Cuciurian was and remains free to campaign against HS2 so long as he does so without breaching the terms of a court order.

65 It is no doubt the case that an award of costs against a defendant may cause hardship. It may affect their credit rating and in some cases may drive a defendant into insolvency. Countless unfortunate litigants have been driven into bankruptcy by costs orders made against them. But that has never been a reason either to refuse an order for costs in civil proceedings or (save in those cases where the CPR makes specific provision) to limit the amount of costs to an amount which the defendant can in practice afford to pay. In cases of defamation, for example, all of which engage article 10, the court does not shrink from awarding a successful claimant both damages and costs, as long as the costs are both reasonable and proportionate in the CPR Pt 44 sense.

Can this court interfere?

66 An award of costs is an exercise of discretion by the judge. Since the judge has a wide discretion, it is well-settled that an appeal court should not interfere simply because it considers that it would have exercised the discretion differently. As Chadwick LJ explained in *Johnsey Estates (1990) Ltd v Secretary of State for the Environment* [2001] L & TR 32, para 22, that principle:

> "requires an appellate court to exercise a degree of self-restraint. It must recognise the advantage which the trial judge enjoys as a result of his 'feel' for the case which he has tried. Indeed, as it seems to me, it is not for an appellate court even to consider whether it would have exercised the discretion differently unless it has first reached the conclusion that the judge's exercise of his discretion is flawed. That is to say, that he has erred in principle, taken into account matters which should have been left out account, left out of account matters which should have been taken into account; or reached a conclusion which is so plainly wrong that it can be described as perverse."

A 67 The Supreme Court appeal panel made the same point in *Crosland* [2022] 1 WLR 367, para 92.

68 Once it is clear that the discretion to award costs is governed by the general principles in the CPR (as the Supreme Court and the Divisional Court have both held); and that contempt cases, even in protest cases, are not in some special category even though tempered to some extent by the approach in *Crosland*, I can identify no flaw in the judge's approach to his
B task.

69 I would dismiss the appeal.

ASPLIN LJ

70 I agree.

C **EDIS LJ**

71 I also agree.

Appeal dismissed.

FRASER PEH, Barrister

D

Supreme Court

E

*Nuffield Health *v* Merton London Borough Council

2022 May 27 Lord Briggs, Lord Hamblen, Lord Burrows JJSC

APPLICATION by the defendant for permission to appeal from the decision of the Court of Appeal [2021] EWCA Civ 826; [2022] Ch 1; [2021] 3 WLR 838

F Permission to appeal was given.

G

H

Neutral Citation Number: [2023] EWHC 1089 (Admin)

Case No: CO/1597/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 May 2023

Before:

LORD JUSTICE BEAN
and
MR JUSTICE CHAMBERLAIN

- -

Between:

DEBORAH HICKS **Appellant**

– and –

DIRECTOR OF PUBLIC PROSECUTIONS **Respondent**

- -

Merry van Woodenberg (instructed by **Murray Hughman Solicitors**) for the **Appellant**
Richard Posner (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 26 - 27 April 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 9 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CHAMBERLAIN

MR JUSTICE CHAMBERLAIN:

Introduction

1 On 19 January 2022, District Judge Wattam ("the judge"), sitting at Cheltenham Magistrates' Court, convicted Debbie Hicks of an offence of using threatening or abusive words or behaviour within sight or hearing of a person likely to be caused harassment, alarm or distress, contrary to s. 5 of the Public Order Act 1986 ("the 1986 Act").

2 Ms Hicks invited the judge to pose three questions: first, whether he had erred in finding that the evidence established to the requisite standard that Ms Hicks' words and behaviour were "threatening, abusive or disorderly" within the meaning of section 5 of the 1986 Act, and that she intended them to be such, or was aware of a risk that they would be perceived as such; second, whether he was correct in rejecting Ms Hicks' defence of reasonable excuse under s. 5(3) of the 1986 Act; third, whether he was correct to find that convicting Ms Hicks was a necessary and proportionate interference with her rights under Article 10 of the European Convention on Human Rights ("the ECHR").

3 The judge, while not accepting that these questions necessarily raised points of law, nonetheless invited this court to address them.

The incident giving rise to the charge

4 The charge arose from an incident on 28 December 2020, during one of the lockdowns imposed to contain the transmission of Covid-19.

5 Ms Hicks was concerned about reports in the mainstream media about the effect of Covid-19 on hospitals. She doubted that hospitals were really overflowing with patients. She therefore decided to go to the Gloucester Royal Hospital ("the Hospital") to witness what was happening there, video it on her mobile phone and publicise it on Facebook.

6 Her first visit was on the day before the incident which gave rise to this charge, 27 December 2020, when she took video of the inside of the hospital and streamed it on or uploaded it to Facebook. She wanted to do so again, from different parts of the hospital, to demonstrate that the hospital was not busy. She attended on the afternoon of 28 December 2020.

7 Ms Hicks was in the stairwell of the main block of the Hospital, on the fifth floor, when she came across a small group of health care professionals who worked there. This group included Katie Williams and Sophie Brown. Ms Hicks interacted with Ms Williams and Ms Brown for a short period (no more than one minute, on the judge's finding), after which Ms Williams went to the site office to report that Ms Hicks was present. At that point, Ms Hicks left voluntarily.

The case stated and the agreed summary of the evidence

8 The case stated was originally prepared on 22 April 2022. On 10 October 2022, Sir Ross Cranston, sitting as a judge of this Court, noted that the first question related to the evidential sufficiency of the judge's finding that the appellant's behaviour was "threatening, abusive or disorderly". The judge had set out some of the evidence in the case stated, but Sir Ross Cranston considered that the court would need a fuller account. This would require the parties to prepare an agreed version of the evidence to assist the

judge in his task. The case stated was accordingly returned to the judge with a direction that the parties prepare an agreed summary of the evidence.

9 The agreed summary was duly prepared. Rather than substantively amend the body of the case stated, the judge included one additional paragraph to the effect that the parties had drafted an agreed summary of the evidence, which was appended to the new version of the case stated, dated 28 November 2022. The agreed summary may therefore be treated as forming part of the case stated.

10 Ms Williams' evidence was that the conversation with Ms Hicks lasted for about 30 seconds. Ms Hicks was "hostile, quizzical and offensive", said that she paid their wages through taxes and could film if she wanted. Ms Hicks was "loud and sharp in tone, and it was not a pleasant tone". Ms Williams said: "the hospital is not the correct place to express those views" and "everyone is entitled to an opinion, but to film a closed department is a breach of confidentiality, so I knew I needed to go and seek help. I didn't know if people were outside waiting to attack us." Ms Hicks did not, however, say anything personal to her, touch her or threaten her. Ms Williams said: "coming into contact with someone who says they have the right to film, it was aggressive, so I took myself out of the situation", and "that's what was distressing, that it took my time away from people who needed it".

11 Ms Brown's evidence was that Ms Hicks was "abrupt", "belittling", "not necessarily aggressive or swearing, just sort of inflammatory. She was trying to walk away from us and thought she was better than us really"; she "started asking a lot of questions about my opinions and hospital and the lockdown'; she did not shout or swear; "she said Covid was a hoax and a shambles, which was aggressive and accusative". Ms Hicks held the phone an arm's length from Ms Brown's face, pointed at her face, but she accepted that, given the width of the stairwell, it would not have been possible for Ms Hicks to stand more than a metre and a half away. Ms Brown said: "it was more the disrespect, the violation of my personal space"; "the main thing was that I had seen the video and seen how popular it was and that there were lots of comments. After having the camera in my face, I thought that I might be seen by thousands of people who might be abusive, which was intimidating"; and she confirmed that her distress was caused "partly by the possible repercussions of the video" and partly due to DH's "tone". Ms Hicks did not touch anyone in the group, and did not make any threats or personal comments.

12 Ms Hicks gave evidence that she was a long-standing political campaigner and had formed the view that the Covid-19 pandemic had led to inappropriate restrictions of civil liberties. When she encountered the group on the stairwell, she tried to avoid their attention. When asked what she was doing, she had answered: "Do you not feel the public have a right to know what's going on? We pay taxes for the NHS." She did not want to have this conversation, but she had been unable to get past the group of workers on the stairwell. She had no intention to distress anyone.

The facts found by the judge, as recorded in the case stated

13 The parts of the case stated where the judge recorded his findings of fact were as follows:

> "25… I found that both Ms Williams and Ms Brown gave evidence that was cogent, credible and without exaggeration. Their accounts stood up well to cross examination.

26. Whilst it is clear that Ms Hicks did not, at first, seek confrontation with these two women on that stairwell, once enquiry was made as to whether she required 'any help' a confrontation did develop. And once engaged with them I have no doubt that both Ms Williams and Ms Brown did feel threatened and abused by Ms Hicks' words and behaviour on the stairwell of these hospital premises that afternoon. That she was aggressive and dismissive of them and attempted to conduct a non-consensual interview with them whilst holding a mobile camera phone towards their faces at arms-length and apparently filming them. Both women were visibly distressed when giving evidence about the contemporaneous impact of Ms Hicks' behaviour upon them. Both told me that they were intimidated by Ms Hicks and were concerned that any film that she was taking with her camera phone was being streamed online and that they might be identified from that footage later.

27. Both were aware of and had seen the video footage livestreamed by Ms Hicks the previous day. Both told me that in view of their own recent experiences they found that footage and what was said by Ms Hicks in her running commentary distressing. Both told me that they were aware – contemporaneously – of online comments made by others (so called antivaxxers and the like) which demonstrated the strength of feeling about the issue Ms Hicks sought to highlight.

28. Both women also expressed concern for the confidentiality of patients in that place - at the hospital. Ms Williams was so alarmed that she sought help immediately, reporting what had happened to the site office – 'raising the alarm' as she put it - so that Ms Hicks might be removed from the hospital. Both witnesses described this all to me on oath and, taken together my finding of fact is that Ms Hicks' behaviour clearly did amount to harassment and was threatening and abusive to both Ms Brown and Ms Williams.

29. I am also sure as to Ms Hicks' subjective state of mind, namely that she was bound to be aware in all of these circumstances, that her behaviour might be threatening and/or abusive to others. Ms Hicks' own case is that her attendance at the hospital was 'undercover'. Clearly she understood that she had no business being at the hospital; that she should not be there. In fact her livestream video commentary demonstrates Ms Hicks making efforts not to be noticed at all. I am also struck by the fact that, despite having the ability to do so, Ms Hicks decided, on reflection, not to live stream the key encounter with the two witnesses on the stairwell. She told me that she went on to delete the video footage that she had taken of the women on the stairwell. This suggests to me that she was well aware of the potential deleterious impact of that, had she done it. Ms Brown and Ms Williams were not to know that she was not livestreaming their encounter at the time, of course. Indeed they both told me that they thought that Ms Hicks was doing this. Both women were demonstrably alarmed by Ms Hicks behaviour toward them at their place of work.

30. At first sight, therefore the prosecution case is made out."

14 Later, the judge summarised his findings of fact in this way:

> "47. At the trial I made the following findings of fact: when approached by Ms Williams a health care professional at the hospital (who was concerned about Ms Hicks' behaviour and recognised her voice from the video livestream the day before) Ms Hicks was confrontational, derogatory, and aggressive in her tone towards Ms Williams and her colleague Ms Brown.
>
> 48. Having initially lied about her purpose for visiting the hospital she told both Ms Williams and Ms Brown that: she could film in the hospital and purported to do so; that she paid taxes and therefore paid the wages of the staff; implied that the Covid pandemic was a hoax; and made derogatory comments about NHS provision in the pandemic."

15 The judge considered the decision of this Court in *Abdul v DPP* [2011] EWHC 247, [2011] HRLR 16. He took the view that the question was whether the defendant's conduct was objectively reasonable, having regard to all the circumstances, including importantly those for which Article 10 itself provides. He noted that Ms Hicks' own description of her conduct was "guerrilla journalism" and asked five questions derived from the judgment of the Supreme Court in *DPP v Ziegler* [2021] UKSC 23, [2022] AC 408.

16 As to Article 10 ECHR, the first question was whether Ms Hicks' behaviour was an exercise of her Article 10 rights. The answer was "Yes". Second, he asked whether there was an interference by a public authority with that right. Again, the answer was that both her arrest and her subsequent prosecution constituted such an interference. The third question was whether the interference was prescribed by law, to which the answer was again in the affirmative: the interference was prescribed by the 1986 Act. Fourth, the judge asked whether the interference pursues a legitimate aim. Again, the answer was that it did: the preservation of public order. Fifth, he asked whether the interference was necessary and proportionate.

17 The judge concluded that "caselaw tells us that Convention rights are capable of being considered within the express words of statute and do not superimpose a separate legal test of proportionality by which a decision to prosecute itself might be challenged". Accordingly, the prosecution did not have to establish, separately from Ms Hicks' guilt of the offence with which she had been charged, the proportionality of the decision to prosecute.

18 The judge found that there were other reasonable ways for Ms Hicks to convey and express her opinions about the pandemic and the authorities' response to it. Her conduct on this occasion was not reasonable and Ms Williams and Ms Brown deserved "not to be molested (in the ordinary sense of that word) whilst at work, and should be protected by the law". Thus, the prosecution had established that the restriction of Ms Hicks' Article 10 rights was proportionate and Ms Hicks had not made out the defence under s. 5(3) of the 1986 Act.

The law

19 Section 5 of the 1986 Act provides as follows:

> "(1) A person is guilty of an offence if he—
>
> (a) uses threatening or abusive words or behaviour, or disorderly behaviour, or
>
> (b) displays any writing, sign or other visible representation which is threatening or abusive,
>
> within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.
>
> …
>
> (3) It is a defence for the accused to prove—
>
> …
>
> (c) that his conduct was reasonable."

20 In its original form, the offence could be committed by the use of "threatening, abusive or insulting" words or behaviour, but the word "insulting" was removed by the Crime and Courts Act 2013.

21 Section 6(4) of the 1986 Act provides:

> "A person is guilty of an offence under section 5 only if he intends his words or behaviour, or the writing, sign or other visible representation, to be threatening or abusive, or is aware that it may be threatening or abusive or (as the case may be) he intends his behaviour to be or is aware that it may be disorderly."

22 In *Percy v DPP* [2001] EWHC 1125 (Admin), Hallett J (with whom Kennedy LJ agreed) said this at [25]:

> "….the provisions of section 5 and section 6 of the Public Order Act, as enacted and applied by the courts of this country, contain the necessary balance between the right of freedom of expression and the right of others not to be insulted and distressed. The right to freedom of expression was well established in the United Kingdom before the incorporation of the Convention. Peaceful protest was not outlawed by section 5 of the Public Order Act. Behaviour which is an affront to other people, or is disrespectful or contemptuous of them, is not prohibited: see *Brutus v Cozens* [1973] AC 854. A peaceful protest will only come within the terms of section 5 and constitute an offence where the conduct goes beyond legitimate protest and moves into the realms of threatening, abusive or insulting behaviour, which is calculated to insult either intentionally or recklessly, and which is unreasonable."

23 In *Abdul v DPP*, this Court had to consider a case about protestors who had shouted that British soldiers were "murderers", "rapists" and "baby killers" (among other things) at a parade to mark the home-coming of a regiment from Afghanistan. They had been charged with offences under s. 5 of the 1986 Act, prior to its amendment in 2013. At [49], Gross LJ (with whom Davis J agreed) set out eight propositions explaining the proper approach to s. 5 of the 1986 Act in cases where Article 10 ECHR was engaged:

> "(i) The starting point is the importance of the right to freedom of expression.
>
> (ii) In this regard, it must be recognised that legitimate protest can be offensive at least to some—and on occasions must be, if it is to have impact. Moreover, the right to freedom of expression would be unacceptably devalued if it did no more than protect those holding popular, mainstream views; it must plainly extend beyond that so that minority views can be freely expressed, even if distasteful.
>
> (iii) The justification for interference with the right to freedom of expression must be convincingly established. Accordingly, while art.10 does not confer an unqualified right to freedom of expression, the restrictions contained in art.10(2) are to be narrowly construed.
>
> (iv) There is not and cannot be any universal test for resolving when speech goes beyond legitimate protest, so attracting the sanction of the criminal law. The justification for invoking the criminal law is the threat to public order. Inevitably, the context of the particular occasion will be of the first importance.
>
> (v) The relevance of the threat to public order should not be taken as meaning that the risk of violence by those reacting to the protest is, without more, determinative; some times it may be that protesters are to be protected. That said, in striking the right balance when determining whether speech is "threatening, abusive or insulting", the focus on minority rights should not result in overlooking the rights of the majority.
>
> (vi) Plainly, if there is no *prima facie* case that speech was "threatening, abusive or insulting" or that the other elements of the s.5 offence can be made good, then no question of prosecution will arise. However, even if there is otherwise a prima facie case for contending that an offence has been committed under s.5, it is still for the Crown to establish that prosecution is a proportionate response, necessary for the preservation of public order.
>
> (vii) If the line between legitimate freedom of expression and a threat to public order has indeed been crossed, freedom of speech will not have been impaired by 'ruling… out' threatening, abusive or insulting speech: per Lord Reid, in *Brutus v Cozens* [1973] A.C. 854, at p.862.
>
> (viii) The legislature has entrusted the decision in a case such as the present to Magistrates or a District Judge. The test for this Court on an appeal of this nature is whether the decision to which the District Judge has come was open to her or not. This Court should not interfere unless, on well-known grounds,

> the Appellants can establish that the decision to which the District Judge has come is one she could not properly have reached."

24 On the facts of the case, Gross LJ noted that the conviction was "rooted in the threat to public order, described in the Case": [50]. At [51] the Court distinguished *Dehal v CPS* [2005] EWHC 2154 (Admin) because in that case the key consideration (other than the paucity of reasons) was the absence of a threat to public order.

25 In *R (Campaign Against Antisemitism) v DPP* [2019] EWHC 9 (Admin), this Court dismissed a claim for judicial review of a decision by the DPP to take over and discontinue a private prosecution under s. 5 of the 1986 Act of a demonstrator who had used offensive language at a pro-Palestinian protest. At [7], Hickinbottom LJ (with whom Nicol J agreed) noted, referring to Lord Reid's speech in *Brutus v Cozens*, that the proper meaning of an ordinary word, such as "abusive", was a question of fact, but s. 5 nonetheless had to be read in the context of Article 10 ECHR. At [9], he noted that the effect of the amendment to s. 5(1) in 2013 was to shift the balance in favour of freedom of expression "by removing the word 'insulting', so that that to be criminal, the words or behaviour now have to be 'threatening or abusive'".

26 At [50], Hickinbottom LJ said this:

> "I fully understand the distress that Mr Ali's words may have caused to some of those who were present as the counter-demonstrators or simply as passers-by, and not just those who were Jewish or who were sympathetic or supportive of the state of Israel. His words may have been intemperate and offensive. But it is not the task of this court to judge whether they were or may have been distressing or offensive. As the authorities stress, article 10 does not permit the proscription or other restriction of words and behaviour simply because they distress some people, or because they are provocative, distasteful, insulting or offensive."

At [68(iv)], he distinguished *Abdul* because in that case there was a "very real threat to public order".

27 In *Ziegler*, the Supreme Court considered the correct approach to the offence of obstructing the highway contrary to s. 137 of the Highways Act 1980, to which there is a defence of lawful excuse. Lords Hamblen and Stephens (with whom Lady Arden in essence agreed) said at [70] that intentional action by protestors to disrupt by obstructing others enjoys the guarantees of Articles 10 and 11 ECHR but both the disruption and whether it is intentional are relevant factors in relation to an evaluation of proportionality. Intentional action even with an effect that is more than *de minimis* does not automatically lead to the conclusion that any interference with the protestors' Article 10 and 11 rights is proportionate. Rather there must be an assessment of the facts in each individual case to determine whether the interference with Article 10 and 11 was "necessary in a democratic society".

28 In *In Re Abortion Service (Safe Access Zones) (NI) Bill* [2022] UKSC 32, [2023] 2 WLR 33, Lord Reed (with whom the other members of the seven-judge Court agreed) held that questions of proportionality were often decided as a matter of general principle rather than on the facts of an individual case: [29]. When a defendant relied on Articles 9, 10 or 11 ECHR, the first question was whether those articles are engaged: [54]. If so, the

court must then ask whether the offence is one where the ingredients themselves strike the proportionality balance so that if the ingredients are made out, and the defendant is convicted, there can have been no breach of his or her Convention rights. This will be the case with many commonly encountered criminal offences, such as offences of violence and offences concerning damage to property, which are likely to be defined in such a way as to make assessment of proportionality unnecessary: [55]. If proof of the elements of the offence does not itself ensure the proportionality of a conviction, the court must consider how to ensure compatibility with Convention rights: [56]. If the offence is statutory, s. 3 of the Human Rights Act 1998 may enable the court to construe the relevant provision compatibly with Convention rights, either by construing it in a way which means that a conviction will always be proportionate, or by interpreting it as allowing for an assessment of proportionality in individual cases: [57]. But the fact that there is a statutory defence of lawful or reasonable excuse does not mean that a proportionality assessment in respect of Convention rights is appropriate: [58].

29 The following principles applicable to the construction of s. 5 of the 1986 Act may be derived from an analysis of the statutory words and from the case law:

(a) The question whether a defendant used "threatening or abusive words or behaviour, or disorderly behaviour" is a question of objective fact. How the words or behaviour were in fact perceived by another person may be relevant to, but is not determinative of, that question.

(b) "Threatening", "abusive" and "disorderly" are ordinary English words, and their meaning is a question of fact, but they must be read in the context of Article 10 ECHR, and in the light of Parliament's decision to omit the word "insulting": *Campaign Against Antisemitism*, [7] and [9].

(c) The Article 10 context includes the principle that "[b]ehaviour which is an affront to other people, or is disrespectful or contemptuous of them, is not prohibited": *Percy*, [25]; nor is behaviour which is merely "distressing", "offensive", "distasteful", "insulting" or "intemperate": *Campaign Against Antisemitism*, [50]. See also the well-known observations of Sedley LJ in *Redmond-Bate v DPP* [2000] HRLR 249, [20]: "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having."

(d) In deciding whether a defendant's words were "threatening or abusive", or whether his behaviour was "disorderly", it is appropriate to ask whether the line between legitimate freedom of expression and a threat to public order has been crossed. If so, the interference with Article 10 rights is unlikely to have been impaired: *Abdul*, [49(vii)], [50] and [51].

(e) Provided that the words "threatening", "abusive" and "disorderly" are given an appropriately narrow construction, in accordance with s. 3 of the Human Rights Act 1998 and with due attention to the line between legitimate freedom of expression and a threat to public order, proof of the elements of the offence, and a failure by the defendant to establish the defence in s. 5(3), will generally be sufficient to demonstrate the proportionality of a conviction: *In Re Abortion Service (Safe Access Zones) (NI) Bill*, [57].

Question 1: Did the judge err in finding the elements of the offence established?

The proper approach to facts on an appeal by case stated

30 In *Ziegler*, Lords Hamblen and Stephens considered how an appellate court should approach the question whether there was a "lawful excuse". The appellate court should consider whether there was "an error of law material to the decision reached which is apparent on the face of the case" or "the decision is one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found". Where the statutory defence depends upon an assessment of proportionality, an appeal would lie if there was "an error of law in the reasoning on the face of the case which undermines the cogency of the conclusion on proportionality". That assessment should be made "on the basis of the primary and secondary findings set out in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached".

31 In my judgment, this approach applies not only to the question whether a conviction is proportionate, but also to the prior question whether the elements of the offence are satisfied. It follows that the answer to question 1 depends on whether the judge's findings of fact and conclusions of law were vitiated by any material error of law on the face of the case. If not, this court can intervene only if those findings were not rationally open to the judge on the evidence recorded in the case stated and the agreed summary (which, given the judge's endorsement of it, may be treated as forming part of the case stated).

Did the judge err in law or reach conclusions that were not open to him on the evidence in finding the elements of the offence established?

32 Merry van Woodenberg for the appellant submitted that the evidence demonstrates that what took place on 28 December 2020 was a conversation of limited duration. The descriptions of Ms Hicks' conduct in the agreed summary are consistent with words and behaviour which are offensive or insulting, but do not show that either her words or her behaviour was threatening or abusive or that her behaviour was disorderly if those words are given an appropriately narrow meaning.

33 Richard Posner for the Crown argued that Ms van Woodenberg's submissions focus too narrowly on the words used. Tone, demeanour, encroaching on to personal space and the holding of a mobile telephone in the face of one witness are relevant factors as to whether the offence was committed. Given his finding that Ms Hicks was "confrontational, derogatory and aggressive in her tone", he was entitled to conclude that her behaviour amounted to harassment and was threatening and abusive.

34 The first findings recorded by the judge, in paragraph 26 of the case stated, concern – either in large part or in their entirety – how Ms Hicks' words and behaviour made Ms Williams and Ms Brown feel: they felt threatened and abused and intimidated by the prospect of their images appearing online. It is not clear whether the sentence beginning "That she was aggressive and dismissive…" is a finding of objective fact or a further recitation of how Ms Williams and Ms Brown experienced Ms Hicks' conduct. Paragraphs 27 and 28 record that the two witnesses had been distressed by seeing the footage streamed by Ms Hicks on the previous day and were concerned about patient confidentiality. The final sentence of paragraph 28 appears, however, to be a finding that Ms Hicks' behaviour was (rather than was perceived as) threatening and abusive to Ms

Williams and Ms Brown. Paragraph 47 records findings that Ms Hicks was "confrontational, derogatory, and aggressive in her tone".

35 I accept that the tone in which words are spoken may in some cases be a relevant factor in deciding whether words or behaviour are threatening or abusive. But in my view the tone in which words are said will rarely be sufficient to convert an unpleasant altercation into a criminal offence if – as here – the words used are not themselves threatening or abusive. Section 5 of the 1986 Act does not impose an obligation to be adopt a tone that is polite or quiet or respectful: see by analogy *McNally v Saunders* [2021] EWHC 2012 (QB), [2022] EMLR 3, [76]-[78], and the case law referred to there. I bear in mind also that Ms Brown said at one point that Ms Hicks was "not necessarily aggressive or swearing, just sort of inflammatory" and that both witnesses agreed that Ms Hicks had not threatened or made any personal comment to them.

36 There are also indications that part at least of the witness's reaction to Ms Hicks' conduct was to the content of what she was saying ("Covid is a hoax", "I'm paying your wages", etc.), which they found belittling or disrespectful. Paragraph 48 of the case stated suggests that the judge also had some regard to the derogatory content of Ms Hicks' words. It must be firmly borne in mind that s. 5 of the 1986 Act does not impose an obligation to express oneself in a way that is moderate or well-judged or appropriate to context, nor does it impose a prohibition on rudeness. If it did, a very large number of social interactions would be at risk of criminalisation.

37 Had it not been for Ms Hicks' behaviour in filming the interaction, there would have been force in Ms van Woodenberg's submissions. However, in my view, the act of filming took this case beyond the bounds of legitimate free speech. Although there was no evidence that filming was prohibited *per se* in this part of the Hospital, it is important to consider both the context and how the filming was done. The judge found that both witnesses were aware of the video streamed on the previous day and of the comments it had generated online. The interaction took place on a narrow stairwell at the witnesses' place of work, during a pandemic. The phone was pointed at Ms Brown's face, an arm's length away. There was a violation of Ms Brown's personal space. Both witnesses felt intimidated and threatened by the prospect that Ms Hicks might be streaming their images and that as a result they might be subject to online abuse. The judge accepted their evidence as cogent, credible and free of exaggeration. In my view, this constituted a sufficient evidential basis for the conclusion that Ms Hicks' conduct was, objectively speaking, threatening and abusive, as distinct from merely distressing, offensive, distasteful, insulting or intemperate.

38 I can detect no error of law in the judge's findings as to Ms Hicks' intention as to or awareness of the effects of her behaviour. Those findings were open to the judge, who had the advantage of hearing and seeing the witnesses.

39 I therefore conclude that the judge was entitled to conclude on the evidence before him that the elements of the offence were made out.

Question 2: Was the judge correct to reject Ms Hicks' defence of reasonable excuse?

40 Ms van Woodenberg submitted that the judge erred in taking into account the location of the incident at a hospital, which was the witnesses' place of work, and the fact that the witnesses deserved not to be "molested" there. This was wrong because the authorities

recognise the importance of location to the expressive content of speech in protest cases. She relied on Lord Neuberger MR's statement that "[t]he right to express views publicly… 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": *Hall v Mayor of London* [2010] EWCA Civ 817, [2011] 1 WLR 504, [37]. The judge also failed to attribute proper weight to Ms Hicks' status as a citizen journalist or to the fact that she was engaged in political speech, or to the need for protest to be disruptive or even offensive if it is to be effective.

41 Mr Posner submitted that the judge was entitled to have regard to the location of the incident as part of the context. Ms Hicks was not convicted because of the content of her views but because of the way she behaved to two individuals who were likely to be, and were, harassed alarmed and distressed.

42 For my part, I would readily accept that Ms Hicks had attended the Hospital in order to gather footage which she intended to communicate for journalistic and/or political purposes. The fact that she was not an accredited member of the press did not disentitle her to the protections of Article 10 ECHR in respect of such communications: see e.g. *McNally v Saunders*, [70]-[73] and the cases referred to there. The fact that she was present at the Hospital for that purpose might have been highly relevant if her conviction had been for merely attending a hospital. But it was not. Whereas the footage gathered on 27 December 2021 formed a core part of her journalistic/political aims (demonstrating, as she believed, the falsity of the narrative that hospitals were being overwhelmed by Covid), the footage of the conversation in the stairwell on 28 December 2021 was of much more peripheral relevance to those aims: it did not illustrate the occupancy of the hospital.

43 Against that background, the submission that the judge should have taken into account the need for protest to be disruptive if it to be effective is inapposite here. What happened on the stairwell was not a protest in any real sense. The words spoken may have conveyed political opinions (and so engaged Article 10 ECHR), but it was not more effective to convey them in a way which was threatening or abusive. Put shortly, there was no need to threaten or abuse anyone. For that reason, the judge was in my view correct to conclude that the statutory defence was not made out.

Ground 3: Did the judge err in not concluding a proper balancing exercise?

44 Ms van Woodenberg submitted that the judge erred in failing to conduct a proper balancing exercise. She noted that Ms Hicks had been arrested at home and conveyed to a police station in handcuffs. This, she said, was a disproportionate response.

45 Mr Posner submitted that Ms Hicks' rights under Article 10 ECHR were not engaged because this was private property: see *Appleby v United Kingdom* (2003) 37 EHRR 783, [47] and [52] and *DPP v Cuciurean* [2022] EWHC 736 (Admin), [2022] QB 888, [46]-[47]. If they were engaged, the judge conducted the balancing exercise properly in accordance with *Ziegler.*

46 Mr Posner's submission that Articles 10 and 11 are not engaged where expressive speech takes place on private land on which the speaker is trespassing seems to me to be ambitious. But it is not necessary to decide it, for two reasons. First, and critically, there

was no finding by the judge that Ms Hicks was trespassing. Second, the judge approached the case on the express basis that Article 10 was engaged.

47 Equally, I do not think that the judge erred in failing to take account of the circumstances of the arrest. The arrest and the conviction were quite separate interferences with Ms Hicks' Article 10 rights. The judge was obliged to consider whether the conviction was a proportionate interference with Article 10 rights. He was not, however, hearing a claim against the police, so was not obliged or entitled to consider the circumstances of the arrest.

48 In this case, and in the light of the approach of the Supreme Court in *In Re Abortion Service (Safe Access Zones) (NI) Bill*, once the elements of the offence (construed in accordance with Article 10 ECHR in the way I have indicated) were established, and the defence of reasonable conduct had been rejected, there was no need to undertake a separate proportionality analysis. The conclusion that Ms Hicks' behaviour had crossed the line from legitimate free speech to behaviour that was threatening and abusive (and not merely distressing, offensive, distasteful, insulting or intemperate), together with the absence of a defence, meant that the conviction was proportionate.

49 If I am wrong about that, the judge was in my view not only entitled but correct to conclude that the conviction was a proportionate interference with Ms Hicks' right to freedom of expression, given the matters in [42]-[43] above and the need to protect the rights of Ms Williams and Ms Brown to go about their work without being subject to threatening and abusive conduct.

Conclusion

50 For these reasons, I would answer the questions posed in the case stated as follows:

Question 1: Did the judge err in finding that the evidence established to the requisite standard that Ms Hicks' words and behaviour were "threatening, abusive or disorderly" within the meaning of section 5 of the 1986 Act, and that she intended them to be such, or was aware of a risk that they would be perceived as such? Answer: No.

Question 2: Was the judge correct in rejecting Ms Hicks' defence of reasonable excuse under s. 5(3) of the 1986 Act? Answer: Yes.

Question 3: Was the judge correct to find that convicting Ms Hicks was a necessary and proportionate interference with her rights under Article 10? Answer: Yes.

51 I would accordingly dismiss the appeal.

LORD JUSTICE BEAN:

52 I agree.

King's Bench Division

*Shell UK Ltd *v* Persons Unknown

Shell International Petroleum Ltd *v* Persons Unknown

Shell UK Oil Products Ltd *v* Persons Unknown

[2023] EWHC 1229 (KB)

2023 April 25, 26; May 23

Hill J

Injunction — Interim — Persons unknown — Claimants applying to continue interim injunctions against persons unknown — Non-party applying for permission to set aside or vary injunctions without being joined as defendant — Whether permission to be granted — Whether non-party "directly affected" by injunctions — Whether court retaining residual discretion to refuse permission — CPR r 40.9

The claimants, who were all companies within a group of oil and gas companies, obtained interim injunctions against persons unknown by which they sought to restrain unlawful protests by environmental activists at an oil refinery, an office and various petrol stations. Each injunction included a provision that anyone affected could apply to vary or discharge the injunction at any time, providing their name and address and applying to be joined as a defendant. The claimants applied for those injunctions to be continued. One day before the hearing of that application, B, who was not a party to the proceedings but was a member of one of the key protest groups, applied to be heard by the court on the application while making it clear that she did not wish to be joined as a defendant. In particular she contended that this could be done by the court formally recognising her under CPR r 40.9[1], which permitted a person who was not a party but who was "directly affected" by an order to apply to have the order set aside or varied.

On B's application to be heard and the claimants' applications to continue the interim injunctions—

Held, allowing the applications, that a non-party would have the right to be heard by the court pursuant to CPR r 40.9 provided they passed through a "gateway" by satisfying the court that they (i) were "directly affected" by the order in question and (ii) had a good point to raise; that in order for a non-party to be "directly affected" by an order for the purposes of rule 40.9, it was necessary that some interest capable of recognition by the law was, or would be, materially and adversely affected by the order; that an order could directly affect a person in many ways, including by affecting the person financially, by affecting the person's property rights or possession of property, by affecting the person's investments or pension, by affecting the person's ability to travel or to use a public highway or by affecting the person's ability to work or enjoy private life or social life or to obtain work; that, given the draconian nature of injunctions against persons unknown and the fact that they might be wide in geographical and/or temporal scope, there should be a low threshold for interested persons to be able to take part pursuant to rule 40.9; that, accordingly, an application under rule 40.9 should not be approached by asking whether the applicant had a real prospect of success in showing that the order should be set aside or varied; that, further, joinder as a defendant was not a prerequisite to making an application under rule 40.9 to set aside or vary an injunction, notwithstanding that the injunction

[1] CPR r 40.9: see post, para 52.

contained a provision to the effect that any party seeking to vary or discharge the injunction had to apply to be joined as a defendant; that, moreover, the court had no discretion as to whether to permit a person to apply where both elements of the rule 40.9 "gateway" were satisfied; that, in the present case, B was directly affected by the injunctions, since they adversely affected her rights under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms and if she breached any of them this would affect her financial interests and expose her to the risk of a prison sentence, and had good points to raise in relation to all three injunctions; that, therefore, B should be permitted to apply to set aside or vary the three injunctions under rule 40.9; but that, since the claimants had shown that they were more likely than not to succeed at trial in establishing their claims, that damages would not be an adequate remedy while a cross-undertaking in damages would adequately protect the defendants, and that there was a sufficiently real and imminent risk of damage, the three injunctions would be continued, subject to amendment to ensure that their terms were sufficiently clear and precise and had clear geographical and temporal limits (post, paras 52–65, 68–69, 73–74, 76, 99, 115, 133–140, 146–148, 154, 159, 199, 220).

Abdelmamoud v The Egyptian Association in Great Britain Ltd [2018] Bus LR 1354, CA, *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, CA, *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (QB), *Esso Petroleum Co Ltd v Breen* [2022] EWHC 2600 (KB) and *Barking and Dagenham London Borough Council v Persons Unknown* [2023] QB 295, CA applied.

The following cases are referred to in the judgment:

Abdelmamoud v The Egyptian Association in Great Britain Ltd [2015] EWHC 1013 (Ch); [2015] Bus LR 928; [2018] EWCA Civ 879; [2018] Bus LR 1354, CA

Ageas Insurance Ltd v Stoodley [2019] Lloyd's Rep IR 1

Allergan Inc v Sauflon Pharmaceuticals Ltd (2000) 23 IPD 23030

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 2 WLR 316; [1975] 1 All ER 504, HL(E)

Attorney General's Reference (No 1 of 2022) [2022] EWCA Crim 1259; [2023] KB 37; [2023] 2 WLR 651; [2023] 1 All ER 549, CA

Barking and Dagenham London Borough Council v Persons Unknown [2022] EWCA Civ 13; [2023] QB 295; [2022] 2 WLR 946; [2022] 4 All ER 51, CA

Birmingham City Council v Afsar [2019] EWHC 1560 (QB); [2019] ELR 373

Canada Goose UK Retail Ltd v Persons Unknown [2020] EWCA Civ 303; [2020] 1 WLR 2802; [2020] 4 All ER 575, CA

City of London Corpn v Samede [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA

Cuadrilla Bowland Ltd v Persons Unknown [2020] EWCA Civ 9; [2020] 4 WLR 29, CA

Director of Public Prosecutions v Cuciurean [2022] EWHC 736 (Admin); [2022] QB 888; [2022] 3 WLR 446; [2022] 4 All ER 1043, DC

Director of Public Prosecutions v Ziegler [2021] UKSC 23; [2022] AC 408; [2021] 3 WLR 179; [2021] 4 All ER 985, SC(E)

EDO MBM Technology Ltd v Campaign to Smash EDO [2005] EWHC 837 (QB)

Esso Petroleum Co Ltd v Breen [2022] EWHC 2600 (KB)

Esso Petroleum Co Ltd v Persons Unknown [2022] EWHC 1477 (QB)

Frankson v Home Office [2003] EWCA Civ 655; [2003] 1 WLR 1952, CA

High Speed Two (HS2) Ltd v Persons Unknown [2022] EWHC 2360 (KB)

Ineos Upstream Ltd v Persons Unknown [2017] EWHC 2945 (Ch); [2019] EWCA Civ 515; [2019] 4 WLR 100; [2019] 4 All ER 699, CA

National Highways Ltd v Persons Unknown [2021] EWHC 3081 (QB)

National Highways Ltd v Persons Unknown [2022] EWHC 1105 (QB)
PeCe Beheer BV v Alevere Ltd [2016] EWHC 434 (IPEC)
Secretary of State for Transport v Cuciurean [2020] EWHC 2614 (Ch)
Shell UK Oil Products Ltd v Persons Unknown [2022] EWHC 1215 (QB)
Tabernacle v Secretary of State for Defence [2009] EWCA Civ 23; The Times, 25 February 2009, CA
Transport for London v Lee [2022] EWHC 3102 (KB)
Transport for London v Lee [2023] EWHC 402 (KB)
Vastint Leeds BV v Persons Unknown [2018] EWHC 2456 (Ch); [2019] 4 WLR 2
Vural v Turkey (Application No 9540/07) (unreported) 21 October 2014, ECtHR

The following additional cases were cited in argument or referred to in the skeleton arguments:

Bromley London Borough Council v Persons Unknown [2020] EWCA Civ 12; [2020] PTSR 1043; [2020] 4 All ER 114, CA
Cameron v Liverpool Victoria Insurance Co Ltd [2019] UKSC 6; [2019] 1 WLR 1471; [2019] 3 All ER 1, SC(E)
Canada Goose UK Retail Ltd v Persons Unknown [2019] EWHC 2459 (QB); [2020] 1 WLR 417
Christian Democratic People's Party v Moldova (Application No 28793/02) (2006) 45 EHRR 13, ECtHR
Director of Public Prosecutions v Jones [1999] 2 AC 240; [1999] 2 WLR 625; [1999] 2 All ER 257, HL(E)
Director of Public Prosecutions v Ziegler [2019] EWHC 71 (Admin); [2020] QB 253; [2019] 2 WLR 1451, DC
Elliott v Islington London Borough Council [2012] EWCA Civ 56; [2012] 7 EG 90 (CS), CA
Harper v G N Haden & Sons Ltd [1933] Ch 298, CA
Ineos Upstream Ltd v Persons Unknown [2017] EWHC 3427 (Ch)
JSC BTA Bank v Ablyazov (No 14) [2018] UKSC 19; [2020] AC 727; [2018] 2 WLR 1125; [2018] 3 All ER 293, SC(E)
Kerner v WX [2015] EWHC 1247 (QB)
Marshall v Blackpool Corpn [1935] AC 16, HL(E)
Moosun v HSBC Bank plc (trading as First Direct) [2015] EWHC 3308 (Ch)
OBG Ltd v Allan [2007] UKHL 21; [2008] AC 1; [2007] 2 WLR 920; [2007] Bus LR 1600; [2007] 4 All ER 545, HL(E)
R v Rimmington [2005] UKHL 63; [2006] 1 AC 459; [2005] 3 WLR 982; [2006] 2 All ER 257, HL(E)
R v Secretary of State for the Home Department, Ex p Salem [1999] QB 805; [1999] 2 WLR 1; [1999] 2 All ER 42, CA
R (Laporte) v Chief Constable of Gloucestershire Constabulary [2006] UKHL 55; [2007] 2 AC 105; [2007] 2 WLR 46; [2007] 2 All ER 529, HL(E)
RWE Npower plc v Carrol [2007] EWHC 947 (QB)
Racing Partnership Ltd v Done Bros (Cash Betting) Ltd [2020] EWCA Civ 1300; [2021] Ch 233; [2021] 2 WLR 469; [2021] 3 All ER 739, CA
Revenue and Customs Comrs v Total Network SL [2008] UKHL 19; [2008] AC 1174; [2008] 2 WLR 711; [2008] 2 All ER 413, HL(E)
Sáska v Hungary (Application No 58050/08) (unreported) 27 November 2012, ECtHR
Secretary of State for the Environment, Food and Rural Affairs v Meier [2008] EWCA Civ 903; [2009] 1 WLR 828; [2009] PTSR 357; [2009] 1 All ER 614, CA
UK Oil and Gas plc (formerly UK Oil and Gas Investments plc) v Persons Unknown [2021] EWHC 599 (Ch)

A **APPLICATIONS**

Shell UK Ltd v Persons Unknown

By a claim form the claimant, Shell UK Ltd, the freehold owner of the Shell Haven Oil Refinery ("the Haven"), a substantial fuel storage and distribution installation, applied for an injunction against persons B unknown entering or remaining on the claimant's refinery site, following protests by persons who sought, inter alia, to raise public awareness of the climate change damage caused by fossil fuels and to put pressure on the Government to halt new investment in the fossil fuel industry and immediately to halt all future licensing and consents for the exploration, development and production of fossil fuels in the United Kingdom. The C grounds of claim were that the actions of the protesters amounted to, inter alia: (i) trespass to the claimant's land; (ii) public nuisance in the form of obstruction of the highway occasioning particular damage; (iii) private nuisance in the form of unlawful interference with the claimant's right of access to its land via the highway; and (iv) private nuisance in the form of substantial interference with the exercise by the claimant of a private right of way.

D On 5 May 2022 Bennathan J granted an interim injunction expiring on 2 May 2023 against persons unknown in respect of the Haven, ordering that the defendants were not to (i) enter or remain upon any part of the Haven without the consent of the claimant; (ii) block access to any of the gateways to the Haven, the locations of which were identified marked blue on plans appended to the order; or (iii) cause damage to any part of the Haven E whether by (a) affixing themselves, or any object, or thing, to any part of the Haven, or to any other person or object or thing on or at the Haven, (b) erecting any structure in, on or against the Haven, (c) spraying, painting, pouring, sticking or writing any substance on or inside any part of the Haven or (d) otherwise. The injunction further provided that a defendant was not to do any of those actions by means of another person acting on their behalf or acting on their instructions or by another person acting with their F encouragement.

By an application notice dated 30 March 2023 the claimant sought an extension of that injunction for a maximum of one year and various other orders. The applications were listed to be heard on 25 and 26 April 2023 together with those made by two other related companies in similar proceedings. During the morning of 24 April 2023, Jessica Branch, a G member of one of the key protest groups, Extinction Rebellion, served a witness statement and lengthy skeleton argument asking to be heard at the hearing, by the exercise of the court's inherent power or by it formally recognising her under CPR r 40.9. The claimants objected to her being heard given the lateness of her documentation and for other reasons. The issues which required determination were: (i) whether to permit Ms Branch, a non-party, to make submissions, and, if so, on what basis and to what H extent; (ii) whether to extend the three injunctions for up to a further year in the manner sought by the claimants; and (iii) whether to grant the claimants permission to serve any order and ancillary documents by alternative means.

The facts are stated in the judgment, post, paras 1, 3, 4, 10–14, 22, 27, 30.

Shell International Petroleum Ltd v Persons Unknown

By a claim form the claimant, Shell International Petroleum Ltd, the freehold owner of the Shell Centre Tower ("the Tower"), a large office building, applied for an injunction against persons unknown entering or remaining on the claimant's site, following protests by persons who sought, inter alia, to raise public awareness of the climate change damage caused by fossil fuels and to put pressure on the Government to halt new investment in the fossil fuel industry and immediately to halt all future licensing and consents for the exploration, development and production of fossil fuels in the United Kingdom. The grounds of claim were that the actions of the protesters amounted to, inter alia: (i) trespass to the claimant's land; (ii) public nuisance in the form of obstruction of the highway occasioning particular damage; (iii) private nuisance in the form of unlawful interference with the claimant's right of access to its land via the highway; and (iv) private nuisance in the form of substantial interference with the exercise by the claimant of a private right of way.

On 5 May 2022 Bennathan J granted the claimant an interim injunction expiring on 2 May 2023 against persons unknown in respect of the Tower, ordering that the defendants were not to (i) enter or remain upon any part of the Tower without the consent of the claimant; (ii) block access to any of the gateways to the Tower, the locations of which were identified marked blue on plans appended to the order; or (iii) cause damage to any part of the Tower whether by (a) affixing themselves, or any object, or thing, to any part of the Tower, or to any other person or object or thing on or at the Tower, (b) erecting any structure in, on or against the Tower, (c) spraying, painting, pouring, sticking or writing any substance on or inside any part of the Tower or (d) otherwise. The injunction further provided that a defendant was not to do any of those actions by means of another person acting on their behalf or acting on their instructions or by another person acting with their encouragement.

By an application notice dated 30 March 2023 the claimant sought an extension of that injunction for a maximum of one year and various other orders. The applications were listed to be heard over 25 and 26 April 2023 together with those made by two other related companies in similar proceedings. During the morning of 24 April 2023, Jessica Branch, a member of one of the key protest groups, Extinction Rebellion, served a witness statement and lengthy skeleton argument asking to be heard at the hearing, by the exercise of the court's inherent power or by it formally recognising her under CPR r 40.9. The claimants objected to her being heard at the hearing given the lateness of her documentation and for other reasons. The issues which required determination were: (i) whether to permit Ms Branch, a non-party, to make submissions, and, if so, on what basis and to what extent; (ii) whether to extend the three injunctions for up to a further year in the manner sought by the claimants; and (iii) whether to grant the claimants permission to serve any order and ancillary documents by alternative means.

The facts are stated in the judgment, post, paras 1, 3, 4, 10, 11, 15–17, 22, 23, 27, 31.

Shell UK Oil Products Ltd v Persons Unknown

By a claim form the claimant, Shell UK Oil Products Ltd, which supplied Shell petrol stations in England and Wales, applied for an injunction against

persons unknown to restrain them from obstructing access to or damaging petrol stations using its brand, by unlawful means and in combination with others, following protests by persons who sought, inter alia, to raise public awareness of the climate change damage caused by fossil fuels and to put pressure on the Government to halt new investment in the fossil fuel industry and immediately to halt all future licensing and consents for the exploration, development and production of fossil fuels in the United Kingdom.

On 17 May 2022 Johnson J granted the claimant an interim injunction, expiring on 12 May 2023, against persons unknown in respect of Shell petrol stations to restrain unlawful protests by environmental activists. As amended on 20 May 2022, the injunction ordered that the defendants were not to do any of the acts listed in paragraph 3 of the order in express or implied agreement with any other person, and with the intention of disrupting the sale or supply of fuel to or from a Shell petrol station, those acts being: (i) blocking or impeding access to any pedestrian or vehicular entrance to a Shell petrol station or to a building within the Shell petrol station; (ii) causing damage to any part of a Shell petrol station or to any equipment or infrastructure (including but not limited to fuel pumps) upon it; (iii) operating or disabling any switch or other device in or on a Shell petrol station so as to interrupt the supply of fuel from that Shell petrol station, or from one of its fuel pumps, or so as to prevent the emergency interruption of the supply of fuel at the Shell petrol station; (iv) affixing or locking themselves, or any object or person, to any part of a Shell petrol station, or to any other person or object on or in a Shell petrol station; (v) erecting any structure in, on or against any part of a Shell petrol station; (vi) spraying, painting, pouring, depositing or writing any substance on to any part of a Shell petrol station; (vii) encouraging or assisting any other person do any of the acts referred to in sub-paragraphs (i) to (vi). Paragraph 4 then provided that a defendant was not to do any of those acts by means of another person acting on their behalf or acting on their instructions or by another person acting with their encouragement.

By an application notice dated 30 March 2023 the claimant sought an extension of the interim injunction for a maximum of one year and various other orders. The claimant also sought permission under CPR rr 19.4(1) and 17.1(3) to amend the description of the persons unknown defendant to remove the word "environmental" from "environmental protest campaigns". The applications were listed to be heard over 25 and 26 April 2023 together with those made by two other related companies in similar proceedings. During the morning of 24 April 2023, Jessica Branch, a member of one of the key protest groups, Extinction Rebellion served a witness statement and lengthy skeleton argument asking to be heard at the hearing, by the exercise of the court's inherent power or by it formally recognising her under CPR r 40.9. The claimants objected to her being heard at the hearing given the lateness of her documentation and for other reasons. The issues which required determination were: (i) whether to permit Ms Branch, a non-party, to make submissions, and, if so, on what basis and to what extent; (ii) whether to grant the claimant in the petrol stations claim permission to amend the description of the persons unknown defendants; (iii) whether to extend the three injunctions for up to a further year in the manner sought by the claimants; (iv) whether to grant the claimants permission to serve any order and ancillary documents by alternative means; and (v) whether to grant

the claimant in the petrol stations claim its application for a third party disclosure order against the Commissioner of Police of the Metropolis.

The facts are stated in the judgment, post, paras 2–4, 10, 11, 18–21, 24–27, 32–34.

Myriam Stacey KC and *Joel Semakula* (instructed by *Eversheds Sutherland (International) LLP*) for the claimants.

Stephen Simblet KC and *Owen Greenhall* (instructed by *Hodge Jones & Allen LLP*) for Ms Branch.

The court took time for consideration.

23 May 2023. **HILL J** handed down the following judgment.

Introduction

1 The claimants in the first two of these claims are Shell UK Ltd and Shell International Petroleum Ltd. They are, respectively, the freehold owners of (i) the Shell Haven Oil Refinery ("Haven"), a substantial fuel storage and distribution installation; and (ii) the Shell Centre Tower ("Tower"), a large office building. On 5 May 2022 Bennathan J granted these two claimants interim injunctions against Persons Unknown in respect of the Haven and the Tower.

2 The claimant in the third claim is Shell UK Oil Products Ltd. It markets and sells fuels to retail customers in England and Wales through a network of Shell-branded petrol stations, and in some cases has an interest in the land where the Shell petrol station is located. On 20 May 2022 Johnson J granted this claimant an interim injunction against Persons Unknown in respect of Shell petrol stations.

3 All three injunctions seek to restrain unlawful protests by environmental activists. The Haven and Tower injunctions were due to expire on 2 May 2023, with the petrol stations injunction expiring on 12 May 2023. By application notices dated 30 March 2023 Shell sought extensions of all three injunctions for a maximum of one year and various other orders. The applications were listed together over 25 and 26 April 2023.

4 During the morning of 24 April 2023, Jessica Branch, a member of one of the key protest groups, Extinction Rebellion ("XR"), served a witness statement and lengthy skeleton argument asking to be heard at the hearing. The claimants objected to her being heard at the hearing given the lateness of her documentation and for other reasons. It was not possible to resolve the issue of Ms Branch's participation easily at the outset of the hearing. Mr Stephen Simblet KC, on her behalf, indicated that she was keen to avoid incurring further costs by being required to return on a further day. I therefore heard all his submissions on a provisional basis.

5 The issues that required determination were as follows:

(1) Whether to permit Ms Branch to make submissions, and, if so, on what basis and to what extent;

(2) Whether to grant the claimant in the petrol stations claim permission to amend the description of the persons unknown defendants;

(3) Whether to extend the three injunctions for up to a further year in the manner sought by the claimants;

(4) Whether to grant the claimants permission to serve any order and ancillary documents by alternative means; and

(5) Whether to grant the claimant in the petrol stations claim its application for a third party disclosure order against the Commissioner of Police of the Metropolis ("the Commissioner").

6 There were only two working days between the end of the hearing and the expiry of the Haven and Tower injunctions; and only three working days until the last date on which Shell could begin complying with the extensive service requirements in respect of any further injunction covering the petrol stations.

7 In those circumstances, the parties raised the possibility of granting a short extension to the injunctions to permit proper consideration of the arguments raised, including certain novel legal points relating to CPR r 40.9 advanced by Ms Myriam Stacey KC. On 27 April 2023 I indicated to the parties that I considered that this course was appropriate. On 28 April 2023 I made orders with the effect of extending the injunctions for one calendar month, until 25 May 2023. I also made the third party disclosure order sought.

8 This judgment gives my decisions and reasons on issues (1)–(4) and my reasons for making the third party disclosure order referred to under issue (5).

9 Regrettably, despite the fact that their submissions invited me to uphold the detail of Bennathan J's reasoning on the Haven and Tower claims, and despite the passage of over a year since his judgment, no transcript of his judgment has been obtained by the claimants. It was therefore necessary to work from a note of his judgment taken by the claimants' former solicitor. Johnson J's judgment can be found at *Shell UK Oil Products Ltd v Persons Unknown* [2022] EWHC 1215 (QB).

The background to the May 2022 injunctions

10 The background to the obtaining of the three injunctions was summarised in a witness statement from Christopher Prichard-Gamble, the country security manager for the Shell group of companies' UK assets, dated 30 March 2023.

11 He explained that in early 2022 Shell became aware that XR, a campaign group formed in October 2018, which seeks to affect Government policy on climate change through civil disobedience, had published guidance about its intention to take disruptive action to end the fossil fuel economy. It called upon members of the public to support its aims. Several other groups were associated with XR's stance, including Just Stop Oil ("JSO"), Youth Climate Swarm ("YCS") and Scientist Rebellion. Matters came to a head in April and May 2022 when various activities were undertaken with, what Mr Prichard-Gamble described as, the "apparent aim of causing maximum disruption to Shell's lawful activities and thereby generating publicity for the protest movement".

Haven

12 Bennathan J was provided with witness statements from Ian Brown, distribution operations manager, dated 13 and 22 April 2022, in respect of the Haven. The protest activities relating to the Haven which Mr Brown

described included (i) a six-hour incident on 3 April 2022, which saw a group of protesters blocking the main access road to the Haven, boarding tankers and blocking a tanker, requiring police attendance; (ii) protesters scoping and attempting to access the jetty at Haven; and (iii) similar incidents at fuel-related sites geographically proximate to the Haven, causing concern that the Haven could be an imminent target.

13 In Mr Brown's second witness statement, provided after the grant of the ex parte injunction by Sweeting J on 15 April 2022, he indicated that there had been no further protests targeted at the Haven. However, he said that there had been other protests in the vicinity and indications of future action.

14 Mr Brown explained that his main concerns related to the fact that the Haven site is used for the storage and distribution of highly flammable hazardous products. If unauthorised access is gained, this could lead to a leak causing a fire or explosion and very significant danger. Unauthorised access to the jetty created an additional risk of damage which could lead to significant release of hydrocarbons into the Thames Estuary. He had concerns over the personal safety of staff/contractors and the protesters themselves (who had, for example, climbed on to moving vehicles) as well as the security of energy supply and Shell's assets.

Tower

15 Bennathan J was provided with witness statements from Keith Garwood, asset protection manager, dated 14 and 22 April 2022, in respect of this claim. The matters he referred to included (i) an occasion on 6 April 2022, when a paint-like substance was thrown, leaving large black marks and splashes on the walls and above one of the staff entrances to the Tower; (ii) a significant incident, on 13 April 2022, when around 500 protesters converged on the Tower, banging drums and displaying banners stating, "Jump Ship" and "Shell=Death" directed at Shell staff, with several gluing themselves to the reception area of the Tower and another Shell office nearby; (iii) an incident on 15 April 2022 when around 30 protesters holding banners obstructed the road where the Tower is located; and (iv) an incident on 20 April 2022 when 11 protesters held banners, used a megaphone and ignited smoke flares. He also described protesters having graffitied and stuck stickers on the outside of the Tower with the XR logo and how, on several occasions, it was necessary to place the Tower in "lockdown".

16 Having reviewed the evidence from Mr Brown and Mr Garwood, Bennathan J emphasised that there was "no account of any violence against any person" and that "[t]he protests are loud, no doubt upsetting to some and potentially disruptive, but are peaceful".

17 Mr Garwood expressed his concerns that protesters would continue to enter, vandalise or damage the Tower, intimidate staff/visitors and block the entrances and exits to the Tower. The latter was a health and safety risk, in particular, because it restricted access for emergency vehicles and sometimes meant that members of the public had to walk on the road.

The petrol stations

18 Johnson J was provided with witness statements from Benjamin Austin, the claimant's health, safety and security manager, dated 3 and

10 May 2022. In his judgment, he explained that, on 28 April 2022, there were protests at two petrol stations (one of which was a Shell petrol station) on the M25, at Clacket Lane and Cobham. Entrances to the forecourts were blocked. The display screens of fuel pumps were smashed with hammers and obscured with spray paint. The kiosks were "sabotaged . . . to stop the flow of petrol". Protesters variously glued themselves to the floor, a fuel pump, the roof of a fuel tanker or each other. A total of 55 fuel pumps were damaged (including 35 out of 36 pumps at Cobham) to the extent that they were not safe for use, and the whole forecourt had to be closed: paras 12–13. Johnson J also referred to wider protests in April/early May 2022 at oil depots in Warwickshire and Glasgow: paras 14–15.

19 Johnson J explained that he had not been shown any evidence to suggest that XR, JSO or Insulate Britain had resorted to physical violence against others. He noted, however, that they are "committed to protesting in ways that are unlawful, short of physical violence to the person". He observed that their websites demonstrate this, with references to "civil disobedience", "direct action", and a willingness to risk "arrest" and "jail time": para 9.

20 He summarised the various risks that arise from these types of protest, in addition to the physical damage and the direct financial impact on the claimant (from lost sales), as follows:

> "18. . . . Petrol is highly flammable. Ignition can occur not just where an ignition source is brought into contact with the fuel itself, but also where there is a spark (for example from static electricity or the use of a device powered by electricity) in the vicinity of invisible vapour in the surrounding atmosphere. Such vapour does not disperse easily and can travel long distances. There is therefore close regulation . . .
>
> "19. The use of mobile telephones on the forecourt (outside a vehicle) is prohibited for that reason . . . The evidence shows that at the protests on 28 April 2022 protesters used mobile phones on the forecourts to photograph and film their activities. Further, as regards the use of hammers to damage pumps, Mr Austin says: 'Breaking the pump screens with any implement could cause a spark and in turn potentially harm anyone in the vicinity. The severity of any vapour cloud ignition could be catastrophic and cause multiple fatalities. Unfortunately, Shell Group has tragically lost several service station employees in Pakistan in the last year when vapour clouds have been ignited during routine operations.' I was not shown any positive evidence as to the risks posed by spray paint, glue or other solvents in the vicinity of fuel or fuel vapour, but I was told that this, too, was a potential cause for concern."

21 He noted the evidence that the campaign orchestrated by the groups in question looked set to continue and cited JSO's statement on its website that the disruption would continue "until the government makes a statement that it will end new oil and gas projects in the UK": para 16.

The terms of the injunctions

22 The Haven injunction provides that the defendants must not (i) enter or remain upon any part of the Haven without the consent of the claimant; (ii) block access to any of the gateways to the Haven, the locations of which are identified marked blue on plans appended to the order; or (iii) cause

damage to any part of the Haven whether by (a) affixing themselves, or any object, or thing, to any part of the Haven, or to any other person or object or thing on or at the Haven; (b) erecting any structure in, on or against the Haven; (c) spraying, painting, pouring, sticking or writing with any substance on or inside any part of the Haven; or (d) otherwise. The injunction further provides that a defendant must not do any of these actions by means of another person acting on his/her/their behalf, or acting on his/her/their instructions, or by another person acting with his/her/their encouragement.

23 The Tower injunction is in materially similar terms.

24 The petrol stations injunction provides that:

> "2. . . . the defendants must not do any of the acts listed in paragraph 3 of this Order in express or implied agreement with any other person, and with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station.
>
> "3. The acts referred to in paragraph 2 of this order are:
>
> "3.1. blocking or impeding access to any pedestrian or vehicular entrance to a Shell Petrol Station or to a building within the Shell Petrol Station;
>
> "3.2. causing damage to any part of a Shell Petrol Station or to any equipment or infrastructure (including but not limited to fuel pumps) upon it;
>
> "3.3. operating or disabling any switch or other device in or on a Shell Petrol Station so as to interrupt the supply of fuel from that Shell Petrol Station, or from one of its fuel pumps, or so as to prevent the emergency interruption of the supply of fuel at the Shell Petrol Station;
>
> "3.4. affixing or locking themselves, or any object or person, to any part of a Shell Petrol Station, or to any other person or object on or in a Shell Petrol Station;
>
> "3.5. erecting any structure in, on or against any part of a Shell Petrol Station;
>
> "3.6. spraying, painting, pouring, depositing or writing any substance on to any part of a Shell Petrol Station.
>
> "3.7. encouraging or assisting any other person do any of the acts referred to in sub-paragraphs 3.1 to 3.6."

25 Paragraph 4 then provides that a defendant must not do any of these acts by means of another person acting on his/her/their behalf, or acting on his/her/their instructions, or by another person acting with his/her/their encouragement. This appears to replicate clause 3.7.

26 Johnson J made the following observations on how the injunction operates:

> "21. Some of the conduct referred to in paragraph 3 is, in isolation, potentially innocuous ('depositing . . . any substance on . . . any part of a Shell Petrol Station' would, literally, cover the disposal of a sweet wrapper in a rubbish bin). The injunction does not prohibit such conduct. The structure is important. The injunction only applies to the defendants. The defendants are those who are 'damaging, and/or blocking the use of or access to any Shell petrol station in England and Wales, or to any equipment or infrastructure upon it, by express or implied agreement with

A others, with the intention of disrupting the sale or supply of fuel to or from the said station'. So, the prohibitions in the injunction only apply to those who fall within that description. Further, the order does not impose a blanket prohibition on the conduct identified in paragraph 3. It only does so where that conduct is undertaken 'in express or implied agreement with any other person, and with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station'.

B "22. It follows that while paragraph 3 is drafted quite widely, its impact is narrowed by the requirements of paragraph 2. This is deliberate. It is because the claimant is not able to maintain an action in respect of the activity in paragraph 3 (read in isolation) in respect of those Shell petrol stations where it has no interest in the land. It is only actionable where that conduct fulfils the ingredients of the tort of conspiracy to injure (as to C which see para 26 below). The terms of the injunction are therefore deliberately drafted so as only to capture conduct that amounts to the tort of conspiracy to injure."

27 The claimants seek orders extending all three injunctions on the same terms for up to one further year, save that the claimant on the petrol s claim seeks to amend the definition of persons unknown (see further under D issue (2) below).

Evidence in support of the applications to extend the injunctions

28 The claimants' solicitors provided detailed chronologies setting out the incidents which they have been able to identify since May 2022 of direct action protest against the claimants, the Shell business and those operating E within the wider oil/gas industry. Specific chronologies were prepared setting out incidents involving protest activity at the Haven and other oil refinery sites, the Tower and other corporate buildings and at petrol stations.

29 These incidents were more fully described in (i) a witness statement from Fay Lashbrook, the Haven's terminal manager; (ii) a third statement from Mr Garwood in respect of the Tower; and (iii) a third statement from Mr Austin in respect of the petrol stations. These statements were all F dated 30 March 2023. They were supported by voluminous exhibits. The statement from Mr Prichard-Gamble, referred to at para 10 above, provided further detail.

Haven

30 There do not appear to have been any further unlawful protest G incidents at the Haven. However, the evidence shows a significant number of incidents in relation to oil refinery sites between August 2022 and February 2023. These included protest action at a number of oil refineries located in Kingsbury. The main road used to access the site was closed as a result of protesters making the road unsafe, by digging and occupying a tunnel underneath it, access roads were also blocked by protesters performing a sit-down roadblock. Similar activity occurred at the Gray's oil H terminal in West Thurrock in August/September 2022. On 28 August 2022 eight people were arrested after protesters blocked an oil tanker in the vicinity of the Gray's terminal, climbing on top of it and deflating its tyres. On 14 September 2022 around fifty protesters acted in breach of the North Warwickshire local authority injunction in relation to the Kingsbury site.

Tower

31 In respect of the Tower, the evidence suggests that Bennathan J's injunction has had a deterrent effect: the claimant's evidence shows no incidences of unlawful activity during protests held within the vicinity of the Tower. However, it continued to be a prime location for protests; and corporate buildings, more broadly, have been the target of unlawful activity since the injunction was made. For example, the evidence referred to (i) prominent buildings and venues across London having been targeted by JSO; (ii) various government and high-profile buildings, such as a Rolex shop and high-end car dealerships, having been targeted by protest groups; and (iii) on 14 November 2022, JSO supporters having targeted the Silver Fin building in Aberdeen where the Shell group have offices, covering it in orange paint.

The petrol stations

32 In relation to the petrol stations, there have been two further incidents, on 24 August and 26 August 2022. Fuel pumps were vandalised, customers's access to the forecourt was blocked and, on the first of these dates, protesters superglued themselves to the forecourt. The first incident involved three petrol stations on the M25 and the second related to seven across London.

33 Mr Prichard-Gamble also described a significant number of incidents of direct action protest against the wider Shell business and the wider oil and gas industry and operators within it. He described over twenty such incidents between May 2022 and February 2023. These included (i) the targeting of Shell's annual shareholders meeting in May 2022; (ii) JSO's call, in May 2022, for the seizure of Shell's assets; (iii) protesters spraying paint on the Treasury building; (iv) JSO's month-long campaign of civil disobedience and protest involving a series of incidents in October 2022; (v) JSO protesters starting a campaign of targeting motorway gantries in different locations on the M25 in November 2022, causing police to halt the traffic; and (vi) an incident in early 2023 involving protesters boarding and beginning to occupy a moving Shell floating production and storage facility while it was in transit heading for the North Sea.

34 These activities have led the claimants to incur the costs of further security at the Kingsbury oil facility and the Tower and an additional vessel to shadow the floating facility referred to above.

The risk of future harm

35 Mr Prichard-Gamble's evidence on this issue was, in summary, as follows.

36 The claimants liaise regularly with the police, whose intelligence indicates that there continues to be an ongoing threat; that the protest campaign is not over; and that protest groups will continue to attempt to put pressure on the Government to halt new investment in fossil fuels. It is apparent that JSO continues to have the ability to draw on a large group of protesters who are willing to be arrested; that they take action using a variety of tactics and target locations across the UK; and that they employ tactics that attract the media and public interest. Further, there is a high level of crossover between the individual protest groups, who appear to

A share disruptive tactics between them. His view was that activities of the sort described above would be likely to increase as a result of the Government's recent approval of the building of a new power station, the cost-of-living crisis and the likely increase in support for JSO given that environmental concerns affect the majority of the public.

37 There is the following specific evidence of the likelihood of
B continuing action against the claimants and the wider Shell business: (i) a 30 November 2022 report that JSO had stated they will "continue to escalate unless the government meets our demand to stop future gas and oil projects"; (ii) an 11 January 2023 report that JSO had said that they planned more large-scale disruption this year; (iii) a 29 January 2023 Twitter post from Fossil Free London inviting people to a meeting on the basis that "in the last year, we've closed down Shell's AGM, challenged their legal director,
C sabotaged their CEO's leaving party & more! Now we want to go bigger"; and (iv) JSO's 14 February 2023 "ultimatum letter" issued to 10 Downing Street which stated that unless the UK Government provided an assurance that it would immediately halt all future licensing and consents for the exploration, development and production of fossil fuels in the UK by 10 April 2023, they would be forced to escalate their campaign.

D 38 Further, during the hearing Ms Stacey took me to press coverage dated 26 April 2023 indicating that following a four-day demonstration XR and other groups said that it would step up campaigns to force the Government to tackle the climate emergency. The co-founder of XR was quoted as saying that the Government had a week to respond to the group's demands.

39 Mr Prichard-Gamble's overall view was that (i) the incidents
E described demonstrate a clear nationwide targeting of members of the wider Shell group of companies and its business operations since April/May 2022; (ii) such demonstrations will continue for the foreseeable future; and (iii) the injunctions need to be extended as they provide a strong deterrent effect and mitigate against the risk of harm to which unlawful activities at the sites would otherwise give rise. Unlawful activity at the sites presents an unacceptable
F risk of continuing and significant danger to the health and safety of staff, contractors, the general public and other persons visiting them.

40 He emphasised that the claimants do not wish to stop protesters from undertaking peaceful protests, whether near their sites or otherwise. Many such peaceful protests have in fact taken place without breaching the injunctions, in particular outside and in the vicinity of the Tower and outside Shell petrol stations.

G

Issue (1): whether to permit Ms Branch to make submissions and, if so, on what basis and to what extent

Ms Branch's application

41 Ms Branch provided witness statements, dated 24 and 26 April 2023, a statement from Nancy Friel and a detailed skeleton argument from
H Mr Simblet and Mr Owen Greenhall.

42 Ms Branch is an environmental activist who has been a member of XR since April 2019. She has not breached any of the injunctions obtained by the claimants. However, she contended that she is directly affected by them as she is keen to participate in protests which make people aware of the

damage caused by fossil fuels but does not wish to risk breaching the injunctions. She believes that the injunctions have a chilling effect on her right to protest peacefully, in the manner and at the location of her choosing.

43 In relation to the Haven, Ms Branch noted that the injunction covers anyone who enters or remains at the site without consent. She was concerned that if a Shell employee asked her to leave the area outside the site and she chose to remain she could be caught by the injunction, even though she had not entered the site, blocked any of its entrances or sought to do so. She was also concerned that she could breach the injunction by placing a poster or flyer on the external walls of the site.

44 In respect of the Tower, she said that XR and many other protest groups see it as a key site from which to make their points. They often gather outside the building, hold banners and signs and chant slogans to make the reason for their protests clear. They do often cause some disruption but they allow traffic to pass and they do not prevent pedestrians from passing through. They welcome interaction with the public and make the most of the opportunities to speak to people about their protest. She said that, in light of the fact that the injunction prohibits blocking the entrance or sticking anything to the building, she would be nervous about joining a protest outside the Tower because even if she blocked the entrance inadvertently for a few minutes this would risk breaching the order.

45 She is particularly troubled by the petrol stations injunction. She explained that they are a symbolically important place to hold demonstrations because they will gain the attention of people who drive cars and encourage them to think about their choices. She would be happy to participate in such a protest if that persuaded people to use their cars less and would be happy if petrol sales were drastically reduced. She is therefore concerned that simply by participating in protests at a petrol station she would be understood to be doing so with the intention of disrupting the sale or supply of fuel and would thus be within the wording of the injunction.

46 She argued that (i) the geographical scope of the injunction was unclear and it was not apparent whether it included areas of the public highway or other areas not necessarily owned by the Shell-branded petrol station where there is public access; (ii) there is a lack of clarity about the "blocking or impeding access" provisions; (iii) the prohibition on "affixing any object" might prevent her attaching a leaflet or flyer to a petrol station or a vehicle in a petrol station, including in the public area not owned by Shell but within the vicinity of a petrol station; (iv) and the "encouraging" provisions within the injunction might mean that if she was present and chanting, waving banners or handing out leaflets while someone else was blocking an entrance, even briefly, or placing leaflets on cars, she would be at risk of breaching the injunction. She also opposed Shell's application to extend the scope of the current petrol station injunction to all protesters and not simply environmental protesters: she argued that this would significantly increase the number of people who could be caught by it.

47 Several of Ms Branch's observations about the wording of parts of the petrol stations injunction also applied to the Haven and Tower injunctions.

48 Finally, Ms Branch made several overarching points about articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR"). She referenced the fact

A that the injunctions all state that they do not intend to prevent lawful protest. She said this did not reassure her: simply because the injunctions are not intended to have that effect does not mean that they will not, in practice, do so. She fears being arrested, especially if her children are present with her at the protest.

49 The skeleton argument from Mr Simblet and Mr Greenhall made detailed legal submissions in support of Ms Branch's position. In particular, B he addressed articles 10 and 11, the tort underlying the petrol stations claim, the applicability of the Human Rights Act 1998 ("the HRA"), section 12(3) and Ms Branch's concerns about the wording of some specific terms in the injunctions.

50 Ms Branch was clear that she did not wish to be joined as a defendant: she explained that the risk of having damages and costs awarded C against her would be catastrophic for her as she does not have the resources to defend a civil action; and would cause her numerous difficulties in respect of her employability, credit score and other matters.

51 However, she sought the right to make submissions on the injunctions. Mr Simblet contended that this could be achieved by the inherent power of the court or by formally recognising Ms Branch under CPR r 40.9.

D

CPR r 40.9

52 CPR r 40.9 provides that "A person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside or varied". This provision has been recognised by the Court of Appeal as the route, or at least the primary route, to be used by E non-parties wishing to set aside or vary persons unknown injunctions: see *Barking and Dagenham London Borough Council v Persons Unknown* [2023] QB 295, para 89, per Sir Geoffrey Vos MR.

53 The injunctions in this case all provided, as it is common in cases of this nature, that anyone "affected" by the order may apply to the court to vary or discharge it "at any time", upon giving not less than 24 hours' notice F to the claimant. Such a party was required to provide their name and address and "must" also apply to be joined as a defendant.

54 However, it has been recognised that joinder as a defendant is not a prerequisite to applying under CPR r 40.9, notwithstanding the existence of such a provision: see Johnson J's judgment on the petrol stations claim [2022] EWHC 1215 (QB) at [5]–[6], citing *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (QB) at [20]–[22] and *Barking and* G *Dagenham*, para 89. In *Esso Petroleum Co Ltd v Breen* [2022] EWHC 2600 (KB) ("*Breen*"), Ritchie J set out a series of factors he had found helpful in deciding whether to require someone to become a named defendant or simply permit them to apply under CPR r 40.9.

55 Accordingly, despite the terms of the injunctions referred to at para 53 above, the fact that Ms Branch did not wish to be joined as a defendant was not fatal to her CPR r 40.9 application. Ms Stacey did not H argue that Ms Branch should be so joined.

56 In *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (QB) at [20], Bennathan J observed that CPR r 40.9 is, on its face, a "strikingly wide" rule which gives no guidance as to how its provisions are to be interpreted; nor is there appellate authority on the issue. In *Breen*, at

para 40, Ritchie J made a similar observation about the lack of appellate authority on CPR r 40.9 cited in the *White Book*.

57 In post-hearing submissions, Ms Stacey referred to *Abdelmamoud v The Egyptian Association in Great Britain Ltd* [2018] Bus LR 1354, para 27, where Newey LJ said:

> "It is clear from its terms . . . that CPR r 40.9 does not empower the court to set aside a judgment or order wherever it might think that appropriate. It is a precondition that the applicant is 'directly affected' by the judgment or order. That the power should not be untrammelled makes obvious sense. In general, a defendant to a claim should be left to decide for himself whether to defend it. Further, it could hardly be appropriate to allow a third party to apply to have a judgment set aside unless he would then be in a position either to defend the claim on the defendant's behalf or to put forward a defence of his own."

58 She also cited the underlying judgment which was upheld by the Court of Appeal, at [2015] Bus LR 928. At paras 58–59 Edward Murray (as he then was, sitting as a deputy judge of the Chancery Division), after referring to a number of previous cases on CPR r 40.9, held:

> "[These cases] support the proposition that in order for a non-party to be 'directly affected' by a judgment or order for the purposes of CPR r 40.9, it is necessary that some interest capable of recognition by the law is materially and adversely affected by the judgment or order or would be materially and adversely affected by the enforcement of the judgment or order . . .
>
> "Since the 'directly affected' test is for the purpose of establishing locus standi, it is sufficient that the relevant judgment or order would prima facie be capable of materially and adversely affecting a legal interest. It is not necessary to show that it would, in fact, do so, for that would be the subject of the application itself."

59 It does not appear that either judgment in *Abdelmamoud* was cited to Bennathan or Ritchie JJ in the cases referred to in para 56 above. That said, in *Breen* [2022] EWHC 2600 (KB) at [43.1], Ritchie J observed that:

> "A person can be directly affected in many ways. The order may affect the person financially. It may affect the person's property rights or possession of property. It may affect the person's investments or pension. The order may affect a person's ability to travel or to use a public highway. The order may affect the person's ability to work or enjoy private life or social life or to obtain work and in so many other ways. It may affect rights enshrined in the Human Rights Act 1988 [sic]."

60 Further, one of the factors he identified as pertinent to the issue of CPR r 40.9 status in *Breen* was "Whether the final decision in the litigation will adversely affect the interested person, whether by way of civil rights, financial interests, property rights or otherwise" (factor (3), para 45).

61 Both of these formulations chime with the test set out in *Abdelmamoud* [2018] Bus LR 1354.

62 In *Breen*, Ritchie J concluded that affording someone the right to be heard under CPR r 40.9 required them to pass through a "gateway",

requiring them to satisfy the court that they were (i) "directly affected" by the injunction; and (ii) had a "good point" to raise.

63 At para 45(6) he observed that given the draconian nature of injunctions against unknown persons and the fact that they may be wide in geographical and/or temporal scope, there should be a "low" threshold for interested persons to be able to take part. This reflects Bennathan J's observations in *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (QB) at [21(2)–(3)] that (i) in cases where orders are sought against unnamed and unknown defendants and where Convention rights are engaged, it is proper for the court to adopt a "flexible" approach to CPR r 40.9; and (ii) in a case where the court is being asked to make wide-ranging orders and, but for a successful rule 40.9 application, would not hear any submissions in opposition to those advanced by the claimants, it is desirable to take a "generous" view of such applications. I agree with and gratefully adopt these sentiments.

64 In *Ageas Insurance Ltd v Stoodley* [2019] Lloyd's Rep IR 1 Judge Cotter QC, as he then was, in the County Court at Bristol had approached an application under CPR r 40.9 by asking whether the applicant had a "real prospect of success" in showing that the order should be set aside or varied. Ms Stacey contended that the court should determine Ms Branch's CPR r 40.9 application by applying this and/or something akin to the test used for determining whether permission to appeal should be granted.

65 *Ageas* was not a persons unknown case. As *Breen* is the most recent High Court authority on the use of CPR r 40.9 and is specific to the context of persons unknown injunctions, I consider it appropriate to follow Ritchie J's approach set out therein. I observe that applying an unduly strict approach to the merits of a CPR r 40.9 application in a persons unknown case could cut across the need for a low threshold for involvement and a flexible/generous approach, given the particular features of these cases, as set out at para 63 above.

(i) Direct effect

66 Ms Stacey initially conceded that Ms Branch was directly affected by the petrol stations injunction (albeit not the Haven and Tower injunctions) but then withdrew that concession in her post-hearing submissions.

67 She relied on the fact that Ms Branch has expressly stated that she has no intention of breaching the prohibitions in the injunctions. On that basis, she would not fall within the definition of persons unknown, is not a party and has no prospect of being a defendant. It was, therefore, difficult to see on what basis she would be entitled to seek to defend the claim on a potential defendant's behalf and to do so without being exposed to any of the costs risks associated with joinder. Moreover, given that the orders only prohibit specific acts which are by their nature unlawful it is difficult to see how Ms Branch can assert that her interests are "materially" affected. She contended that the approach of Bennathan J and Ritchie J renders the qualifier "directly" in the phrase "directly affected" otiose and is contrary to the approach of the Court of Appeal in *Abdelmamoud* [2018] Bus LR 1354.

68 I disagree. A key concern Ms Branch has raised is that the injunctions have a chilling effect on her rights under articles 10 and 11 of the ECHR. She does not accept that the injunctions only prohibit unlawful acts. She is keen to understand the limits of the injunctions, as she fears

inadvertently breaching them through her protest activity and thus leaving herself vulnerable to the damaging consequences of committal proceedings. She has specific concerns about the existence, scope and wording of each of these injunctions and considers that they impede her right to lawful protest at those locations. I accept Ms Branch's evidence that a final decision in the litigation would adversely affect her civil rights under articles 10 and 11 (albeit in a manner which is said to be justified) and if she breached any of them this would affect her financial interests and expose her to the risk of a prison sentence.

69 For these reasons, I consider that she meets the "direct effect" test set out in *Abdelmamoud* at first instance and in the Court of Appeal test: the injunctions are prima facie capable of materially and adversely affecting her recognised legal interests.

70 Although determinations under CPR r 40.9 turn on their own facts, and although it does not appear that *Abdelmamoud* has been previously cited, my assessment as to Ms Branch's status mirrors Bennathan J's "tentative" view, when considering the Haven and Tower injunctions, that the words "directly affected" are "just wide enough" to encompass someone in Ms Branch's position, such that her submissions would have been taken into account had she not withdrawn her application under CPR r 40.9 (on the basis that a named defendant had applied to join the action). It is also consistent with the recognition of Ms Branch under CPR r 40.9 in (i) *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (QB) at [20]–[22], where Lavender J concluded that she was affected by the initial injunction although she had not taken part in the relevant protests and so took into account her submissions; and (ii) *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (QB) at [21] and [21(1)], where Bennathan J accepted that her concern that the order "might catch people such as her who, while not involved in IB or any of its protests, might protest near some of the many roads specified in NHL's draft order and find herself inadvertently caught up in contempt proceedings" was "not fanciful and would amount to a sensible basis to regard her as 'directly affected' ".

(ii) "Good point"

71 In *Breen* [2022] EWHC 2600 (KB) at [43.2], Ritchie J framed the relevant question thus: "Does the IP have a good point to raise? If the point raised is weak or irrelevant there is no need for the CPR r 40.9 permission."

72 Ms Stacey argued that Ms Branch did not have a good point to make and therefore did not proceed through the second of Ritchie J's gateways. She argued that all the points Ms Branch wished to advance had been made at the earlier hearings by the claimants' counsel and fully considered by Bennathan J and Johnson J: for example, they had grappled with the issues she raised relating to *Director of Public Prosecutions v Ziegler* [2022] AC 408 and section 12(3) of the HRA.

73 I found this submission conceptually troubling: it amounted to an invitation to the court to approve a process by which one party is assumed to have advanced all of the opposing party's submissions, in exactly the same way as they would have done, such that the opposing party should be denied the right to be heard. Putting aside the question of whether such a

A submission might find favour in a conventional case, a court would surely be particularly nervous about adopting such a course in cases of this nature, for the reasons given at para 63 above.

74 In any event, I am satisfied that Ms Branch had good points to make on all three injunctions. Her evidence and skeleton argument raised a series of important and helpful points about the tension between the injunctions and articles 10 and 11; the conspiracy to injure tort underpinning the petrol B stations claim; the section 12(3) issue and about the specific wording of some of the terms. As will become apparent, I have accepted some of her arguments.

The Breen factors and discretion under CPR r 40.9

C 75 The factors identified by Ritchie J in *Breen* are focused on whether someone should be afforded CPR r 40.9 status or joined as a defendant. As Ms Stacey did not press any application to join Ms Branch as a defendant, they are of limited direct relevance.

76 However, Ms Stacey contended that even if someone satisfied both elements of the CPR r 40.9 "gateway", the use of the word "may" in the rule indicates that the court retains a residual discretion as to whether to permit D that person to make an application under CPR r 40.9. I am not confident that such an analysis is correct: it seems to me that this places a further gloss on the rule that is not indicated by its wording (which does not suggest that anything is necessary beyond the "gateways") nor supported by authority. It seems to me that the wording of CPR r 40.9 simply establishes the basis on which someone "may" apply to have a judgment or order set aside or varied, E but whether they succeed in doing so is a separate matter.

77 In case Ms Stacey's analysis is correct, and in case any or all of the factors identified by Ritchie J in *Breen* are relevant to how that discretion is exercised, I have considered them. In fact, taken as a whole they support the view that Ms Branch should be recognised under CPR r 40.9 and not joined as a defendant.

78 I understood Ms Stacey to accept Mr Simblet's submissions on F factors (1) and (4)–(7): Ms Branch will not profit from the litigation financially or otherwise; she is not funding the defence of the litigation; she is raising a substantial public interest or civil liberties point; there is a need for a "low" threshold given the draconian and potentially wide nature of these injunctions; and Ms Branch could be faced with costs risks and difficulties due to orders which she did not instigate.

G 79 As to factor (2), Ms Branch is not "controlling the whole or a substantial part of the litigation": she is making wide-ranging submissions but does not purport to speak for all the protest groups caught by the orders or for those who have already been caught by the orders, even if they have not yet been named.

80 As to factor (3), as noted above, I accept Ms Branch's evidence that a final decision in the litigation would adversely affect her rights as set out at H para 68 above.

81 Factor (8) is whether there would be any prejudice to the claimant by granting someone CPR r 40.9 status rather than requiring them to become parties. Ms Stacey did not press an argument about particular prejudice in this sense.

82 She did advance a much broader point about prejudice, which she contended was relevant to the general discretion under CPR r 40.9, to the effect that the claimants had been "ambushed" by Ms Branch's late application. She was keen to stress that the claimants did not wish to "shut down" Ms Branch's submissions but argued that Ms Branch had inappropriately delayed. She had been aware of the injunctions since they were made in May 2022 and her solicitors had been on notice since 28 February 2023 that applications to renew all three injunctions were being made.

83 I had limited sympathy with this argument. The injunctions obtained by the claimants all permit someone who is merely "affected" (not "directly" so) to apply to vary or discharge them on 24 hours' notice, a timescale with which Ms Branch had complied. Interested members of protest groups regularly attend hearings of this kind and seek to be heard, as the cases referred to at para 70 above and *Breen* illustrate: indeed, Ms Branch had attended the hearing before Bennathan J and Ms Friel had attended before Johnson J. If the claimants wish to ensure they are given greater notice of such applications it is open to them to seek to increase the 24 hours' notice provision. If they are concerned to make sure review hearings are not "derailed" by such applications it is open to them to provide more realistic time estimates for hearings which do not assume a lack of opposition to the orders they seek.

84 Further, Ms Branch provided a credible reason for only applying to the court when she did: she was willing to live with the May 2022 injunctions for a year but wished to wait to see if the claimant sought to extend them for a further year; and she acted reasonably promptly once she became aware of that fact, especially bearing in mind she does not retain solicitors on a standing basis.

85 I also accept Mr Simblet's submissions that (i) Ms Branch could be placed in no worse a position than someone who sought joinder as a defendant who only had to give 24 hours' notice under the order; (ii) it was consistent with the overriding objective for her to make her application at a hearing when the court would already be reviewing the injunctions, rather than by insisting that the court conduct a further hearing to hear her submissions; and (iii) she was entitled to limit her costs liability in this way. As to the overriding objective, her actions in seeking to have her application dealt with at the review hearing were consistent with CPR r 1.4(2), which provides that active case management includes "(i) dealing with as many aspects of the case as it can on the same occasion".

86 In the event, Ms Stacey was able to reply in detail to Mr Simblet's submissions during the hearing (a half day of further court time having been made available for it) and was permitted to make additional written submissions after it, to which Mr Simblet could respond. Accordingly, any prejudice the claimants suffered by the timing of Ms Branch's application has been mitigated by these case management steps.

87 Ms Stacey argued that the poor merits of Ms Branch's submissions were also relevant to the residual discretion under CPR r 40.9. Aside from the issue of whether such a discretion exists (see para 76 above) I have addressed the merits in the context of the "good point" element of the gateway at para 74 above.

The limits of CPR r 40.9

88 During the hearing, Ms Stacey advanced a novel point about the limits of CPR r 40.9 which does not appear to have been taken in any of the other persons unknown cases. She developed this further in her written post-hearing submissions.

89 She contended that CPR r 40.9 must be construed by reference to its language which sets out its parameters. It only permits submissions to be made as to whether an order that has already been made should be set aside or varied but cannot relate to any future order the court was being asked to make. She submitted that there was a window of time in which Ms Branch could have made her application in relation to the May 2022 orders but she had now lost that opportunity due to delay. Instead, she would need to wait until the court made any orders extending the injunctions and, if so, return to court to make her submissions.

90 I pause to observe that the "window of time" point in this submission is directly contrary to the wording of the injunctions themselves, which make clear that someone seeking to vary or discharge them may do so "at any time".

91 As to the main point about the scope of CPR r 40.9 involvement, Ms Stacey's interpretation of the provision is understandable in conventional cases between two or more named defendants, where a final order has been made after trial, that does not involve an injunction.

92 However, matters are more complicated in cases involving persons unknown injunctions. This is primarily because, unlike most court orders, they are not made against known individuals; and because the injunctions so made are the subject of regular review by the court: either at the return date (shortly after an ex parte injunction) or at a review hearing (as here, after an injunction has run for a considerable period of time, such as a year). At either type of hearing, if a person seeks to make submissions under CPR r 40.9, it is, in my judgment, artificial to regard them as only being permitted to do so in relation to the injunction that has already been made because the very focus of that hearing is whether the injunction that has already been made should be set aside, renewed or varied in some form.

93 The point is illustrated by the fact that the only orders Ms Stacey sought from me were ones which had no independent existence of their own but which referred back to the May 2022 injunctions, and amended their temporal scope. Ms Stacey was, herself, effectively seeking a variation of the May 2022 injunctions in those respects. In those circumstances, it is artificial to contend that Ms Branch could not challenge the proposed variation and submit that other variations should be made, if the injunctions were not set aside in full.

94 Albeit that I appreciate this is a novel legal point that has not been taken before, the practical position is illustrated by how previous cases have played out. In *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (QB), Lavender J took into account Ms Branch's submissions, not only as to terms but also the service provisions of the injunction he was being asked to make. He clearly did not consider that his role was solely "backward-looking". Indeed, he discharged the interim injunction and made an entirely fresh order for the future. Similarly, in *National Highways Ltd v Persons Unknown* [2022] EWHC 1105 (QB), Bennathan J took

into account Ms Branch's submission to the effect that the Insulate Britain protests described by National Highways Ltd ("NHL") were all in 2021 and there had been no repetition of them in the past year, which was clearly a "future-facing" point about whether the injunctions should be renewed.

95 Indeed, the very nature of the ability to "vary" an order under CPR r 40.9 illustrates that the right to intervene under that rule is to some degree "forward-looking".

96 Interpreting CPR r 40.9 in this way in persons unknown cases would limit the efficacy of this route for non-parties, the route having been recognised at Court of Appeal level. There is also a need for flexibility of approach in these cases, for the reasons given at para 63 above.

97 Even if Ms Stacey's interpretation of CPR r 40.9 is correct, it would make limited difference on the facts of this case. That is because I would be able to consider all of Ms Branch's submissions on the basis that they related solely to the May 2022 injunctions or, indeed, the short extension orders I made in late April 2023. If I were persuaded by any of her submissions that the orders were wrong in principle and should be set aside or varied, I would, by definition, not be persuaded that extending them in materially identical terms to their current form was appropriate.

98 In her post-hearing submissions, Ms Stacey modified her position that Ms Branch could not be heard now and would need to return to court in the future once I had made any fresh orders. Rather, she contended that it would be open to me to "treat the application as having been made immediately after the review and consider it on that basis". This was a pragmatic suggestion. To the extent that the same is necessary I consider that such a step is sensible case management, consistent with CPR r 1.4(2) (see para 85 above).

99 For all these reasons, I conclude that Ms Branch should be permitted to apply to set aside or vary the May 2022 injunctions under CPR r 40.9. I do not, therefore, need to determine Mr Simblet's submission that I could have heard her submissions under a wider court power. I simply observe that there may well be force in the argument: for example, I note that in *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100, para 16 the Court of Appeal felt able to take into account submissions from counsel for two named defendants in a persons unknown case, where there were some concerns about their locus standi, on the simple ground that they were of assistance to the court.

The nature of Ms Branch's involvement

100 As to the nature of Ms Branch's involvement, Ms Stacey took me to Gee, *Commercial Injunctions*, 7th ed (2022), paras 24-020–24-021. This provides that where a defendant who wishes to set aside a *Mareva* (i e a freezing) injunction obtained without notice applies to discharge it, they should do so promptly and by application notice; and that what takes place is in the form of a "complete rehearing of the matter, with each party being at liberty to put in evidence".

101 In my judgment, the same should apply to a non-party such as Ms Branch applying under CPR r 40.9. That said, I accept Ms Stacey's submission that "the matter" in this context necessarily includes consideration of the judgments of the previous judges.

Issue (2): whether to grant the claimant in the petrol stations claim permission to amend the description of the persons unknown defendants

102 The claimant in the petrol stations claim seeks permission under CPR rr 19.4(1) and 17.1(3) to amend the description of the persons unknown defendant to remove the word "environmental" from "environmental protest campaigns".

103 Once a claim form has been served, the court's permission is required to add a party under CPR r 19.4(1). The *White Book*, vol 1 at para 19.4.4 notes that in *Allergan Inc v Sauflon Pharmaceuticals Ltd* (2000) 23 IPD 23030, Pumfrey J refused an application to join a party as a second defendant where the claimant failed to plead a good arguable case. Further, in *PeCe Beheer BV v Alevere Ltd* [2016] EWHC 434 (IPEC) at [36], Judge Hacon stated that, in most cases, in order to show a good arguable case for this purpose, the correct test to be applied is that which would be applied in an application to strike out a claim against a defendant pursuant to CPR r 3.4(2)(a) or (b)).

104 Paragraph 1.2 of CPR PD 3A ("Striking out a Statement of Case") gives examples of cases where the court may conclude that the particulars of claim disclose no reasonable grounds for bringing the claim under CPR r 3.4(2)(a), such as those which set out no facts indicating what the claim is about; those which are incoherent and make no sense; and those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant. CPR r 3.4(2)(b) applies to statements of case which are an abuse of the court's process or are otherwise likely to obstruct the just disposal of the proceedings.

105 Ms Stacey submitted that the purpose of the amendment was to ensure that the description of persons unknown is as clear and accurate as possible and properly reflects the most recent evidence which suggests that there is movement between groups and protest campaigns which are not necessarily limited to environmental protests.

106 She referred to Mr Austin's evidence, which illustrated the growing trend in recent months of broader interest groups, beyond environmental protest groups, engaging in protest actions against Shell petrol stations. He exhibited a press report to the effect that, on 21 January 2023, two dozen members of Fuel Poverty Action and other groups had protested at a petrol station in Cambridge. They were quoted as accusing Shell of "profiteering as people struggle to pay for essentials such as energy and food". The article confirmed the presence of the notice at the petrol station warning protesters of the existence of the injunction. He also described a protest by austerity protesters on 3 February 2023 at a Shell petrol station in the Bristol area. He confirmed that the protesters on both occasions respected the terms of the injunction.

107 Further, Mr Prichard-Gamble's evidence was that there is a "high level of crossover" between "individual protest groups" and that the cost-of-living crisis is likely to increase JSO's animosity towards oil companies, including the claimant.

108 In light of this evidence, I am satisfied that the CPR r 3.4(2)(a)/(b) test is met.

109 Accordingly, I grant the claimants permission to amend in the manner sought, such that the defendants on the claim form and ancillary documents in the petrol stations claim become:

"PERSONS UNKNOWN DAMAGING, AND/OR BLOCKING THE USE OF OR ACCESS TO ANY SHELL PETROL STATION IN ENGLAND AND WALES, OR TO ANY EQUIPMENT OR INFRASTRUCTURE UPON IT, BY EXPRESS OR IMPLIED AGREEMENT WITH OTHERS, IN CONNECTION WITH ~~ENVIRONMENTAL~~ PROTEST CAMPAIGNS WITH THE INTENTION OF DISRUPTING THE SALE OR SUPPLY OF FUEL TO OR FROM THE SAID STATION."

110 Whether to grant the claimant an injunction in relation to this more widely defined group of persons unknown is a separate issue which I address at para 148 below.

Issue (3): whether to extend the three injunctions for up to a further year in the manner sought by the claimants

111 I have taken as a framework for my analysis the list of issues identified by Johnson J in his judgment on the petrol stations claim, which had come from the claimants' submissions. This is appropriate given the rehearing approach I have determined was necessary in light of Ms Branch's application under CPR r 40.9 (see para 101 above), rather than the slightly narrower approach appropriate on an uncontested review hearing.

112 As Johnson J explained at para 23 these different legal issues arise because the injunctions are sought on an interim basis before trial against Persons Unknown on a precautionary basis to restrain anticipated future conduct; and because they interfere with the rights to freedom of expression and assembly under articles 10 and 11.

(1) Is there a serious question to be tried, applying the test set out in American Cyanamid Co v Ethicon Ltd [1975] AC 396, 407G per Lord Diplock?

The Haven and Tower claims

113 The Haven and Tower injunctions were sought and obtained on the basis of the claimant's underlying claim of trespass to their land and private nuisance, in the form of unlawful interference with their right of access to their land via the highway and their exercise of a private right of way (as discussed in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29, para 13 and Gale, *Easements*, 21st ed (2020), para 13-01).

114 Although there do not appear to have been further incidents, specifically at the Haven and Tower sites, the evidence of Mr Brown and Mr Garwood, to which Bennathan J was taken, led him to conclude that the claimants had a strong claim in trespass or nuisance for events that took place before the injunctions were made. I have read all that evidence. The position remains as it was before Bennathan J and the evidence shows that there is a real and imminent risk of the offending conduct occurring.

115 The *American Cyanamid* test is therefore met in relation to these two claims. To the extent that the relevant test is, in fact, that the claimants are "likely" to succeed, due to the operation of the HRA, section 12(3) (see further under sub-issue (12) below), that test is met.

A The petrol stations claims

116 The claimant's claim in relation to the petrol stations is advanced under the tort of conspiracy to injure by unlawful means. Ms Stacey relied heavily on Johnson J's findings on this issue.

117 His first key finding was as follows:

B "25. The claimant has a strong case that on 28 April 2022 the defendants committed the activities identified in paragraph 3 of the draft order: those activities are shown in photographs and videos. There are apparent instances of trespass to goods (the damage to the petrol pumps and the application of glue), trespass to land (the general implied licence to enter for the purpose of purchasing petrol does not extend to what the defendants did) and nuisance (preventing access to the petrol stations). C None of this gives rise to a right of action by the claimant in respect of those Shell petrol stations where it does not have an interest in the land and does not own the petrol pumps. It is therefore not, itself, able to maintain a claim in trespass or nuisance in respect of all Shell petrol stations."

118 As with the Haven and Tower claims, I have reviewed the D underlying evidence which led to this conclusion and I agree with it. The claimant has a strong prospect of showing that the various acts said to have taken place on 28 April 2022 did in fact take place. There have also been further incidents at petrol stations on 24 and 26 August 2022 of a similar nature (although no application to amend the particulars of claim to refer to these has been made).

E 119 The next element of Johnson J's reasoning addressed the legal consequences of his factual finding at para 25, thus:

"26. The claim advanced by the claimant is framed in the tort of conspiracy to injure by unlawful means ('conspiracy to injure'). The ingredients of that tort are identified in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29 per Leggatt LJ at para 18: (a) an unlawful act F by the defendant, (b) with the intention of injuring the claimant, (c) pursuant to an agreement with others, (d) which injures the claimant.

"27. . . . To establish the tort of conspiracy to injure, it is not necessary to show that the underlying unlawful conduct (to satisfy limb (a)) is actionable by the claimant. Criminal conduct which is not actionable in tort can suffice (so long as it is directed at the claimant): *Revenue and* G *Customs Commissioners v Total Network SL* [2008] AC 1174 per Lord Walker of Gestingthorpe at para 94 and Lord Hope of Craighead at para 44. A breach of contract can also suffice, even though it is not actionable by the claimant: *The Racing Partnership Ltd v Done Bros (Cash Betting) Ltd* [2021] Ch 233, para 155 per Arnold LJ.

"28. The question of whether a tort, or a breach of statutory duty, can suffice was left open by the Supreme Court in *JST BTS Bank v Ablyaszov* H *(No 14)* [2020] AC 727. Lord Sumption and Lord Lloyd-Jones JJSC observed, at para 15, that the issue was complex, not least because it might—in the case of a breach of statutory duty—depend on the purpose and scope of the underlying statute and whether that is consistent 'with its deployment as an element in the tort of conspiracy'.

"29. For the purposes of the present case, it is not necessary to decide whether a breach of statutory duty can found a claim for conspiracy to injure, or whether every (other) tort can do so. It is only necessary to decide whether the claimant has established a serious issue to be tried as to whether the torts that are here in play may suffice as the unlawful act necessary to found a claim for conspiracy to injure. Those torts involve interference with rights in land and goods where those rights are being exercised for the benefit of the claimant (where the petrol station is being operated under the claimant's brand, selling the claimant's fuel). Recognising the torts as capable of supporting a claim in conspiracy to injure does not undermine or undercut the rationale for those torts. It would be anomalous if a breach of contract (where the existence of the cause of action is dependent on the choice of the contracting parties) could support a claim for conspiracy to injure, but a claim for trespass could not do so. Likewise, it would be anomalous if trespass to goods did not suffice given that criminal damage does. I am therefore satisfied that the claimant has established a serious issue to be tried in respect of a relevant unlawful act."

120 Having addressed this legal issue, he continued:

"30. There is no difficulty in establishing a serious issue to be tried in respect of the remaining elements of the tort. The intention of the defendants' unlawful activities is plain from their conduct and from the published statements on the websites of the protest groups: it is to disrupt the sale of fuel in order to draw attention to the contribution that fossil fuels make to climate change. They are not solitary activities but are protests involving numbers of activists acting in concert. They therefore apparently undertake their protest activities in agreement with one another. Loss is occasioned because the petrol stations are unable to sell the claimant's fuel."

121 All of the evidence before me leads me to the same factual conclusion as he reached at para 30.

122 Johnson J concluded as follows:

"31. I am therefore satisfied that there is a serious issue to be tried.

"32. Further, the evidence advanced by the claimant appears credible and is supported by material that is published by the groups to which the defendants appear to be aligned. That evidence is therefore likely to be accepted at trial. I would (if this had been a trial) wished to have clearer and more detailed evidence (perhaps including expert evidence) as to the risks that arise from the use of mobile phones, glue and spray paint in close proximity to fuel, but it is not necessary precisely to calibrate those risks to determine this application. It is also, I find, likely that the court at trial will adopt the legal analysis set out above in respect of the tort of conspiracy to injure (including, in particular, that the necessary unlawful act could be a tort that is not itself actionable by the claimant). It follows that not only is there a serious issue to be tried, but the claimant is also more likely than not to succeed at trial in establishing its claim."

123 Mr Simblet submitted that neither the *American Cyanamid* test nor the "likely to succeed" test derived from the HRA, section 12(3), were met on this claim.

A **124** First, he was critical of the drafting of the claimant's statements of case and with some good reason. The claim form asserts that the claimant seeks an injunction "to restrain the defendants from obstructing access to or damaging petrol stations using its brand, by unlawful means and in combination with others". The "unlawful means" are not specified. The claim form does not therefore make clear on its face that the overarching tort relied on is the tort of conspiracy to injure by unlawful means. Further, B neither the current nor the draft amended version of the particulars of claim specify what the underlying unlawful means are meant to be—Mr Simblet was right to identify that the particulars do not mention the torts of trespass to land, trespass to goods and nuisance referred to by Johnson J. They simply list the unlawful acts that occurred at the Cobham services on 28 April 2022. It is clear from the nature of the unlawful acts that they are C said to constitute the torts of trespass to land, trespass to goods and private nuisance but the particulars would benefit from greater clarity. Ms Stacey sought to persuade me that avoiding legalese and writing in plain language was appropriate when dealing with persons unknown. That is correct as far as the injunctions are concerned but the requirements of the CPR and the need for legal clarity still apply to the statements of case.

D **125** Mr Simblet submitted that the claimant has not complied with the mandatory obligation in CPR PD 16, para 7.5 applying to a claim based upon agreement by conduct, where "the particulars of claim must specify the conduct relied on and state by whom, when and where the acts constituting the conduct were done". The conduct in question has been specified: namely the unlawful acts on 28 April 2022 referred to above. Further, the claimant has pleaded that they involved "co-ordinated action by a group of persons" E and were also "carried out as part of the wider [JSO] movement", noting that some of the protesters were carrying or displaying banners which referred to JSO. The requirements of PD 16, para 7.5 have been met, just, by this brief pleading.

126 Second, the claimant is relying on the tort of conspiracy to injure because it is not in legal possession of all the petrol stations and does not own all the equipment on them. Accordingly, the underlying torts, F depending on their precise location, may only be directly actionable in their own right by third parties. Mr Simblet argued that, given the complexities of land ownership in multi-retailer commercial environments it cannot confidently be asserted that the landowner would not tolerate the presence of those protesting against the claimant in each and every case where this might occur. For present purposes, I am satisfied that there is a serious issue G to be tried as to whether the landowners would tolerate unlawful activity of the type restrained by the injunction, noting the observations as to protest on private land in *Director of Public Prosecutions v Cuciurean* [2022] QB 888, paras 45–46. To the extent necessary, I consider it likely that the claimant would succeed at trial on this issue.

127 Third, Mr Simblet contended that as the claimant appeared to accept that it does not have sufficient rights of possession to bring a claim in H its own name for trespass or private nuisance, it was not clear on what basis claims of trespass and private nuisance could form the underlying unlawful means for this tort. The answer is found in the case law summarised by Johnson J at para 27, which establish that it is not necessary to show that the underlying unlawful conduct is actionable by the claimant. As he noted at

para 28, whether the unlawful means relied upon can be a tort actionable by a third party rather than a breach of contract is a novel point that has yet to be determined. The skeleton argument placed before Johnson J advanced reasons why the answer to that question should be in the affirmative. He has alluded to these in the latter part of para 29. As he did, I consider that the claimants can show a serious issue to be tried on that point.

128 Fourth, he argued that "instrumentality"—meaning that the conduct must be the means by which the claimant has suffered loss—is an additional element of the tort of unlawful means conspiracy. He contended that the poor state of the pleadings meant that this issue had not been addressed and that Johnson J had erred by not addressing the instrumentality issue. I disagree. The claimant's pleaded case refers to the significant duration of the protests on 28 April 2022 and the loss suffered by the claimant, due to the fact that petrol sales were significantly prevented or impeded while the protest was ongoing. The claimant's case also refers to different kinds of loss, namely, damage to equipment for the distribution of highly flammable fuels and consequential health and safety risks. Johnson J specifically referred to the fourth limb of the tort as being the injury to the claimant and addressed the evidence on loss: see paras 26 and 30. Further in *Cuadrilla* [2020] 4 WLR 29 at paras 67–69 the Court of Appeal explained that the requirement of the conspiracy tort to show damage can be incorporated into a quia timet injunction by reference to the defendants' intention, which is the approach taken here. The extent of actual damage would need to be proved at a final hearing or on any committal.

129 Fifth, he noted that reliance on wide-ranging economic torts, such as conspiracy to injure through unlawful means, was discouraged by the Court of Appeal in *Ineos* [2019] 4 WLR 100. The court discharged those parts of an order based on public nuisance and unlawful means conspiracy, leaving only those based on trespass and private nuisance. Further, in *Cuadrilla*, the prohibitions were made out on the facts from claims in private nuisance and at para 81 the court described the prohibition corresponding to unlawful means conspiracy as "a different matter" on which Cuadrilla did not need to rely. However, as Ms Stacey highlighted, the discharge of the injunction based on conspiracy by the Court of Appeal in *Ineos* involved materially different facts, namely, a challenge to an injunction sought before any offending conduct had taken place; and terms which were impermissibly wide. In *Cuadrilla* at para 47 the Court of Appeal noted that the fact that the injunction had been made before any alleged unlawful interference with the claimant's activities had occurred was "important in understanding the decision" and I agree. In contrast, the injunction granted by Johnson J was based on past conduct having already occurred and was suitably narrow in focus.

130 Sixth, he contended that while the courts will, in certain circumstances, allow claims to be brought against persons unknown, this does not mean that claims can be brought against purely hypothetical defendants. The courts will strike out claims brought against persons without legal personality, such as occurred in *EDO MBM Technology Ltd v Campaign to Smash EDO* [2005] EWHC 837 (QB), a case seeking injunctive relief against protesters. Here, the claimants were simply "imagining or conjuring up" the alleged conspirators and a year into the life of the injunctions, there were still no named individuals involved. This was an

A example of the serious conceptual and practical problems in using "persons unknown" injunctions in protester cases. This was particularly so where the injunctions are underpinned by an alleged conspiracy (namely a state of mind and agreement). However, *Cuadrilla* shows that the use of persons unknown injunctions in cases of this nature is conceptually acceptable.

131 I therefore agree with Johnson J, for the reasons he gave at
B paras 25–31 that there is a serious issue to be tried on this claim.

132 Further, I share his conclusion, at para 32, that in light of the credible evidence provided and the persuasive nature of the legal arguments on the third party tort issue, the claimant is more likely than not to succeed at trial in establishing its claim.

C *(2) Would damages be an inadequate remedy for the claimants and would a cross-undertaking in damages adequately protect the defendants?*

133 The note of Bennathan J's judgment indicates that he accepted that (i) the activities at the Haven and Tower sites would cause grave and irreparable harm; (ii) trespassing on the sites could lead to highly dangerous outcomes, especially given the presence on the sites of flammable liquids;
D and (iii) the blocking of entrances could lead to business interruption and large scale cost to the claimant's businesses. He concluded that given the sorts of sums involved and the practicality of obtaining damages, the latter would not be an adequate remedy.

134 Johnson J accepted at para 34 that the defendants' conduct with respect to the petrol stations gives rise to potential health and safety risks and if those risks materialised they could not adequately be remedied by way
E of an award of damages. He took into account the fact that there is no evidence that the defendants have the financial means to satisfy an award of damages, such that it is "very possible that any award of damages would not, practically, be enforceable".

135 The evidence before me shows that all of these considerations remain valid.

F **136** There is also an element to which the losses at the Haven and Tower sites may be impossible to quantify, though, like Johnson J at para 33, I do not find the claimants' argument to similar effect with respect to the petrol stations persuasive.

137 However, for the other reasons set out at paras 133–135 above I am satisfied that damages would not be an adequate remedy for the
G claimants.

138 As to the issue of a cross-undertaking, as Johnson J noted at para 36 of *Shell* that while the petrol stations injunction does interfere with the defendants' rights of expression and assembly, to the extent that a court finds that there has been any unjustified interference with those rights, that could be remedied by an award of damages under the HRA, section 8.

139 The evidence from Alison Oldfield, the claimants' solicitor, made
H clear that the claimants have offered a cross-undertaking in damages, in the event that the same becomes necessary. The claimants have the means to satisfy any such order.

140 Accordingly, a cross-undertaking in damages would be an adequate remedy for the defendants.

(3) Alternatively, does the balance of convenience otherwise lie in favour of the grant of the order: American Cyanamid per Lord Diplock at p 408C–F?

141 As damages are not an adequate remedy and the cross-undertaking is adequate protection for the defendants, it is not necessary separately to consider the balance of convenience: see Johnson J at para 38.

142 To the extent necessary, Ms Stacey relied on his further reasoning at para 39 to this effect:

> "the balance of convenience favours the grant of injunctive relief. If an injunction is not granted, then there is a risk of substantial damage to the claimant's legal rights which might not be capable of remedy. Conversely, it is open to the defendants (or anybody else that is affected by the injunction) at any point to apply to vary or set aside the order. Further, although the injunction has a wide effect, there are both temporal and geographical restrictions."

143 She submitted that this analysis, save for the final sentence, applies equally to the Shell Haven and Tower claims, and even more strongly since those orders do not have such wide effect.

144 I agree: for these reasons the balance of convenience is in favour of continuing the relief.

(4) Is there a sufficiently real and imminent risk of damage so as to justify the grant of what is a precautionary injunction?

145 It is only appropriate to grant an interim injunction if there is a sufficiently "real" and "imminent" risk of a tort being committed to justify precautionary relief (see, for example, *Canada Goose UK Retail Ltd v Persons Unknown* [2020] 1 WLR 2802, para 82(3), per Sir Terence Etherton MR).

146 All three injunctions were made because of conduct causing harm that had already taken place. Since then, further conduct and harm has occurred at petrol station sites. The risk of repetition is demonstrated by this further action and the various statements made by the protest groups indicating their intention to continue with similar activities, as summarised at paras 35–40 above.

147 I am, therefore, satisfied that unless restrained by injunctions the defendants will continue to act in breach of the claimants' rights; that there continues to be a real and imminent risk of future harm; and that the harm which might eventuate is sufficiently "grave and irreparable" that damages would not be an adequate remedy: see *Vastint Leeds BV v Persons Unknown* [2019] 4 WLR 2, para 31(3)(b), per Marcus Smith J.

148 It is appropriate to deal, at this juncture, with the element of the claimant's application for an extension of the petrol stations injunction which deals with the newly defined defendants. I deal with the issue here because the evidence in relation to non-environmental protesters at petrol stations, summarised at para 106 above, makes clear that they respected the terms of the injunction. This means that the aspect of the extension to the petrol stations injunction sought by the claimant in relation to this wider group is "purely" precautionary, as it is not based on any past tortious

A conduct. However, in light of the evidence suggesting movement between groups and protest campaigns which are not necessarily limited to environmental protests, summarised at para 107 above, I am satisfied that the *Canada Goose* and *Vastint* tests are met with respect to this more widely defined group of defendants.

149 Finally, I agree with Johnson J's reasoning at paras 41–42, B illustrating that the injunctions are not premature, due to the fact that warnings of protests are unlikely to be given in sufficient time to obtain an injunction:

> "41. If the claimant is given sufficient warning of a protest that would involve a conspiracy to injure, then it can seek injunctive relief in respect of that specific event. If there were grounds for confidence that such C warnings will be given, then the risk now (in advance of any such warning) might not be sufficiently imminent to justify a more general injunction. There is some indication that protest groups sometimes engage with the police and give prior warning of planned activities. But it is unlikely that sufficient warning would be given to enable an injunction to be obtained. That would be self-defeating. Further, it is not always the case that warnings are given. Extinction Rebellion say in terms (on its D website) that it will not always give such warnings. Moreover, the claimant did not receive sufficient (or any) warning of the activities on 28 April 2022.
>
> "42. Accordingly, I am satisfied that this application is not premature, and that the risk now is sufficiently imminent. The claimant may not have a further opportunity to seek an injunction before a further protest causes E actionable harm."

(5) Do the prohibited acts correspond to the threatened tort and only include lawful conduct if there is no other proportionate means of protecting the claimant's rights: Canada Goose, paras 78 and 82(5)?

150 The acts prohibited in the Haven and Tower injunctions necessarily F correspond to the threatened torts of trespass to their land and private nuisance.

151 The acts prohibited in the petrol stations injunction necessarily amount to conduct that constitutes the tort of conspiracy to injure, provided that the injunction is read in full in the way described by Johnson J at para 26 above. This means that the concerns raised in Mr Simblet's submission to G the effect that clause 3.4 ("affixing . . . any object or person") would prohibit placing leaflets or signs on any objects on or in a Shell petrol station and his similar concerns about clauses 3.5 and 3.6 ("erecting any structure in, on or against any part of" or "painting . . . depositing or writing any substance on to any part of" a Shell petrol station) are to some degree mitigated by the fact that such activities are only prohibited by the injunction if they are (i) such that they damage the petrol station; (ii) done in agreement with others; and H (iii) done with the intention of disrupting the sale or supply of fuel. These are similar to the "sweet wrapper" example given by Johnson J at para 26 above: the prohibited acts in paragraph 3 need to be read in conjunction with the definition of defendants. When that is done, it can be seen that they mirror the torts underlying the overarching tort of conspiracy to injure.

152 I do not agree with Mr Simblet that it is necessary to revise the wording to make clear that the conduct must have the "effect" of disrupting the sale or supply of fuel to or from a Shell petrol station as this is an element of the conspiracy to injure tort. The same is not necessary given that this is an anticipatory injunction. The current wording focuses on the defendants' intention to cause harm which is consistent with *Cuadrilla* [2020] 4 WLR 29, paras 67–69 (see para 128 above). Actual loss or damage can be addressed in due course.

153 Each injunction contains an order making clear that it is not intended to prohibit behaviour which is otherwise lawful. To the extent that it does, the same is a proportionate means of protecting the claimant's rights for the reasons given under sub-issue (10) below.

(6) Are the terms of the injunctions sufficiently clear and precise: Canada Goose at para 82(6)?

154 In my judgment, the wording of all three injunctions is in clear and simple language, save for two caveats with respect to the petrol stations injunction: (i) some wording should be inserted before clauses 3.4–3.6 to reflect that the acts are only prohibited if they cause damage (such wording being clear on the face of the Tower and Haven injunctions but not on the petrol stations one); and (ii) clause 3.7 should be removed as it duplicates paragraph 4.

155 In respect of the petrol stations injunction, as Johnson J noted at para 46, it is usually desirable that such terms should, so far as possible, be based on objective conduct rather than subjective intention. However, for the reasons he gives, the element of subjective intention in paragraph 2 ("with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station") is necessary because of the nature of the tort of conspiracy to injure and to avoid the language being wider than is necessary or proportionate (noting the sweet wrapper example he gave at para 21).

156 I do not accept Mr Simblet's contention that the "encouragement" provisions are unduly vague: they are clearly defined as being linked with the underlying acts and are intended to ensure that the injunctions are effective. To the extent that they capture lawful activity they are proportionate, as explained under sub-issue (10) below.

(7) Do the injunctions have clear geographical and temporal limits: Canada Goose, para 82(7) (as refined and explained in Barking and Dagenham London Borough Council v Persons Unknown [2023] QB 295 per Sir Geoffrey Vos MR at paras 79–92)?

157 As to geographical limits, the extent of the Haven and Tower injunctions is made clear by the plans appended to them. The Haven injunction includes a clear definition of, and plan showing, the boundary of the injunction. This should address Ms Branch's concern about where she would need to be to risk breaching it if asked to leave by an employee. As to Ms Branch's concern that she might breach the Haven injunction by placing a poster or flyer on the external walls of the site, the injunction only prohibits the affixing of objects which cause damage, within the geographical boundary as defined (the latter of which should help her identify which "external walls" are covered).

A **158** The petrol stations injunction applies only to "petrol stations displaying Shell branding (including any retail unit forming part of such a petrol station, whatever the branding of that retail unit)". I agree with the reasons Johnson J gave at para 48 as to why it is necessary and proportionate to protect the claimant's interests to include all such petrol stations rather than, for example, those that have already been targeted or certain types of
B petrol station.

159 However, Ms Branch and Mr Simblet had raised valid concerns about the extent to which the injunction covers land around or approaching the petrol stations. Accordingly, in my draft judgment I invited the claimant to propose some words that would greater delineate where the scope of the injunction ends and the public highway over which the injunction does not
C apply begins (albeit not using wording such as "short" distance as that would be insufficiently clear: see *Cuadrilla* [2020] 4 WLR 29, para 57). Ms Stacey, having explained why a simple "radius" provision was not practicable, proposed that the injunction would apply to those "directly blocking or impeding access to any pedestrian or vehicular entrance to a Shell Petrol Station forecourt or to a building within the Shell petrol station". I am satisfied that this revised wording renders the petrol stations order
D sufficiently geographically specific, as it makes it clear that the area of focus is the petrol station forecourts. It also correctly focuses on the nature of the prohibited activity, in the form of direct obstructions.

160 As to temporal limits, the claimants seek an extension to each injunction until trial or further order, with a backstop of a duration of one year.

E **161** Ms Stacey referred to the observations of the Court of Appeal in *Barking and Dagenham* [2023] QB 295, paras 89 and 108, to the effect that "For as long as the court is concerned with the enforcement of an order, the action is not at end" and "There is no rule that an interim injunction can only be granted for any particular period of time. It is good practice to provide for a periodic review, even when a final order is made".

F **162** She made clear that the claimants intend to await the outcome of the appeal to the Supreme Court in *Barking and Dagenham*, which is expected to clarify the central issue of whether final injunctions are capable of being obtained against persons unknown or whether they can only be obtained against named individuals, before seeking a final hearing on these injunctions. Both interim and final orders must be kept under review, in any
G event. That said, she put on record that the claimants are mindful of their obligations to progress the litigation and intend to do so by seeking directions to bring the matter to a final hearing as soon as practical once judgment in *Barking and Dagenham* is available. If there is a proper evidential basis to join named defendants that may occur, and then they can be permitted to file a defence.

163 I accept her assurance that the proposed "backstop" period of one
H year is just that, in light of the matters referred to in the preceding paragraph. I am satisfied that this period strikes the correct balance between the need to keep orders under review and the express indications by JSO and other groups that their campaigns are escalating, rather than being brought to an end in the near term. I note that, for example, in *High Speed Two*

(HS2) Ltd v Persons Unknown [2022] EWHC 2360 (KB) at [109], Julian Knowles J granted an interim injunction on the basis of yearly review periods to determine whether there was a continued threat which justified the continuation of the order, with the usual provisions allowing for persons affected to vary or discharge it.

(8) The defendants having not been identified, are they, in principle, capable of being identified and served with the orders: Canada Goose, paras 82(1) and 82(4)?

164 The note of the hearing before Bennathan J makes clear that a Mr Smith was joined as a defendant to the Tower claim on an unopposed basis, but he is no longer so joined.

165 Johnson J's judgment explained, at para 13, that on 28 April 2022 five people were arrested and charged with offences, including criminal damage, in respect of the Clacket Lane and Cobham petrol station protests. He noted that the claimant had not sought to join them as individual named defendants to this claim because (in the case of four of them) it considered that, in light of the bail conditions, there was no significant risk that they would carry out further similar activities, and (in the case of the fifth) it was not sufficiently clear that the conduct of that individual came within the scope of the injunction.

166 Accordingly, there are currently no named defendants to any of the claims.

167 However, Ms Oldfield's evidence explains how the claimants are keeping the issue under review. They are liaising with the relevant police forces in an effort to identify persons falling within the persons unknown description; and comply with the undertaking to join such persons as named defendants to the three orders as soon as reasonably practicable following the provision of their names and addresses by the police.

168 Pursuant to the third party disclosure order made by May J (see para 218 below), on 29 March 2023 Surrey Police provided the claimant in the petrol stations claim with the names and addresses of individuals arrested at Clacket Lane and Cobham motorway services on 28 April 2022 and 24 August 2022. The claimant is liaising with Surrey Police to obtain the further information necessary to enable them to decide whether there is a proper evidential basis for applying to join any of the individuals as named defendants, following the approach set out by Freedman J in *Transport for London v Lee* [2022] EWHC 3102 (KB) at [71]–[79]. A similar process is no doubt underway in relation to the Commissioner following the third party disclosure order I made on 28 April 2023.

169 Therefore, while no named defendants have yet been identified, the claimants are taking active steps to identify such people. On that basis, I am satisfied that when people take part in protests at the relevant sites they are, in principle, capable of being identified and that there is a process in place focused on achieving that. Such persons can then be served personally with court documents. In the meantime, effective alternative service on the persons unknown defendants can take place in a manner that can reasonably be expected to bring the proceedings to their attention, as explained under issue (4).

(9) Are the defendants identified in the claim forms and the injunctions by reference to their conduct: Canada Goose, para 82(2)?

170 The descriptions of the persons unknown are sufficiently precise to identify the relevant defendants as the descriptions target their conduct. Ms Oldfield's evidence makes clear that (i) effective service has taken place on persons unknown pursuant to the alternative service provisions in the orders; and (ii) the claimants are taking steps to identify persons falling within the description of the persons unknown and to comply with the undertaking to join such persons as named defendants.

(10) Are the interferences with the defendants' rights of free assembly and expression necessary for, and proportionate to the need to protect, the claimants' rights: articles 10(2) and 11(2) of the ECHR, read with the HRA, section 6(1)?

171 As Mr Simblet highlighted, articles 10 and 11 contain important protections on the right to protest, which supplement those at common law. Further, it is the essence of protest that many, including those in power, will regard it as unwelcome (see, for example, the observations of Laws LJ in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23.

172 All three injunctions interfere with the defendants' rights under articles 10(1) and 11(1) of the ECHR. However, such interferences can be justified where they are necessary and proportionate to the need to protect the claimants' rights. As Lord Sales JSC explained in *Ziegler* [2022] AC 408, para 125, the test is as follows:

> "the interference must be 'necessary in a democratic society' in pursuance of a specified legitimate aim, and this means that it must be proportionate to that aim. The four-stage test of proportionality applies: (i) Is the aim sufficiently important to justify interference with a fundamental right? (ii) Is there a rational connection between the means chosen and the aim in view? (iii) Was there a less intrusive measure which could have been used without compromising the achievement of that aim? (iv) Has a fair balance been struck between the rights of the individual and the general interest of the community, including the rights of others?"

173 As to element (i), in the petrol stations claim, Johnson J at para 57 identified the aim of the interference as the need to protect the claimant's right to carry on its business. The same applies to the Haven and Tower claims which also involve the claimants' rights over their privately owned land, as protected by article 1 of the First Protocol to the ECHR. Johnson J observed that the defendants are "motivated by matters of the greatest importance" and "might say that there is an overwhelming global scientific consensus that the business in which the claimant is engaged is contributing to the climate crisis and is thereby putting the world at risk, and that the claimant's interests pale into insignificance by comparison". Ms Branch's statement indicates that these are her firm beliefs. However, as he continued, this is not "a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important" (see *City of London Corpn v Samede* [2012] PTSR 1624, para 41, per Lord Neuberger of Abbotsbury MR); and "It is not for the

court . . . to adjudicate on the important underlying political and policy issues raised by these protests. It is for Parliament to determine whether legal restrictions should be imposed on the trade in fossil fuels". A

174 I agree with his analysis that the claimant in the petrol stations claim is entitled to ask the court to uphold and enforce its legal rights, including its right to engage in a lawful business without tortious interference. The same is even clearer with respect to the claimants on the Haven and Tower claims, given that the injunctions only cover their private property. The claimants' rights in these respects are prescribed by law and their enforcement is necessary in a democratic society. As Johnson J held at para 57, the aims of the injunctions are therefore "sufficiently important to justify interferences with the defendants' rights of assembly and expression". B

175 As to issues (ii) and (iii) in the test described by Lord Sales JSC, I am satisfied that in each of the three cases there is a rational connection between the terms of the injunction and the aim that it seeks to achieve. The terms of the injunction are drafted so that they only prohibit activity that would amount to the torts of trespass and private nuisance (in the case of the Haven and Tower claims) and conspiracy to injure (in the case of the petrol stations claim). The terms of the injunctions, including their geographical and temporal scope, are no more intrusive than is necessary to achieve the aims of the injunctions. C D

176 As to issue (iv), as Johnson J said at paras 36 and 59 of *Shell*, the defendants are not prevented from congregating and expressing their opposition to the claimants' conduct, including, "in a loud or disruptive fashion", in a location close to Shell petrol stations, so long as it is not done in a way which involves the unlawful conduct prohibited by the injunctions. The same applies to the Haven and Tower sites. The injunctions do not therefore prevent activities that are "at the core" or which form "the essence" of the rights in question (see *Cuciurean* [2022] QB 888, at paras 31, 36 and 46, per Lord Burnett of Maldon CJ). All that is prohibited on each of the injunctions is specified deliberate tortious conduct. E

177 Leggatt LJ observed in *Cuadrilla* [2020] 4 WLR 29, paras 94–95 that intentional disruption of activities of others (as opposed to disruption caused as a side-effect of protest held in a public place) is not "at the core" of the freedom protected by article 11. As Johnson J noted at para 62, the petrol station injunction sought to restrain protests which have as their aim such intentional unlawful interference with the claimant's activities; and the same is true of the Haven and Tower injunctions. F

178 On the other hand, as Johnson J observed at para 60, simply leaving it to the police to enforce the criminal law would not adequately protect the rights of the claimant in the petrol stations claim: such enforcement could only take place after the event, meaning inevitable loss to the claimant; and some of the activities that the injunction sought to restrain are not breaches of the criminal law and could not be enforced by the exercise of conventional policing functions. The same is true of the claimants' rights at the Haven and Tower sites. Indeed the balance is even clearer in those respects given that the sites involve the claimants' private property, as to which see *Cuciurean*, paras 45–46, 76 and the conclusion at para 77, that articles 10 and 11 "do not bestow any 'freedom of forum' to justify trespass on private land or publicly owned land which is not accessible by the public". G H

A **179** The injunctions therefore strike a fair balance between the defendants' rights to assembly and expression and the claimants' rights: they protect the claimants' rights insofar as is necessary to do so but not further.

180 Overall, I am satisfied that the interferences with the defendants' rights of free assembly and expression caused by the injunctions are necessary for and proportionate to the need to protect the claimants' rights.

B *(11) Have all practical steps been taken to notify the defendants: the HRA, section 12(2)?*

181 The HRA, section 12(1)–(2) provide as follows:

"(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right
C to freedom of expression.

"(2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied— (a) that the applicant has taken all practicable steps to notify the respondent; or (b) that there are compelling reasons why the respondent should not be notified."

D **182** Ms Oldfield's evidence sets out the steps the claimants have taken to effect service of the orders and thus explains how the claimants have complied with the section 12(2) requirement in respect of the persons unknown defendants.

(12) If the order restrains "publication", is the claimant likely to establish
E *at trial that publication should not be allowed: the HRA, section 12(3)?*

183 The HRA, section 12(3) provides as follows: "No such relief [i e that defined by section 12(1) at para 181 above] is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

184 Johnson J addressed this issue in detail in his judgment. He found
F that section 12(3) is not applicable in this context as the injunction sought did not restrain publication. His reasons were as follows:

"67. Nothing in the injunction explicitly restrains publication of anything. Nor does it have that effect. The defendants can publish anything they wish without breaching the injunction. The activities that the injunction restrains do not include publication. It does not, for
G example, restrain the publication of photographs and videos of the protests that have already taken place. Nor does it prevent anyone from, for example, chanting anything, or from displaying any message on any placard or from placing any material on any website or social media site.

"68. Lord Nicholls explained the origin of section 12(3) in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253, para 15. There was concern that the incorporation of article 8 ECHR into domestic law might result
H in the courts readily granting interim applications to restrain the publication by newspapers (or others) of material that interferes with privacy rights. Parliament enacted section 12(3) to address that concern, by setting a high threshold for the grant of an interim injunction in such a case. It codifies the prior restraint principle that previously operated at

common law. The policy motivation that gave rise to section 12(3) has no application here.

"69. The word 'publication' does not have an unduly narrow meaning so as to apply only to commercial publications: 'publication does not mean commercial publication, but communication to a reader or hearer other than the claimant'—*Lachaux v Independent Print Ltd* [2020] AC 612 per Lord Sumption at para 18. Lord Sumption's observation was made in the context of defamation, but Parliament legislated against this well-established backdrop. Section 12(3) should be applied accordingly so that 'publication' covers 'any form of communication': *Birmingham City Council v Afsar* [2019] ELR 373 per Warby J at para 60.

"70. The meaning set out by Lord Sumption in *Lachaux* is sufficient to achieve the underlying policy intention. There is therefore no good reason for giving the word 'publication' an artificially broad meaning so as to cover (for example) demonstrative acts of trespass in the course of a protest. Such acts are intended to publicise the protester's views, but they do not amount to a publication.

"71. Further, the wording of section 12 itself indicates that the word 'publication' has a narrower reach than the term 'freedom of expression'. That is because the term 'freedom of expression' is expressly used in the side-heading to section 12, and in section 12(1), and is used (by reference ('no such relief')) in section 12(2) and section 12(3). The term 'publication' is then used in section 12(3) to signify one form of expression. If Parliament had intended section 12(3) to apply to all forms of expression, then there would have been no need to introduce the word 'publication'."

185 He went on to consider the fact that in *Ineos* [2017] EWHC 2945 (Ch), at first instance, Morgan J held (i) that section 12(3) applied (at para 86) and (ii) the statutory test was satisfied because if the court accepted the evidence put forward by the claimants, then it would be likely, at trial, to grant a final injunction (at paras 98 and 105). He noted that Morgan J found the injunction that he was considering might affect the exercise of the right to freedom of expression, continuing:

"73. . . . That was plainly correct, because the injunction restrained activities that were intended to express support for a particular cause. It does not, however, necessarily follow that section 12(3) is engaged (because, as above, 'publication' is not the same as 'expression'). There does not appear to have been any argument on that point—rather the focus was on the question of whether there was an interference with the right to freedom of expression. To the extent that Morgan J in *Ineos* and Lavender J in *National Highways* [*National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (QB) at [41]] reached different conclusions about the applicability of section 12(3) in this context, I respectfully adopt the latter's approach for the reasons I have given."

186 At paras 74–76, he observed that on appeal ([2019] 4 WLR 100), there was no challenge to the holding of Morgan J that section 12(3) applied, such that the Court of Appeal did not consider the issue. On that basis he found that while the Court of Appeal decision in *Ineos* is authority for the approach that should be taken where section 12(3) applies, it is not

A authority for the proposition that section 12(3) applies in the circumstances where "there is no question of restraining the defendants from publishing anything".

187 If he was wrong with respect to section 12(3) not being applicable, he found that the claimant was likely to succeed at a final trial: paras 76 and 32.

B **188** It appears from the solicitor's note of the judgment on the Haven and Tower claims that Bennathan J took a different view and considered that section 12(3) applied, apparently on the basis that he considered himself bound by the Court of Appeal decision in *Ineos*. That is consistent with the approach he took in *National Highways Ltd v Unknown* [2022] EWHC 1105 (QB) at [40]). The solicitor's note is unclear, though, and can only be properly understood by looking at the *National Highways* judgment to C which Mr Simblet referred. This sort of issue underscores why having an approved transcript of Bennathan J's judgment was important.

189 Ms Stacey contended that Johnson J's reasoning was correct and should be adopted in respect of all three injunctions.

190 Mr Simblet took issue with this analysis. He contended that a number of High Court judges, including Bennathan J, have accepted that D section 12(3) does apply in cases concerning protest. Further, contrary to Johnson J's findings, the Court of Appeal judgment in *Ineos* [2019] 4 WLR 100 is clear authority for the proposition that section 12(3) applies to cases such as the present, permission to appeal having been explicitly granted on the question of whether the trial judge "failed adequately or at all to apply section 12(3) of the Human Rights Act 1998". *Ineos* was binding on E Johnson J, who erred in failing to follow it; and it was binding on me.

191 He referred to the broad definition of "publication" applied by Warby J in *Birmingham City Council v Afsar* [2019] ELR 373, para 60 thus:

> "But I would go further. I am satisfied that it would be quite wrong to treat the word 'publication' in section 12(3) as having a limited meaning, restricted, for example, (as [counsel for the claimant's] submission F seemed to imply) to commercial publication. It is hard to see how that (sic) such an approach could be rationally defended. It would give commercial publishers preferential treatment compared to other defendants, such as individuals communicating for private purposes, on social media. As everybody knows, some social media accounts have larger readerships than some paid-for newspapers. But there is a more G fundamental point. In the law of defamation, 'publication does not mean commercial publication, but communication to a reader or hearer other than the claimant': *Lachaux v Independent Print Ltd* [2020] AC 612, para 18 (Lord Sumption). This is generally true of the torts associated with the communication of information, sometimes known as 'publication torts', and the related law (see the discussion in *Aitken v Director of Public Prosecutions* [2016] 1 WLR 297, paras 41–62). H Parliament must be taken to have legislated against this well-established background. Section 12(3) applies to any application for prior restraint of any form of communication that falls within article 10 of the Convention. This is appropriately reflected in the language of the practice guidance, quoted above." (Emphasis added.)

192 He submitted that the proper test for the application of section 12(3) is therefore whether an order restrains: "any form of communication that falls within article 10 of the Convention". Whilst Johnson J was correct that this is narrower than simply acts which fall within the scope of article 10, this is only to the extent that the act must additionally be a "form of communication". Therefore, whilst an act of expression that was not intended to be communicated to any audience would not be included, the application of section 12(3) is not otherwise restricted. He cited *Vural v Turkey* (Application No 9540/07) (unreported) 21 October 2014, para 54, where the Strasbourg court held that

> "an assessment must be made of the nature of the act or conduct in question, in particular of its expressive character seen from an objective point of view, as well as of the purpose or the intention of the person performing the act or carrying out the conduct in question".

That case involved pouring paint on a statue and the court observed that "from an objective point of view", this "may be seen as an expressive act".

193 Mr Simblet argued that, once an act is categorised as "expressive" it is only if it is violent, incites violence or has violent intentions that the conduct will be considered to fall outside the protection of article 10; and that this was recently confirmed in *Attorney General's Reference (No 1 of 2022)* [2023] KB 37, para 96, citing the Strasbourg principle that "an assessment of whether an impugned conduct falls within the scope of article 10 of the Convention should not be restrictive, but inclusive".

194 He submitted that while there could be arguments about whether any form of visible or performative protest amounted to "publication", it was clear that the petrol stations injunction involved publication as it prohibited "writing any substance on to any part of a Shell Petrol station". It was absurd to suggest that this was not a publication, not least as it could make out the necessary component of a libel claim (see *Clerk and Lindsell on Torts*, 23rd ed (2020), ch 21, section 5, referring, for example, to proof of posting a postcard amounting to "publication" for the purposes of a libel claim).

195 I do not consider that *Ineos* [2019] 4 WLR 100 is binding authority for the proposition that section 12(3) applies. Johnson J was correct to point out that it proceeded on the assumption that section 12(3) applied and did not hear argument to the contrary, whatever the basis on which permission was originally granted.

196 However, I agree with Mr Simblet that the injunctions in this case do involve some elements of publication for these purposes, at the very least the prohibition on "writing". I make this finding applying the broad approach taken to the definition of "publication" by Warby J in *Birmingham City Council* [2019] ELR 373 and the expansive approach of the Strasbourg court to this issue as evidenced by *Vural* 21 October 2014 and *Attorney General's Reference (No 1 of 2022)* . I, therefore, take the same approach as Bennathan J in the Haven and Tower claims and *National Highways* [2022] EWHC 1105 (QB).

197 It must be remembered that Johnson J did not have the benefit of submissions from anyone other than the claimants. Further, the focus of his reasoning was the general concept of "demonstrative acts of trespass in the course of a protest": see para 184 above. It does not appear that he was

asked to give specific consideration to the narrower question of whether the prohibition on "writing" within the petrol stations injunction might engage section 12(3).

198 On that basis, the test is whether the claimants are "likely" to succeed at a final trial, at least in relation to the "writing" aspects of the injunctions. However, I am satisfied that that test is met for the reasons given under issue (1).

Overall conclusion on issue (3)

199 For all these reasons I consider it appropriate to extend the injunctions in the manner sought by the claimants, with the modifications referred to at paras 154 and 159 above.

Issue (4): whether to grant the claimants permission to serve any order and ancillary documents by alternative means

200 Under CPR r 6.15(1), in order to authorise service of proceedings by a method or at a place not otherwise permitted by that part of the CPR, the court requires "good reason". That reason is made out here because the defendants are persons unknown, such that it is not possible to serve them personally.

201 The alternative means of service proposed for the order in the Tower claim are (i) affixing warning notices to and around the Tower which (a) warn of the existence and general nature of the order and of the consequences of breaching it; (b) indicate when it was last reviewed and when it will be reviewed in the future; (c) indicate that any person affected by it may apply for it to be varied or discharged; (d) identify a point of contact and contact details from which copies of the order may be requested; and (e) identify http://www.noticespublic.com/ as the website address at which copies of the order may be viewed and downloaded; (ii) uploading a copy of the notice to http://www.noticespublic.com/; (iii) e-mailing a copy of the notice to a series of e-mails relating to the main protest groups listed in the schedule of the order; and (iv) sending a copy of the notice to any person who has previously requested a copy of documents in the proceedings.

202 The alternative means of service proposed for the order in the Haven claim are (i)–(iii) above.

203 The alternative means of service proposed for the order in the petrol stations claim are (i)–(iv) above. The interim orders which I made on 28 April 2023 mirrored the terms of Johnson J's order and provided for the notices to be affixed by use of conspicuous notices in prescribed locations in the petrol stations, or in alternative locations in the stations, depending on the physical layout and configuration of the stations.

204 The alternative means of service proposed for the amended claim form and any ancillary documents in the petrol stations claim are (ii)–(iv) above.

205 Alternative service by means of this kind has been found to be appropriate in respect of Persons Unknown in similar proceedings involving co-ordinated campaigns by protest groups. In *Transport for London v Lee* [2023] EWHC 402 (KB) at [32], Cavanagh J said:

> "Alternative service is necessary for the relief to be effective. Moreover . . . the defendants already have a great deal of constructive

knowledge that the [injunction] may well be extended: the extent and disruptive nature of the JSO protests since March 2022 (and the Insulate Britain protests which began in September 2021); the multiple civil and committal proceedings brought in response to those protests by National Highways Ltd, TfL, local authorities and energy companies and the frequent service of documents on defendants within those proceedings including multiple interim injunctions; the extensive media and social media coverage of the protests, their impact, and of the legal proceedings brought in response; the large extent to which, in order to organise protests and support each other, JSO protesters are in communication with each other both horizontally between members and vertically by JSO through statements, videos etc shared through its website and social media. These are not activities that single individuals undertake of their own volition. In my judgment, in the perhaps unusual circumstances of this case, it is very unlikely, perhaps vanishingly unlikely, that anyone who is minded to take part in the JSO protests . . . is unaware that injunctive relief has been granted by the courts."

206 Bennathan and Johnson JJ also approved service of the orders in these proceedings in materially identical terms. The note of Bennathan J's judgment indicates that he observed that in persons unknown cases, it is sensible to adopt a variety of methods of service and considered that the proposals for alternative service in the Tower and Haven claims were "sensible" and "broad". The note of the hearing before Johnson J makes clear that counsel for the claimant in the petrol stations claim explained why other methods of alternative service, such as the use of newspapers and social media, had been considered but discounted.

207 Ms Oldfield's evidence sets out the efforts that have been made to identify individuals who ought properly to be named as defendants and the steps that had been taken to serve the previous three orders and the draft amended claim form and related documents in the petrol stations claim.

208 I am satisfied that the proposed methods of alternative service are appropriate and sufficient. I accept Ms Oldfield's evidence as to why these methods of service remain an appropriate means by which the documents may be brought to the attention of potential defendants. I am satisfied that the proposed methods of alternative service should apply to the further sealed injunctions orders I make and to the amended claim form and ancillary documents in the petrol stations claim. For the purposes of the injunctions, I dispense with personal service for the purposes of CPR r 81.4(2)(c)–(d).

209 Ms Stacey rightly highlighted that even once alternative service is approved, it remains open to any defendant on a committal application to argue that it has operated unfairly against them: *Secretary of State for Transport v Cuciurean* [2020] EWHC 2614 (Ch) at [63(9)].

Issue (5): whether to grant the claimant in the petrol stations claim its application for a third party disclosure order against the Commissioner

210 The claimant in the petrol stations claim is currently unable to name any individual defendants. The third party disclosure application under CPR r 31.17 sought documents from the Commissioner relating to the arrests of a number of people, some falling within the category of persons

A unknown, as defined in the petrol stations injunction, who were arrested on 26 August 2022 in protests at the Shell Acton Park and Acton Vale petrol stations, both sites covered by injunction. It has been reported that 43 people were so arrested. The application was supported by the third witness statement from Ms Oldfield.

211 The draft order sought the names and addresses of those arrested. The purpose of this disclosure was to help the claimant identify and name, so B far as possible, defendants to the claim, so that the claimant can consider whether to join them as defendants and so that they can be served with the proceedings in the usual way.

212 The draft order also provided for the claimant to revert to the Commissioner on provision of the names and addresses and seek (i) arrest notes, incident logs or similar written records relating to the activity and/or C conduct in question and those involved; (ii) other still photographic material; and/or (iii) body-worn or vehicle camera footage; and for the Commissioner to provide the same, insofar as it discloses any conduct and/or activity which may constitute a breach of the injunctions granted in these proceedings and/or may assist in identifying any person who might have undertaken such conduct and/or activity. This information was sought to D support potential contempt proceedings.

213 The Commissioner did not object to providing the disclosure sought, provided a court order was made.

214 In the first hearing in *Transport for London v Lee* [2022] EWHC 3102 (KB) at [94], Freedman J reiterated that CPR r 31.17 provides a general power for the court to order a non-party to disclose information into the proceedings; and that although it is established that such orders are the E exception and not the rule (see *Frankson v Home Office* [2003] 1 WLR 1952, para 25), the court retains a wide discretion to make such an order in appropriate cases.

215 In *Esso Petroleum Co Ltd v Persons Unknown* [2022] EWHC 1477 (QB) at [32], Bennathan J accepted that ordering the similar disclosure sought from various police forces as "evidence of breaches of the F injunctions" was "the most sensible and efficient way to identify any breaches of the injunction" and that it was "best that any evidence that could be used by the claimants to pursue breaches is gathered by the legally regulated and democratically accountable police forces of the United Kingdom".

216 Further, in *Transport for London v Lee* [2022] EWHC 3102 (KB) at [96] Freedman J made a materially similar order to the one sought in G this case in respect of the name and address of the relevant individuals on the basis that:

> "(1) The name and address of the people concerned are likely to support the case of the claimant or adversely affect the case of one of the other parties to the proceedings. Being able to identify who the people are who have been acting in the way complained of is a central facet of the H interim relief that the court has already granted. Evidence of breach will go to upholding the . . . injunction.
>
> "(2) Disclosure is necessary in order to dispose fairly of the claim or to save costs, because (a) without the names and addresses the claimant cannot enforce the . . . injunction without significant impediments; and

(b) the claimant needs the names and addresses in order to make good an undertaking it has given to the court to add defendants as named defendants wherever possible.

"(3) Identifying the protesters will allow them to defend their position in the proceedings and it increases the fairness of the proceedings to have named defendants as far as possible.

"(4) The Metropolitan Police have stated to the claimant that it will only disclose the requested information pursuant to a court order and they do not oppose the grant of the making of that order.

"(5) The disruption to the public and the risks involved mean that it is proportionate to order third party disclosure.

"(6) It is much more desirable for the evidence gathering to be undertaken by the police, rather than for third parties such as inquiry agents to interfere during the demonstrations in order to obtain such evidence."

217 It appears that the order Freedman J made was in materially identical terms to the one sought in this case. I therefore assume it covered not only the names and addresses but also the material described at para 212 above.

218 On 13 March 2023 May J made a materially identical third party order against Surrey Police in these proceedings in relation to arrests at the Shell petrol station at Cobham Motorway Services and Clacket Lane services on 28 April 2022 and/or 24 August 2022, having received submissions from the Equality and Human Rights Commission and having permitted the Attorney General and the Press Association the opportunity to do so.

219 In my judgment, the same general considerations as were set out by Bennathan and Freedman JJ above, and found to apply by May J in the specific context of the petrol stations injunction, applied here. I was satisfied that the names and addresses and further information referred to should be the subject of a third party disclosure order because the requirements of CPR r 31.17 were met, in that (i) the documents are relevant to an issue arising out of the claim; (ii) they are likely to support the claimant's case (or adversely affect the case of one of the other parties); and (iii) disclosure is necessary to dispose fairly of the claim or to save costs.

Conclusion

220 For all these reasons I:

(i) Grant Ms Branch permission to apply to set aside or vary the existing injunctions under CPR r 40.9 and have taken her submissions into account;

(ii) Grant the claimant in the petrol stations claim permission to amend the description of the persons unknown defendant:

(iii) Extend the three injunctions for up to a further year, in the manner sought by the claimants, subject to the modifications identified at paras 154 and 159 above; and

(iv) Grant the claimants permission to serve the three orders as well as the amended claim form and ancillary documents in the petrol stations claim by alternative means.

221 This judgment also explains why I made the third party disclosure order sought against the Commissioner.

Postscript

222 After circulation of my draft judgment, the claimants provided revised draft orders. These addressed the geographical scope issue, referred to at para 159 above. They also correctly removed the duplicative provisions relating to "encouragement", referred to at paras 24, 25, 154 and 156 above, albeit preserving the word "assisting" which only appeared in one of the original "encouragement" clauses. I am content to approve that revision.

223 I indicated that I was prepared to extend all three orders to 12 May 2024. Accordingly, any hearing to review them will need to take place in April 2024 (not May 2024, as the claimants proposed). Any application to extend them should be made by 28 February 2024 (not by 29 March 2024, as was proposed). I consider a time estimate of $1\frac{1}{2}$ days realistic (not the five hours proposed). That may need to be revised if any applications to vary or set aside the orders are made.

224 As to the notice required for any applications to vary or set aside the orders, the original draft orders provided with these applications sought a notice provision of 48 hours, not the 24 hours originally approved by Bennathan and Johnson JJ. For the reasons alluded to at para 83 I consider a 48 hours' notice provision appropriate.

225 The draft orders, which were provided very shortly before the hand down was due to take place, sought to increase this period to three clear days (excluding weekends and bank holidays). As Mr Simblet highlighted in his response, this issue had not been the subject of argument. It also raises issues as to how the claimants, and the court, deal with unrepresented defendants. If the claimants seek a further variation of the orders to this effect they should apply by way of an application notice, on notice to Ms Branch.

Permission granted for non-party to apply under CPR r 40.9 to set aside or vary injunctions.
Injunctions extended subject to certain amendments.
Description of persons unknown amended in third case.
Permission granted for service by alternative means.

CATHERINE MAY, Solicitor

Neutral Citation Number: [2024] EWHC 1529 (KB)

Case No.: KB-2024-BHM-000127

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Date: 19th June 2024

Before:
MR JUSTICE RITCHIE

- -

BETWEEN

THE UNIVERSITY OF BIRMINGHAM

Claimant

- and –

PERSONS UNKNOWN [1]
MARIYAH ALI [2]

Defendants

Katherine Holland KC and **Michelle Caney**
(instructed by **Shakespeare Martineau LLP**) for the **Claimant**.
The 1st Defendant did not appear.
The 2nd Defendant appeared in person.

Hearing date: 14th June 2024

- -

APPROVED JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be at 10:30 am on Wednesday 19th June 2024.

Mr Justice Ritchie:

The Parties

1. The Claimant is a University providing tertiary education to students.

2. The 1st Defendant is a group of people occupying or present upon two areas of grassed land owned by the University. The 1st is Green Heart (GH) and the second is Chancellor's Court (CC), both on the Edgbaston campus in Birmingham. The two together will be called the "Protest Camps". The University has three campuses: Edgbaston, Selly Oak and Exchange Building. The occupation of GH started on 9.5.2024 when the first protest camp was established. The second protest camp was set up on CC on 27.5.21024.

3. The 2nd Defendant stepped forwards at the hearing and handed in a letter on behalf of the students at the Protest Camps, so she became a named Defendant. She is not a lawyer and said very little at the hearing.

Bundles

4. For the hearing I was provided with: (1) a bundle of authorities; (2) a hearing bundle; (3) the Claimant's skeleton argument; (4) a last minute witness statement with video clips produced on the day of the hearing; (5) a letter from Hodge Jones and Allen.

Summary

5. On the 9th of May 2024 various students and perhaps staff set up a protest camp with some tents on GH. They were protesting to the University and presented a list of six demands to the University in relation to the killings and suffering in Gaza, Palestine. The University issued a claim form 4 weeks later, on the 10th of June 2024 and possession was sought against trespassers who were described as unknown persons. All three campuses were to be covered by the draft order. The application was made under CPR part 55, a section which focuses on possession claims against trespassers. In the Particulars of Claim the University pleaded that they believed the protesters were largely students who had "generally" been concealing their faces and that as a result the University did not know the identity of the protesters. The pleading sets out that the Protesters demanded the following:

> *"University of Birmingham Encampment Coalition for Palestine has launched!*
> *As the situation in Gaza escalates, so too does the global student movement towards establishing lasting peace and liberating Palestine*
> *BREAKING - UoB Students Establish Liberated Zone*
> *OUR DEMANDS*
>
> *DISCLOSE all of the University's investments by OPENING THE BOOKS to ensure transparency.*

> *DIVEST immediately from all companies complicit in the Israeli occupation, apartheid, and genocide of Palestinians.*
> *TERMINATE all investments, research partnerships and promotion of arms manufacturers.*
> *BOYCOTT all Israeli universities by ending research collaboration and study abroad programs.*
> *PLEDGE to contribute to the reconstruction of universities and educational infrastructure in Gaza.*
> *PROTECT students and staff's right to protest on campus and freedom of speech to express solidarity with Palestine."*

6. The University issued notices to quit the GH protest camp the next day: on the 10th of May and subsequently on the 11th, 12th and 15th of May 2024. No application was made for any injunction. There was no pleading that any student had been identified during the passage of the four weeks between the start of the occupation and the issuing of the claim form. There was no pleading that any student had been disciplined for these protest activities.

Service

7. Under CPR r.55.5(2) service on alleged trespassers has to be completed at least 2 days before the hearing. Having seen the evidence of service from Mr Hines, I am satisfied that the Protest Camps were served by the delivery of many paper copies of the proceedings and the evidence on 11.6.2022.

The hearing

8. The Claimant asked for the hearing to be listed urgently and the Court complied with this request. The hearing took place on the 14th of June 2024. At the hearing approximately 20 students attended together with some members of the public. The second Defendant, named above, stepped forwards on behalf of the protesters and handed up a letter from a solicitors firm called Hodge, Jones and Alan, which asked for an adjournment so that the students and staff who were protesting could obtain legal advice and representation to be able to defend the possession proceedings. The Claimant asserted that there were no issues in this action and that the University was entitled to possession as the owners of the land. In her skeleton argument Miss Holland KC submitted, at paragraph 8, that there were no arguable defences to the claim. She asserted that the rights guaranteed by Section 1 (2) of the *Human Rights Act* [HRA] and Articles 10 and 11 of the *European Convention on Human Rights* [ECHR] did not assist trespassers on private property. Furthermore, she asserted the statutory duty on the University in section 43 (1) of *the Education Act 1986* did not require the University to allow students to occupy any part of the University's land because the students could exercise their freedom of speech effectively in many other ways. I have considered the submissions made by the Claimant and the case law and set out what I consider to be the issues below. Instead of giving an extemporary judgment I reserved judgment. I now set out my reasons for granting limited possession orders relating to the Edgbaston

campus only and relating to non-students only, save for the CC area from which I ordered possession against all persons unknown. I also give my reasons for adjourning the rest of the application to 25th June 2024. I have provided this judgment quickly, without the usual draft to the parties for corrections, so I beg forgiveness for any typing errors. The Claimant indicated a firm desire to appeal my order and that is another reason why I have provided this judgment quickly.

The Issues

9. At this early stage, without the benefit of any legal argument from the students or staff, pursuant to the Court's duty when considering claims against persons unknown, in my judgment the following issues arise or may arise from the facts put before me:
   - 9.1 Are the protesters really persons unknown?
   - 9.2 Do students at the University have a licence to use the University's land?
   - 9.3 What are the express and implied terms of that licence?
     - (a) Do the terms incorporate and adequately enable the students' rights to freedom of assembly and to freedom of speech on University land under the *Human Rights Act 1998*?
     - (b) Do the terms properly incorporate and apply the University's statutory duties under S.43 of the *Education Act 1986* and Part A1 of the *Higher Education Act 2023* [the Education Acts]?
     - (c) Does the University procedural Code for protests comply with and enfranchise the students' rights under the *Human Rights Act 1998* and the University's duties under the *Education Acts* or unreasonably block and fetter those rights?
   - 9.4 Were the students in breach of the student contract by setting up tents, inviting other students and staff to discuss their protest and making demands of the University?
   - 9.5 Alongside the student's contractual rights, do the *Human Rights Act 1998* combined with *the Education Acts* provide the students and staff in the Protest Camps with a defence to the possession proceedings on the basis that the University is imposing an effective fetter on their rights to freedom of assembly and speech on University land?

The applications

10. The 2nd Defendant applied for an adjournment for legal advice for herself and the 1st Defendant. I granted it in relation to all students on the HG area.

11. The Claimant applied for permission to put into evidence a second witness statement from Doctor Blanco dated 14.6.2024, which had not been served on the Defendants and which contained video clips taken from the internet of three events to which I will refer below.

12. At the hearing I decided to consider the adjournment after I had heard submissions. I decided to read and see the unserved further evidence before deciding whether it would be fair to allow the Claimant rely upon it against the Defendants.

The lay witness evidence

13. I read evidence from the following witnesses. None were called.
    13.1 Doctor Blanco, in two witness statements dated 10.6.2024 and 14.6.2024;
    13.2 Mark Lawrence, statement dated 10.6.2024;
    13.3 John Elsmore, statement dated 10.6.2024;
    13.4 Scott Hines, statement dated 13.6.2024, re service.

14. I also read the bundle of documents produced by the witnesses by way of exhibits which included: the registers of title of the campus land; screenshots of social media issued by the protesters; an information sheet about the student contracts; the terms of Post Graduate and Direct Entry offers; S.s 4 & 9 of the University Regulations; the Code of Practice on Freedom of Speech; the Protesters' letter explaining their protest and setting out their demands (undated but probably delivered in early May 2024); the Vice Chancellor's reply message to students dated 17.5.2024; correspondence between the protesters and the University; photos of the Protester Camps; the notices to quit; the security logs.

Findings of fact

15. There are not many findings of fact which I can make on the balance of probability at this stage because the Defendants have only had 2 days notice of the proceedings. I am going to set out a summary of the evidence below but what I set out may change once the Defendants have obtained legal representation and put in evidence at the adjourned hearing.

16. Doctor Blanco is the director of legal services at the University. In her witness statement she gives evidence that the Protest Camps were established at the Edgbaston campus. She asserts that the occupiers are largely students. Their contracts with the University incorporated the University Regulations and University Code. She asserted that the students had the right to access University land under Regulation 4. She relied upon Regulation 4.1.1 which provides students and staff with the right to access all land and buildings "for any legitimate purpose connected with the work, business and social activities of the University". She relied on Regulation 9 which required staff and students to observe the Codes of Practice, Policies and Guidance issued by the University. She set out section 6.1 of the Code of Practice on Freedom of Speech under which the University, in writing, accepted responsibility to promote free speech including all demonstrations, protests and other events organised by a member of staff or student of the University. She relied on section 6.2 which required organisers of such events to follow the procedures set out in Appendix B which included requesting permission for protests and demonstrations (14 days in advance) and set out that the University should not unreasonably refuse consent for lawful freedom of speech.

17. In her chronology of events Doctor Blanco recorded a demonstration by the Friends of Palestine Society on the 7th of February 2024 at the University. Her evidence omitted any mention of whether permission was requested or granted for that demonstration. On the 22nd of April 2024 a protester group sent a letter to the Vice Chancellor setting out the demands and their rationale. The demands are summarised in the pleading which I have set out above. The letter also informed the University of a demonstration planned on the 1st of May 2024. The witness statement does not mention whether that request was granted by the University, nor whether the demonstration event took place. On the 9th of May 2024 the GH camp was established and social media postings set out the protesters' intention to occupy the area to protest against Israel's actions in Gaza. Doctor Blanco set out the University's response to the protest camp. On the 17th of May 2024 the Vice Chancellor, Mr Tickle, posted a message to all students which included the following:

> "You may have seen that a group of tents has been set up on the Green Heart by individuals protesting in support of Palestine and I wanted to address this in this message. Firstly, I want to emphasise that we will support students who wish to take part in protests about issues that they care deeply about. There are many ways in which this can be done lawfully, including through authorised demonstrations and our staff have worked with students over recent weeks and months to encourage this wherever possible. However, this does not extend to setting up tents where there is no authority or permission to do so. Although the camp has been largely peaceful to date, the Green Heart is a space which is important for University activities, and the presence of the camp (which has also included those who are not members of the University community) causes disruption to current and planned University activities in and close to that area. This includes examinations, the summer programme activities, which take place from the start of June, and the July degree ceremonies. It is also true that camps at other universities have led to incidents that we do not want to see repeated here. **While I have informed the students involved that I am unable to meet with them whilst the camp is in place,** members of the University's senior team are visiting the camp daily for welfare checks. Once the encampment ends, I remain open to meeting with them. As I have said above, there are other ways in which protests can be done lawfully, and we are happy to discuss and facilitate these with the organisers so that those who wish to can continue to protest. One issue raised with me this week relates to transparency around the University's investments. We already publish detailed information on this online, and I thought it would be helpful to provide some links, for those who are interested in finding out more. **We publish the University's current investment portfolio which is up to date as at the end of April.** The University's investments are managed by an external investment manager, who is required to invest in line with the University's responsible Investment Policy. **This policy**

> **was revised in January 2024 and includes the clear exclusion of arms from our investment portfolio** (p5)." (My emboldening).

18. The assertion in the middle of this message that the University Vice Chancellor was "unable to meet" the protesters seems to me to be factually incorrect. I interpret those words as him being unwilling to meet the protesters to discuss the terms of their demands. No evidence was put forwards that he was in fact unable physically or mentally to meet with any of the protestors to discuss their demands. On the information provided in the Vice Chancellor's message the first and third demands of the Protest Camps had probably been partly satisfied already. The 6th demand is undermined by the University seeking possession.

19. Doctor Blanco then went on to complain that the protesters refused to engage further with University staff members and cancelled meetings, but it is apparent from the social media attached to Doctor Blanco's witness statement that the University were requiring a meeting solely for abolishing the camp and the protesters sought to discuss their concerns and "non-negotiable" demands. Hence the obvious impasse was reached. Doctor Blanco asserted that the encampment was disrupting the University and its students' activities. However, she did not set out in her witness statement any educational activity that had been disrupted up to the date of her witness statement. She asserted no allegations of violence. She included no allegation of breach of the peace or verbal abuse of staff or students, in particular there was no allegation of verbal abuse to Jewish students which I would have taken very seriously. At paragraph 39 Doctor Blanco asserted that senior staff members of the University had consistently offered to engage and meet with the protesters and asserted that the Vice Chancellor was not the highest authority in the University, that was vested in the University Council. However, this assertion needs to be seen in the context of the Vice Chancellor refusing to meet the students to discuss their demands until they had taken down their Protest Camps.

20. Doctor Blanco gave evidence that the students had threatened to "disrupt the routine of the University" in one social media post. She set out that the students had not sought the consent required in Appendix B to the Code on Freedom of Speech. She pointed out that the protesters invited people to meetings and that some of the groups involved in the protest were named "Revolutionary Communists". Another group was called "Crochet for Action". She set out that she was concerned that the camp had extended into Chancellors Court and that the camps would interfere with the University's summer programme which had already started because it was scheduled to take place between the 3rd and the 21st of June 2024. She informed the Court that the summer programme included academic elements, talks, challenges and social events on areas including CC and GH. She was also concerned that the Graduation Ball which was to take place on the 13th of June 2024 would be affected (in the event, in her later witness statement dated 14.6.2024, there was no mention of it being disrupted). She was concerned that open days which are due to take place on the 21st and 22nd of June 2024 could be disrupted. Doctor Blanco pointed out that graduation will occur on the 9th and 19th of

July 2024 at the Great Hall on the edge of Chancellors Court. She asserted that staff in the University library were concerned for their safety. She asserted there was a "substantial risk of public disturbance and serious harm to persons or property". She stated that the circumstances of the case were "exceptional". Taking judicial notice of the protest camps at many UK and USA universities I am unpersuaded that this protest is exceptional. She also asserted that the University would suffer financial and reputational loss but did not specify what that would be.

21. In his witness statement, Mark Lawrence, the head of safety and security at the University, stated that he believed there was a strong likelihood that if these students were removed from GH and CC they would relocate elsewhere on any of the three campuses. He did not rely on any evidence of any threat by the Defendants to make this assertion. He gave evidence of various events including a counter protest on the 9th of May 2024 by Israel supporters. He did not give any evidence of any vandalism, breach of the peace or crimes committed during the protest/counter protest at GH. Nor did he give evidence that consent was obtained for that counter protest. He stated that a noisy demonstration disrupted a University conference on epilepsy on the 11th of May 2024. On the 21st of May 2024 a group of protesters went to the Vice Chancellor's office to deliver their demands in writing. He gave evidence of the extension of the GH camp into the area of CC on the 27th of May 2024 and about banners being raised and then taken down. He stated that he personally found a group of 20 or 30 students intimidating when he sought to persuade them to take down a banner on the 4th of June 2024 and so he withdrew. He gave evidence that additional security had been hired by the University costing £1,000 per day to cover meetings and the Protester Camps. He also gave evidence that on the 27th of May 2024 the protesters called on the Vice Chancellor to meet and discuss their concerns with them. At that time they called themselves a "student/staff coalition of 1000 students and 200 faculty members". He exhibited his security records. Those records showed that on the 4th of June 2024 the protesters entered the Poynting Physics building. Otherwise, the records mostly showed regular prayer meetings and peaceful, welcoming protests.

22. John Elsmore gave evidence, as the director of student affairs, that the 5 organisations involved in the protests were: 1. BHM Liberated Zone; 2. UOB Friends of Palestine; 3. Midlands Pal Act; 4. UOB Communists; 5. Brum Action Palestine. He asserted that *"we have been unable to identify any individual"*. This assertion is perhaps remarkable. The students had been on the campus for four weeks by the time Mr Elsmore swore his witness statement. The social media photographs exhibited to Doctor Blanco's witness statement show quite a few students with no masks on. These are presumably students who are studying at Birmingham University. I do not understand why the University has been unable to identify any student involved in the Protest Camps. At Court there were approximately 20 students, mixed with some members of the public, none of whom were wearing masks. Without some evidence of the efforts made by the University to identify the protesters by name I find this evidence less than convincing at this stage. Mr Elsmore asserted that on the 22nd of May 2024 masked students

entered University buildings and in a hall outside a meeting room of the investment committee shouted, chanted loudly and banged on doors. He gave evidence that many staff were visibly shaken and that University security and police liaison intervened. He gave no evidence that any police charges were brought against any of these students for any criminal offences. He went on to say that Jewish staff and students say that the camp has created an "uncomfortable and hostile environment". However, he did not produce any emails or communications from any student or member of staff. He asserted that some of the protestors had shouted at staff and blocked staff movement but he only made general assertions of those matters and did not descend into specifics of which date, which member of staff or how any blocking movement occurred or the content of any shouting. More worryingly, Mr Elsmore gave evidence that on the 5th of June 2024 several buildings were vandalised when red paint was sprayed on them. These included the Aston Webb building. I asked during the hearing whether the paint was water washable and was informed by counsel that it was not and, although efforts have been made to remove the red paint, they have not fully succeeded. I take that sort of activity very seriously because it is a crime. Mr Elsmore also asserted that a sculpture had been damaged and that responsibility had been claimed for that by "Midlands Pal". Mr Elsmore explained that the summer programme of the University from the 3rd to the 21st of June was being disrupted and it had to be re-planned and relocated at an additional cost of £22,000 for a week of Heras fencing, in particular.

23. In Doctor Blanco's unserved second witness statement she referred to links to protesters' social media videos which showed: (1) the paint spraying vandalism at the classic building next to CC, (2) the delivery of the demand letter to the Vice Chancellor, and (3) the intimidation of the investment committee by loud students. I watched the videos in Court with the students and counsel.

Documents

24. I have not been provided with the following: I have no copy of the student contract; I do not have full copies of the Rules of the University or the Regulations or the Statutes; I do not have copies of any Code of Practice other than the excerpts listed above. I will set out the relevant excerpts provided to me below.

25. "Information on the student contract":

> "If you decide to accept this offer, a contract will be formed between you and the University. Your rights and obligations to the University and the University's obligations to you arising under that contract are set out in the documents listed below, which form the terms and conditions of your student contract…The University's Royal Charter, Statutes, Ordinances, Regulations and Codes of Practice – these are regularly reviewed, with any changes normally taking effect at the start of the new academic year."
>
> …
>
> **"Conduct and attendance**

> You must be aware of the University's Regulations and Codes of Practice relating to conduct, academic integrity and plagiarism, attendance and reasonable diligence (see: https://intranet.birmingham.ac.uk/as/registry/legislation/index.aspx). The University can impose penalties if you do not follow these requirements, and in serious cases the University can suspend or expel you from the University."
> …
> **"When you may be asked to leave the University**
> You may be asked to leave the University if: … You are expelled from the University for
> …
> breach of the conduct, Fitness to Practise, attendance or reasonable diligence requirements;"

26. The Regulations S.4:

> "Regulations of the University of Birmingham
> Section 4. 2023-24
> **4.1 Rights of Access to the University**
> 4.1.1 **All Staff and Registered Students of the University have the right of access to all land and buildings owned by the University for any legitimate purpose connected with the work, business and social activities of the University,** except:
> 4.1.1 (a) buildings or space within buildings properly allocated exclusively for the use of particular University employees or otherwise not designated for general access;
> 4.1.1 (b) any part of the University access to which is restricted or closed temporarily or otherwise on the authority of an authorised Officer of the University; or
> 4.1.1 (c) where an authorised Officer has, for good reason and acting within his or her authority, specifically barred an individual from general access to the University or from access to a specific part of it."
> …
> Section 9:
> Codes of Practice: are mandatory and apply to all Staff and students. Breach of a Code of Practice may result in a disciplinary offence for both Staff and students. Policies: Staff and students are expected to comply with policies, and their breach may result in a disciplinary offence for both Staff and students. Guidance and other advisory documents: may set out best practice in terms of procedures, but are advisory only, whether for Staff or students." (My emboldening).

27. The Code of Practice on Freedom of Speech states as follows:

"Code of Practice Freedom of Speech
Purpose
1.1 This Code of Practice sets out the University of Birmingham's approach to freedom of speech on campus. The University has had a Code of Practice on Freedom of Speech for many years, with this fuller revision being undertaken in light of the Higher Education (Freedom of Speech) Act 2023. The Code includes the institution's values and expectations in relation to freedom of speech, explains the legislation that **the University must operate under in this area, and outlines responsibilities.** It sets out how the University's approach to freedom of speech operates in practice across the University's activities, including events with visiting speakers, and in teaching and research settings."

…

"2. **Our values and expectations**
2.1 The University of Birmingham is an academic community of staff and students, a place for open, critical thinking, and the creation, sharing and dissemination of knowledge. We are a University that teaches, researches, and applies knowledge in a comprehensive range of subjects. In this environment, academic freedom, and freedom of speech, are fundamental: **- the ability of all our members freely to challenge prevailing orthodoxies, query the positions and views of others, and to put forward ideas that may sometimes be radical or dissenting in their formulation. We are committed to securing freedom of speech within the law for all our members, staff, students and visiting speakers**. We are also committed to ensuring academic freedom for all academic staff and any visiting academics invited by the University, its staff or students."

…

"2.4 … It is not the role of the University to protect or shield people from ideas or opinions with which they disagree, or which make them feel uncomfortable. However, freedom of speech is not an unqualified right, and we set out in section 3 some of the wider legislation that we must consider in the context of freedom of speech. **The challenge for universities is to provide an environment which promotes and protects freedom of speech, whilst also identifying when the purported exercise of freedom of speech crosses a threshold and becomes unlawful.** In practice, it is important to recognise that these are often complex matters requiring difficult judgements and that there may be a perception of conflicting rights which need to be balanced."

…

"2.5 **In supporting freedom of speech, the University will take reasonably practicable steps to promote and protect the lawful speech rights of staff, students**, and visiting speakers of the University independently of the viewpoint being expressed. The University will not normally adopt an official institutional position on sensitive or politically contentious matters, and will not normally affiliate with organisations that would require the University to commit to a particular perspective on such matters. **This does not prevent members of our community from taking stances on such issues: we recognise that staff and students will often have very strong views and are free to express them lawfully."**

…

"3.1 … Freedom of speech means everyone has the right to express lawful views and opinions freely, in speech or in writing, without interference. …

3.2 Freedom of speech and academic freedom within the law are protected. This means that freedom of speech and academic freedom will not be protected if they contravene some other law.

3.3 Universities in England have a range of legislative and regulatory duties in relation to free speech, including:

• The Higher Education (Freedom of Speech) Act 2023 requires that higher education institutions protect and promote the importance of freedom of speech within the law for staff, students, and visiting speakers, and academic freedom. This includes in teaching and research settings. It requires that institutions have a Code of Practice (this document) setting out their approach to freedom of speech.

• The Education (No. 2) Act 1986 Section 43 places universities under a statutory duty to take reasonably practicable steps to ensure that freedom of speech within the law is secured for staff, students and visiting speakers.

• The Human Rights Act 1998 incorporated the European Convention on Human Rights (ECHR) in domestic legislation and includes the right to freedom of expression, which includes freedom of speech.

• The Office for Students (OfS), through its Regulatory Framework requires the University to comply with a set of public interest governance principles, two of which are freedom of speech and academic freedom. The Framework also regulates free speech and academic freedom by means of Conditions E1 (public-interest governance) and E2 (management and governance)."

…

"3.5 It is important to note that the requirements on universities in relation to the above issues differ. **Specifically, for freedom of speech, the University 'must promote the importance of freedom of speech and academic freedom', and must 'take such steps as are reasonably practicable' to secure freedom of speech within the law. For other duties, including PSED and the Prevent duty, universities are required to 'have due regard' to the need to achieve the aims of these pieces of legislation."**

…

"6. Application to meetings, events and demonstrations

6.1 The responsibility to promote and protect free speech covers all events, demonstrations, protests and other events organised by a member of staff or student of the University, including events organised by individuals or groups using the University name, funding, branding or facilities. It is particularly relevant to the following activities (although this list is not exhaustive):

• public meetings, arranged internally or externally, and held physically or virtually;

• demonstrations, protests or marches on campus;

• other forms of freedom of speech.

6.2 The procedures that must be followed by the organisers of these events are set out at Appendix B. This includes the process for requesting permission for such events and the potential mitigations that may be required to protect lawful free speech. The University shall not unreasonably refuse consent to those who are subject to the obligations of this Code (as per paragraph 1.2, above) who wish to hold an event, meeting or other activity for the expression of any views or beliefs held and lawfully expressed. Any conditions imposed on the holding of the meeting shall be kept to the minimum considered necessary in light of any risks identified in holding the meeting. Further details of how this will work in practice is set out in Appendix B."

…

"**Appendix B**:

…

6. Application to hold a demonstration, protest or other similar event

6.1 The full procedures in this Appendix also apply to the organisation of demonstrations, protests or similar events. Applications to hold such events should be made **with 14 days' notice,** using the application form at this link: https://intranet.birmingham.ac.uk/campusservices/ conferences-and-events/orqanisinq-events.aspx."

…

> **"8. Other terms**
> 8.1 The University confirms that, apart from in exceptional circumstances, use of our premises by an individual or body will not be on terms that require the individual or body to bear some or all of the costs of security relating to their use of the premises. Exceptional circumstances may include very high-profile visits (for example, very senior politicians) or events with a speaker likely to attract very significant protest. The decision on this will be made by the Authorising Officer as part of the application process set out above, and the costs made clear to the organisers.
> **8.2 So far as is reasonably practicable, the University will not deny use of University premises to any individual or group on any grounds solely connected with the beliefs or views, or the policy or objectives, of that individual or group."** (The emboldening is mine).

I note that the summary of the *Higher Education Act 2023* does not mention the duty not to exclude students from University land due to their opinions. The summary of the *HRA* makes no mention of the right to freedom of assembly.

28. The HG protest looked like this, on the University's evidence:

29. The CC protest looked like this:

The Law

CPR

30. The procedure for possession actions against trespassers is set out in CPR Part 55. A trespasser is defined in rule 55.1(b) as a person who entered or remained on land without consent. Such applications for possession are to be issued in the County Court but they may be issued in the High Court if a certificate setting out specified reasons is provided. Doctor Blanco provided the certificate in this case. The specified reasons are set out in PD55A at paragraph 1.3, and these include: complicated disputes of fact; points of general important; or evidence that there is a substantial risk of public disturbance or serious harm to persons or property which properly require determination. Paragraph 2.1 of the Practice Direction requires that the Particulars of Claim identify the land, the grounds for possession and give details of every person who, to the best of the Claimants knowledge, is in possession. There are other provisions about shortening of time limits, service on trespassers by putting stakes in the ground or attaching to front doors and dispensing with the need for responses from trespassers. By rule 55.8 the Court may order possession in a summary fashion or give directions and adjourn the hearing where the defendants genuinely dispute the claim on grounds which appear substantial. In which circumstances the Court will allocate the claim to a track and direct evidence to be given which may be in writing.

Statutes

31. The *Human Rights Act 1998* (HRA) enshrines the *European Convention on Human Rights* (ECHR) into UK Law. Section 6 imposes duties on public function bodies thus:

> **"6. Acts of public authorities.**
> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
> (2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes—
(a) a court or tribunal, and
(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament."

"8 Judicial remedies.

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate."

The ECHR provides as follows:

"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."

32. *The Education Act 1986* provides:

> **"43 Freedom of speech in universities, polytechnics and colleges.**
> (1) Every individual and body of persons concerned in the government of any establishment to which this section applies **shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for** members, **students** and employees of the establishment and for visiting speakers.
> (2) The duty imposed by subsection (1) above includes (in particular) the **duty to ensure, so far as is reasonably practicable, that the use of any premises of the establishment is not denied to any individual or body of persons on any ground connected** with—
> (a) the **beliefs or views** of that individual or of any member of that body; or
> (b) the policy or objectives of that body.
> (3) The governing body of every such establishment shall, with a view to facilitating the discharge of the duty imposed by Subsection (1) above in relation to that establishment, issue and keep up to date a code of practice setting out—
> (a) the procedures to be followed by members, students and employees of the establishment in connection with the organisation—
> (i) of meetings which are to be held on premises of the establishment and which fall within any class of meeting specified in the code; and
> (ii) of other activities which are to take place on those premises and which fall within any class of activity so specified; and
> (b) the conduct required of such persons in connection with any such meeting or activity;
> and dealing with such other matters as the governing body consider appropriate." (My emboldening).

33. The *Higher Education (Freedom of Speech) Act 2023* provides thus:

> "1 Duties of registered higher education providers In the Higher Education and Research Act 2017, before Part 1 insert—
> **"PART A1**
> **PROTECTION OF FREEDOM OF SPEECH**

Duties of registered higher education providers

A1 Duty to take steps to secure freedom of speech

(1) The governing body of a registered higher education provider **must take the steps** that, having particular regard to the importance of freedom of speech, **are reasonably practicable** for it to take in order to achieve the objective in subsection (2).

(2) That objective is securing freedom of speech within the law for—

(a) staff of the provider,

(b) members of the provider,

(c**) students of** the provider, and

(d) visiting speakers.

(3) The objective in subsection (2) includes **securing that—**

(a) the use of any premises of the provider is not denied to any individual or body on grounds specified in subsection (4), and

(b) the terms on which such premises are provided are not to any extent based on such grounds.

(4) The grounds referred to in subsection (3)(a) and (b) are—

(a) in relation to an individual, their ideas or opinions;

(b) in relation to a body, its policy or objectives or the ideas or opinions of any of its members.

(5) The objective in subsection (2), so far as relating to academic staff, includes securing their academic freedom.

(6) In this Part, "academic freedom", in relation to academic staff at a registered higher education provider, means their freedom within the law—

(a) to question and test received wisdom, and

(b) to put forward new ideas and controversial or unpopular opinions, without placing themselves at risk of being adversely affected in any of the ways described in subsection (7).

(7) Those ways are—

(a) loss of their jobs or privileges at the provider;

(b) the likelihood of their securing promotion or different jobs at the provider being reduced.

(8) The governing body of a registered higher education provider must take the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take in order to achieve the objective in subsection (9)."

…

"**A2 Code of practice**

(1) The governing body of a registered higher education provider must, with a view to facilitating the discharge of the duties in section A1(1) and (10), maintain a code of practice setting out the matters referred to in subsection (2).

> (2) Those matters are—
> (a) the provider's values relating to freedom of speech and an explanation of how those values uphold freedom of speech,
> (b) the procedures to be followed by staff and students of the provider and any students' union for students at the provider in connection with the organisation of—
> (i) meetings which are to be held on the provider's premises and which fall within any class of meeting specified in the code, and
> (ii) other activities which are to take place on those premises and which fall within any class of activity so specified,
> (c) the conduct required of such persons in connection with any such meeting or activity, and
> (d) the criteria to be used by the provider in making decisions about whether to allow the use of premises and on what terms (which must include its criteria for determining whether there are exceptional circumstances for the purposes of section A1(10))." (My emboldening).

34. I take away from these statutes that the University was under duties to protect and uphold the students' rights to freedom of speech and assembly and to take reasonably practicable steps to ensure that University premises were not denied to the students for those purposes. As for the University's Code, it had to facilitate the discharge of those duties, not frustrate them.

Case Law

35. The University relied on the following cases:
    1. *McPhail v Persons Unknown* [1973] Ch 447 *(McPhail);*
    2. *University of Essex v Djemal* [1980] 1 W.L.R. 1301 *(Djemal);*
    3. *Appleby v United Kingdom* [2003] 37EHRR 38 *(Appleby).*
    4. *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] 1 WLR 2780 *(Meier);*
    5. *School of Oriental and African Studies v Persons Unknown* [2010] EWHC 3977 (Ch) *(SOAS);*
    6. *University of Birmingham v Persons Unknown* [2015] EWHC 544 (Ch) *(UoB);*
    7. *Ineos Upstream Ltd v Persons Unknown* [2019] 4 WLR 100 *(Ineos);*
    8. *Director of Public Prosecutions v Cuciurean* [2022] QB 888 *(Cuciurean);*

36. I do not need to summarise *McPhail,* save to say that this Court has no power to suspend a possession order against trespassers if one is required in law.

37. In *Appleby* the European Court of Human Rights [ECHR] was considering an application relating to private land by an environmental group protesting against plan to build on the only public playing field in the area. The protesters set up stands in a private shopping mall. They were prevented from doing so and applied under Article

10 and 11 of the ECHR asserting that the refusal breached those articles. The ECHR rejected the application holding that there was no violation of those rights and ruled thus:

> **"1. General principles**
> 39. The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals, 29 where the Turkish Government were found to be under a positive obligation to take investigative and protective measures where the "pro-PKK" newspaper and its journalists and staff had been victim to a campaign of violence and intimidation; also Fuentes Bobo v Spain , 30 concerning the obligation on the State to protect freedom of expression in the employment context.
> 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."
> …
> "43. The Court recalls that the applicants wished to draw attention of fellow citizens to their opposition to the plans of their locally elected representatives to develop playing fields and to deprive their children of green areas to play in. This was a topic of public interest and contributed to debate about the exercise of local government powers. However, while freedom of expression is an important right, it is not unlimited. Nor is it the only Convention right at stake. Regard must also be had to the property rights of the owner of the shopping centre under Art.1 of Protocol No.1 ."
> …
> 47. That provision [Article 10], notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, **the Court is not persuaded that this requires the automatic creation of rights of entry to private**

> **property, or even, necessarily, to all publicly owned property (Government offices and ministries, for instance). Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights.** The corporate town, where the entire municipality was controlled by a private body, might be an example.
> 48. In the present case, the restriction on the applicants' ability to communicate their views was limited to the entrance areas and passageways of the Galleries. It did not prevent them from obtaining individual permission from businesses within the Galleries (the manager of a hypermarket granted permission for a stand within his store on one occasion) or from distributing their leaflets on the public access paths into the area. It also remained open to them to campaign in the old town centre and to employ alternative means, such as calling door to door or seeking exposure in the local press, radio and television. The applicants do not deny that these other methods were available to them. Their argument, essentially, is that the easiest and most effective method of reaching people was in using the Galleries, as shown by the local authority's own information campaign. The Court does not consider however that the applicants can claim that they were, as a result of the refusal of the private company, Postel, effectively prevented from communicating their views to their fellow citizens. Some 3,200 people submitted letters in their support. Whether more would have done so if the stand had remained in the Galleries is speculation which is insufficient to support an argument that the applicants were unable otherwise to exercise their freedom of expression in a meaningful manner.
> 49. Balancing therefore the rights in issue and having regard to the nature and scope of the restriction in this case, the Court does not find that the Government failed in any positive obligation to protect the applicants' freedom of expression."

I take from this judgment that there is no general right for protesters to protest on private land to which they have no connection and for which they have no licence to enter and use, but there are exceptions. There is a balance to be struck. The nature of the protest, the persons who the protesters seek to persuade, the nature of the private land and the alternative means for protest, if any, and their effectiveness are all relevant to the balance. The facts are a little different to the case before me. In the current case the students have a licence to enter and use the land, so they are connected with it.

38. As for *Djemal,* students occupied buildings on University premises which were used as offices. When a possession order was made they went to other premises. The University sought possession of all of the campuses and the students left just before the hearing but threatened to re occupy after the hearing. Walton J. gave possession just of the part of the premises which the students had been occupying. On appeal the Court of Appeal granted possession of all of the campus. The ratio of the case was that the extent of the possession order depends on the evidence and the circumstances. The threat of reoccupation justified the order in relation to the whole of the land. The relevant part of the judgement of Buckley LJ is at P 1304 letters E to F:

> "The jurisdiction in question is a jurisdiction directed to protecting the right of the owner of property to the possession of the whole of his property, uninterfered with by unauthorised adverse possession. In my judgment the jurisdiction to make a possession order extends to the whole of the owner's property in respect of which his right of occupation has been interfered with, but the extent of the field of operation of any order for possession which the court may think fit to make will no doubt depend upon the circumstances of the particular case."
>
> …
>
> "If that is the position, the order which I would make, and which I think it was open to the judge to have made when the matter was before him, namely, a possession order extending to the whole property of the University and enforceable against the defendants or any other person who might be in unauthorised adverse possession of any part of g the University property, will not in fact incommode the students in any way because, through Miss Jones, they disavow any intention to pursue that policy in the future. I would allow the appeal." (P1305A).

39. In *Meier* travellers camped in woodlands owned by the Secretary of State who applied for possession of many sites, not just the one occupied by the travellers. The judge ordered possession of the occupied site but not the other sites. On appeal the ratio of the decision was that an order possession of land which was not occupied was not justified on the facts. An injunction could cover that. Lord Roger ruled as follows:

> "…The central issue in the present appeal is whether that case was rightly decided. In my view it was not.
>
> 6. Most basically, an action for recovery of land presupposes that the Claimant is not in possession of the relevant land: the defendant is in possession without the Claimant's permission. This remains the position even if, as the Court of Appeal held in *Manchester Airport plc v Dutton* [2000] QB 133, the Claimant no longer needs to have an estate in the land. See Megarry & Wade, The Law of Real Property, 7th ed

> (2008), para 4-026. To use the old terminology, the defendant has ejected the Claimant from the land; the Claimant says that he has a better right to possess it, and he wants to recover possession. That is reflected in the form of the order which the court grants: "that the Claimant do forthwith recover" the land or, more fully, "that the said AB do recover against the said CD possession" of the land: see Cole, The Law and Practice in Ejectment (1857), p 786, Form 262."
>
> …
>
> "8. The intention behind the relevant provisions of rule 55 remains the same as with Order 113: to provide a special fast procedure in cases which only involve trespassers and to allow the use of that procedure even when some or all of the trespassers cannot be identified."
>
> …
>
> "10. Saville J referred to the decision of the Court of Appeal in *University of Essex v Djemal* [1980] WLR 1301, which I have just mentioned. That decision is clearly distinguishable, however. The defendant students, who had previously taken over, and been removed from, certain administrative offices of the University of Essex, had been occupying another part of the University buildings known as "Level 6". The Court of Appeal made an order for possession extending to the whole property of the University in effect, the whole campus. This was justified because the University's right to possession of its campus was indivisible: "If it is violated by adverse occupation of any part of the premises, that violation affects the right of possession of the whole of the premises"
>
> …
>
> "15. Plainly, the idea of the Commission having to return to court time and again to obtain a fresh order for possession in respect of a series of new sites is unattractive. But the scenario presupposes that the defendants would, with impunity, disobey the injunction restraining them from entering the other parcels of land. So this point is linked to the contention that the injunction would not work.
>
> 16. I note in passing that there is actually no evidence that these defendants would fail to comply with the injunction in respect of the other parcels of land. So there is no particular reason to suppose that the Court of Appeal's injunction will prove an ineffective remedy in this case."

This ruling assists on the extent of the scope of an order for possession and the need for any such order to go beyond the land occupied by protesters.

40. In *SOAS* students took occupation of a floor in a University building, protesting about the Government's spending plans. The occupied floor was a conference centre. A conference had to be cancelled. University business was disrupted. Prospective

bookings would have to be cancelled if the occupation continued, wasting £11,000 in fees. The lease under which SOAS occupied had clauses prohibiting activities causing nuisance. The without notice application for possession was put back for notice to be served. An interim injunction was granted. At the adjourned hearing, the next day, the Defendants were represented. The University refused to negotiate with the protesters but would negotiate with the student union. Henderson J. granted possession of the whole campus not just the occupied part of the building and ruled as follows:

> "5. Since the SOAS campus is private land, it follows, as a matter of basic English property law, that the only persons who may enter upon the campus are people who have the licence or consent of SOAS. For normal purposes, of course, the students who are enrolled at SOAS have the permission of SOAS to be on the campus for the purposes of their education in the broadest sense of that term."
> "7. … the basic ground upon which the possession order is sought is the property rights of SOAS to have occupation of its own premises and to prevent unlawful trespass. SOAS says that the students who are conducting the sit-in are trespassers, because they have no right or licence to occupy the Brunei Suite to the exclusion of the school, and they most certainly have no right to sleep there or to control who has access to the premises."
> "8. … the regulations for students at SOAS, which are exhibited to Mr Poulson's witness statement and which provide in paragraph 9.1 under the heading "Student discipline":
>
> > "No student of the School shall engage in activity likely to interfere in the broadest sense with the proper functioning or activities of the School or those who work or study in the School or undertake action which otherwise damages the School."
>
> It appears clear to me that conducting a sit-in on part of the school's premises is to engage in an activity which is likely to interfere in the broadest sense with the proper functioning and activities of the school, and with those who work or study there"

41. Henderson J. then considered the potential defences raised by the protesters and cited the ruling in para. 47 of *Appleby* thus:

> "24. …this paragraph appears to me to provide clear authority that Article 10 does not give any general freedom to exercise the relevant rights upon private land. The only exception which the court envisaged was where the prohibition on access might prevent any effective exercise at all of freedom of expression, or where it might

> be said that the underlying essence of the right had in some way been destroyed."
>
> …
>
> "25. On the facts of the present case, it seems to me entirely fanciful to argue that preventing the students of SOAS from exercising their Article 10 rights in the Brunei Suite would in any way impinge upon the effective exercise of their right of freedom of expression. There are many other places and ways in which that right can be exercised, and as the events of the last few days have shown there are indeed many ways in which it has been exercised. The proposition that Article 10 requires the law to override the property rights of SOAS in its own buildings is, in my view, unarguable and offers no prospects of success at trial.
>
> 26. Similar considerations apply to Article 11 which the court went on to deal with in paragraphs 51 and 52 of its judgment, because the court found that "largely identical considerations arise under this provision". So, for the same reasons, it would be equally fanciful to suppose that the Article 11 right to freedom of peaceful assembly required the court to override the property rights of SOAS in its own premises.
>
> 27. The case of *Appleby* appears to me to be plainly and squarely against the proposition which was advanced to me yesterday by Mrs Hamilton, and was further advanced to me today by Mr Slatter, to the effect that there may be an arguable defence based upon Articles 10 and 11. Mr Slatter had a further point, which was to say that SOAS is, at least arguably, a public authority, but I am not persuaded that that makes any relevant difference for present purposes. It is not in issue that, if there were a valid human rights argument, it could be relied upon by way of defence to the possession proceedings."

42. I note and take into account that the protest in *SOAS* was against the Government not the University, so protests outside Parliament or to MPs or Ministers would have been more direct and would have addressed the objective of the protest more effectively than disrupting University business. The students therefore had other effective means of protest.

43. Five years later, in *UoB* the University made an application to extend the validity of a writ of possession made the year before in relation to the campus. The year before a pattern of disruptive occupational protests of University buildings across the whole campus arose which interfered with University educational business. The protests were against Government cuts in fees. The Court made a possession order the previous year but the protests had continued at regular intervals and disbanded before bailiffs arrived. HHJ Purle QC granted the extension but summarised the practical issues with campus wide possession orders thus:

> " 6. … At one stage in July of last year the High Court bailiffs were asked to help, but by the time they arrived the protest was effectively over and they did not, as they have confirmed in a recent email, then effect repossession of the site. In fact, the practical reality may be that they never will effect repossession of the entire site. They are only called in as and when there is a protest that the police or University authorities themselves are not able to deal with effectively. The activities of the protestors move around the site and their occupation of parts of the campus for protest does not usually embrace all, so that any disruption would be ended by simply clearing the building or part of the site in question. In July 2014 the Strathcona Building was affected, and the protestors had in fact left that building by the time the bailiffs arrived. Even had the bailiffs effected possession of the Strathcona Building, it may be that this would not have amounted to possession of the remainder of the site as indicated on the plan attached to the Possession Order. I do not think that matters, and do not need to decide the point."

I note that this protest was against Government policy not the University.

44. I find little assistance in *Ineos* however, in *Cuciurean,* Lord Burnett of Maldon CJ dealt with protests on private land against the Government's HS2 project in the context of the rights in Arts. 10 and 11 of the ECHR thus:

> "45. We conclude that there is no basis in the Strasbourg jurisprudence to support the defendant's proposition that the freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg court has not made any statement to that effect. Instead, it has consistently said that articles 10 and 11 do not "bestow any freedom of forum" in the specific context of interference with property rights (see *Appleby* at paras 47 and 52). **There is no right of entry to private property or to any publicly owned property**. **The furthest that the Strasbourg court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of destroying the essence of those rights, then it would not exclude the possibility of a state being obliged to protect them by regulating property rights.**
> 46 The approach taken by the Strasbourg court should not come as any surprise. Articles 10, 11 and A1P1 are all qualified rights. The Convention does not give priority to any one of those provisions. We would expect the Convention to be read as a whole and harmoniously. Articles 10 and 11 are subject to limitations or

> restrictions which are prescribed by law and necessary in a democratic society. Those limitations and restrictions include the law of trespass, the object of which is to protect property rights in accordance with A1P1. On the other hand, property rights might have to yield to articles 10 and 11 if, for example, a law governing the exercise of those rights and use of land were to destroy the essence of the freedom to protest. That would be an extreme situation. It has never been suggested that it arises in the circumstances of the present case, nor more generally in relation to section 68 of the 1994 Act. It would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the freedoms of expression and assembly would be destroyed. Legitimate protest can take many other forms." (My emboldening).

I note here that the protest was against Government policy but the company who owned the land occupied was the creature set up by Government to put the policy into effect. There were many other methods and places in which the protesters could protest effectively.

Applying the law to the facts

45. **CPR 55.** I have touched on identification above. I am not satisfied on the evidence before me that the University has made reasonable efforts or provided any evidence of any efforts to identify the students who are in the protest camps. The CPR require details of every person who is, to the best of the Claimants, knowledge in possession. This does not mean the worst of the Claimant's knowledge. The University have only made general assertions that they have not been able to identify any individual. The University has not given any evidence that they have disciplined any students for being on GH and CC in the protest camps for the four weeks before the claim was issued. Maybe it does not consider the Protest Camps to be a disciplinary matter. So, I am concerned that the claim for possession against persons unknown is really a claim for possession against persons who are known or should be known but the Claimant has not sufficiently or adequately tried to identify them. This may also give rise to the difficulty in enforcement. Any possession order against persons unknown would arguably fail to bite on any current student who should or would be "known" to the University. Therefore, it is arguable that all students would have to do would be to show their student cards to defeat then enforcement of a possession order against persons unknown.

46. In relation to the GH camp I am not satisfied that the certificate provided by Doctor Blanco contains any sufficient evidence that there is a substantial risk of public disturbance or serious harm to persons or property which properly require determination by the High Court. By the time that she signed her witness statement

and the Certificate these students had been on GH for four weeks. There had been a counter protest in support of Israel with no evidence of any public disturbance. There is not evidence of any damage to property at GH or injury to persons at GH let alone serious harm at GH.

47. In relation to CC and the vandalism there, the intimidation of the security officer there and the intimidation of the investment committee members who, as I understand matters, met near there, I do consider that these facts get closer to satisfying the criteria in the Practice Direction of a substantial risk of public disturbance or serious harm to property. Whether spraying indelible paint on classic buildings is serious harm or just harm is at least arguable. Intimidating the security staff or investment committee members is wholly improper, so I agreed to let the claim remain in the High Court on that evidence.

48. **HRA and the ECHR:** In my judgment, in carrying out tertiary education with state loans for UK students the University is arguably carrying out acts of a public nature. In any event it is at the least arguable that the *HRA* and the *ECHR* binds the University as a public authority. Many universities are registered with the OfS. The extracts of the Rules and Regulations put before me make no reference to the students' right to freedom of assembly. If this has been omitted from the contract, Rules and Codes then the University is overlooking a key *ECHR* right which is arguably operative in this claim as a potential defence. These protesters are assembling. However, the Rules do enshrine students' rights to protest and require the University to support those. What the students have done is assemble on the grass at GH and CC to raise the profile of their protest *against the University*. It is aimed at the University, not Government. So, when considering the balance inherent in the fettering of freedom of assembly and speech by issuing notices to quit, the person whom the protesters are trying to persuade is highly relevant. In this case that is the University. When considering whether the protesters have other "effective" methods of protest, different factors apply in this case to those in *SOAS* and *Djemal*. Arguably, marching in Birmingham High Street would be wholly ineffective to persuade the University, whereas concentrating on the University land and siting in protest near the Vice Chancellor is likely to be more effective use of the right to freedom of assembly and speech. In addition, when considering the balance inherent in *HRA* defences, the Court will take into account the nature of the land occupied and indeed whether it is actually exclusively occupied or just jointly used. In the current case the student protesters are not excluding anyone from GH or CC. On the contrary, they are welcoming staff and others to GH and CC. The larger tents are open, prayer meetings are being held and discussions taking place. People are wandering about in the land. The only exclusive occupation is under the small sleeping tents scattered about. Another factor in the balance under the *HRA* is the level of the effect on the University of the Protest Camps. There is a quantum difference between occupying a lecture hall, administrative building or conference centre (*SOAS* or *Djemal)* on the one hand and scattered camping on patches of grass on the other. The former directly interferes with lectures and teaching or administration. The latter is a

noisy nuisance but does not prevent educational business. The University asserts that the Protester Camps on CC and GH are interfering with the summer programme held between 3rd and 21st June, but if that was a real concern the University could have applied long before it started. Instead, the University chose to apply mid-way through the summer programme. As for the asserted losses, the figure of £22,000 for Heras fencing is a very substantial cost which will weigh heavy in the balance, but it is currently put forwards without stating what the "but for" costs would have been. Until the University prove that these costs were caused by the protest alone, they remain potentially relevant figures instead of losses proven to have been caused by the protests. I take into account that a marquee for graduation is usually put on GH but that can probably be re-sited. These matters are all to be weighed in the balance required under the *HRA*. I consider that there is an arguable defence here for the students for peaceful protest on GH.

49. **The Education Acts** required the University to take reasonably practicable steps to ensure that the protesting students were not excluded from University premises on the grounds of their opinions. I have not been provided with any evidence that just letting the students stay on GH is not reasonably practicable. All reasonable practicability tests involve an evidence based assessment of options and costs, the risks and benefits, the relative rights and then a balancing judgment. In this claim the University has only stressed what it sees as the downsides of the GH and the CC camps. There is no analysis of how the University can take steps to ensure the protesters are not excluded or how they can be supported. There is, in my judgment, a substantial difference between student protesters occupying lecture halls, buildings or administration offices and hence preventing or interfering with the business of education, and the protesters in this claim, who are using two patches of grass without excluding anyone else. The protesters are not stopping lectures. They are not stopping the administration of the University, save when the investment committee intimidation occurred and I shall return to that below. So arguably, in my judgment, at this stage the students have a defence based on the University's failure to comply with their duties under *the Education Acts* to "take steps" to protect their right to protest on University land.

50. **Licence to enter and use.** The University contract with the students requires the students to attend the campus and use it. The purposes for the use are wide. The University Rules enshrine the right to freedom of speech. They should enshrine the right to freedom of assembly but no such Rule has been put in evidence yet. So, when the protesters walked onto the GH and CC land, arguably they had licence to do so. They did not enter as trespassers. This leaves the assertion that remaining on the land is a trespass and that depends on whether the University was permitted, under its student contracts, Rules and Regulations, read in accordance with its statutory duties properly applied, to serve the notices to quit. The day the camp was established was 9.5.2024. The notice to quit was first served on the camp on 10.5.2024. The University may (or may not) have carried out a really rushed HRA and Education Acts analysis, balancing the various factors, in less than 24 hours, but no evidence of any such balancing exercise

or of any note of the considerations taken into account was produced in the evidence before this Court. If the University did not carry out that balancing exercise, a defence of failure to comply with the *Education Acts* may be fortified. In my judgment, the Defendants have an arguable case that they have licence to remain on GH and are not trespassers. I shall deal with CC below.

51. **CC.** In my judgment different factors apply to the camp at CC. Once a protest turns into a base camp for criminal activity I have little doubt that the express or implied licence to use ceases to apply, the *HRA* provides no protection to criminals and those who encourage or cover up criminal activity and the *Education Acts* no longer assist the protesters who assist or are criminals. Red paint was thrown onto a classic building facing the CC camp and this was recorded on video. I do grant permission for the videos showing that and the other key intimidation events in Doctor Blanco's unserved witness statement, to be put in evidence because they come from the Defendants and they evidence these crimes or potential crimes. The intimidation of the investment committee was close to threatening words and behaviour, although no police charges have yet been laid and no disciplinary proceedings started. I infer that those actions were carried out, and/or encouraged by the occupiers of the CC camp because the red paint vandalism was on buildings facing the CC camp. No protester reported the culprits to the University. Instead it was posted on social media. The intimidation of one security guard also occurred at CC. No protester has admitted to that behaviour and the protesters at the camp have not reported who the intimidators were. For those reasons I do not consider that the occupants of the camp at CC have any arguable defences and, at the hearing, I granted possession of that camp against persons unknown whether students or non-students.

52. **Non students.** At the hearing I granted possession of the whole campus at Edgbaston against all persons unknown who are non-students and are not staff of the University. Those persons unknown are trespassers and have no arguable defences.

53. **Geographical scope.** I do not need to decide the scope of the final possession orders in this judgment. The two orders I granted related to the whole of one campus for non-students and to CC for students and staff. I do not consider, on the evidence before me, at this early stage that there is justification for a possession order relating to the other two campuses on which no protests have taken place and over which no threat has been made for the protesters to relocate.

Conclusions

54. The Claimants have drawn up the possession orders, the adjournment order and the directions for the wider applications to be heard later and the order was issued on 17.6.2024.

55. For the reasons set out above I consider that the wider possession applications against students and staff should be heard at an adjourned hearing on 25.6.2024. I have not

granted possession of the GH camp against any students. That area is the main issue. Possession is also sought for the other two campuses and that is the second issue.

56. This claim is allocated to the multi-track.

57. I urge the parties to negotiate or enter mediation before the hearing. If they do not I shall take that into account.

END

Neutral Citation Number: [2024] EWHC 3130 (KB)

Claim 1: No: QB-2022-001241 ("Haven Claim")
Claim 2: No: QB-2022-001259 ("Tower Claim")
Claim 3: No: QB-2022-001420 ("Petrol Stations Claim")

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/12/2024

Before :
Mr Justice Dexter Dias

- -

Between :

(1) Shell U.K. Limited

Claimant: Claim 1

-and-

PERSONS UNKNOWN ENTERING OR REMAINING AT THE CLAIMANT'S SITE KNOWN AS SHELL HAVEN, STANFORD-LE-HOPE (AND AS FURTHER DEFINED IN THE PARTICULARS OF CLAIM) WITHOUT THE CONSENT OF THE CLAIMANT, OR BLOCKING THE ENTRANCES TO THAT SITE

Defendants: Claim 1

(2) Shell International Petroleum Company Limited

Claimant: Claim 2

-and-

PERSONS UNKNOWN ENTERING OR REMAINING IN OR ON THE BUILDING KNOWN AS SHELL CENTRE TOWER, BELVEDERE ROAD, LONDON ("SHELL CENTRE TOWER") WITHOUT THE CONSENT OF THE CLAIMANT, OR DAMAGING THE BUILIDNG, OR DAMAGING OR BLOCKING THE ENTRANCES TO THE SAID BUILDING

(3) Shell U.K. Oil Products Limited

Claimant: Claim 3

-and-

PERSONS UNKNOWN DAMAGING AND/OR BLOCKING THE USE OF OR ACCESS TO ANY SHELL PETROL STATION IN ENGLAND AND WALES, OR TO ANY EQUIPMENT OR INFRASTRUCTURE UPON IT, BY EXPRESS OR IMPLIED AGREEMENT WITH OTHERS, IN CONNECTION WITH ENVIRONMENTAL PROTEST CAMPAIGNS WITH THE INTENTION OF DISRUPTING THE SALE OR SUPPLY OF FUEL TO OR FROM THE SAID STATION

-and-

14 named defendants, including:
Emma Ireland (D7)
Charles Philip Laurie (D8)

- -
- -

Myriam Stacey KC and Joel Semakula (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimants**
Emma Ireland (D7, Claim 3) in person
Charles Philip Laurie (D8, Claim 3) in person
No other defendant appeared or was represented

Hearing dates: 22-23 October 2024
- -
JUDGMENT

Approved Judgment

This judgment was handed down remotely at 10.30 am on 5th December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Mr Justice Dexter Dias

Mr Justice Dexter Dias :

1. This is the judgment of the court.

2. To assist the parties and the public to follow the court's line of reasoning, the text is divided into 13 sections and four annexes as set out in the table below.

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§I.

INTRODUCTION

3. Three claims are being heard together. The case overall is about whether the claimants, a number of companies in the Shell Group ("Shell"), should be granted final injunctions against Persons Unknown ("PUs") and a number of named environmental protesters, who took direct and deliberately disruptive action against Shell during 2022. Two of these protesters, Emma Ireland and Charles Philip Laurie, appear in person and addressed the court at length, carefully explaining why they, and many other protesters, have directed protests against Shell. The protesters include supporters or affiliates of environmental campaigning and activism groups including Just Stop Oil ("JSO"), Extinction Rebellion ("XR"), Youth Climate Swarm and Scientists' Rebellion.

4. The protesters strongly object to Shell's involvement in the extraction, distribution, supply and sale of fossil fuels, and thus Shell's involvement in the burning of the fuels. Such incineration releases carbon dioxide and greenhouse gases into the atmosphere through the process of hydrocarbon combustion. Indeed, the whole point of the complex supply chain created by the fossil fuel industry is the supply of such fuel for burning hydrocarbons. The three claims sharply raise, perhaps for the first time in these direct action environmental protest cases, the applicability and legal relevance of the Aarhus Convention ("Aarhus") (full title: Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters), an international convention that the United Kingdom is party to, having ratified the treaty almost 20 years ago in 2005 (analysed in detail in **Section X. Aarhus Convention Analysis**). In particular, Ms Ireland and Mr Laurie rely on Article 3(8) of Aarhus, which provides insofar as material:

> "Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement."

5. Their joint submission is that the grant of final injunctions would be "in breach of Aarhus" and "an excessive use of the law". More generally, the environmental protest groups in these three claims maintain that burning fossil fuel is a major contributor to the environmental emergency they wish to bring to the urgent attention of the general public and the Government. They intend to pressurise the Government into ending investment in fossil fuels and halting the issuing of licences and consents for their exploration, development and production. In pursuit of this aim, from the spring until the autumn of 2022, environmental groups, including JSO, directed protests at the fossil fuel industry, including Shell. Their tactics have been variable and have explored new ways to manifest their rights under the European Convention on Human Rights ("ECHR") to freedom of expression and assembly and association. Some people support them; others share their concerns about climate change and the environment but disapprove of their protest methods. In this it is important to remind oneself of the words of Sedley LJ in *Redmond-Bate v DPP* [2000] HRLR 249 at para 20:

> "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having."

Shell maintains that the acts of the protesters have gone beyond mere irritation, but damage or create the strong probability of damaging Shell's substantive rights under the civil law. Various of the campaign groups have explicitly called for acts of "civil disobedience", a term with a long and complex history. It was defined by Rawls in his landmark *A Theory of Justice* (1971) as a

> "public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government." (p.364)

6. A key issue the court has been invited to examine by the defendants is whether peaceful acts contrary to the law and the rights of others under the civil law are protected by the Aarhus Convention, and if so, in what way. Previously in these claims, when Shell

sought to protect its commercial interests from what it said was unlawful protest activity, various judges of this court granted interim injunctions against a shifting array of defendants to prohibit direct action protest which targeted three different parts of Shell's broad business activities:

(1) "**Haven**": Shell's Haven Oil Refinery in Stanford-le-Hope, Essex, a substantial fuel storage and distribution facility (**Claim 1**);

(2) "**Tower**": Shell Centre Tower on London's South Bank, an administrative centre for Shell's UK operations (**Claim 2**);

(3) "**Petrol stations**": petrol stations which are retail customers of Shell, buying Shell's fuel and selling it on to the public and commercial customers via fuel pumps on petrol station forecourts (**Claim 3**).

7. This judgment must be read in conjunction with the previous judgments of this court. The relevant judgments are tabulated below for convenience and when mentioned will be referred to by the name of the judge (for example, "the Hill judgment" or "Johnson J at para XX"). In all of them, Shell succeeded in obtaining or renewing interim injunctions.

Judgment Date	**Site(s)**	**Expiry**	**Judge**	**Citation**
5 May 2022	Haven Tower	2 May 2023	Bennathan J	Ex tempore (no transcript available)
20 May 2022	Petrol stations	12 May 2023	Johnson J (hearing 13 May 2022)	[2022] EWHC 1215 (QB)
23 May 2023	All 3 claims	12 May 2024	Hill J (hearing dates: 25-26 April 2023)	[2023] 1 WLR 4358 [2023] EWHC 1229 (KB)
24 April 2024	All 3 claims	12 November 2024 or 4 weeks after final hearing (whichever later)	Cotter J	[2024] EWHC 1546 (KB)

8. Therefore, these are three separate but connected claims that have been managed together for administrative convenience and efficiency. I come to this case completely independently and have considered the claims afresh. Having received submissions for a day and a half, I reserved judgment and extended the interim injunctions pending the handing down of the court's decision. This is that decision.

9. Before turning to the specific details of the claims, there are four immediate contexts to the applications for final injunctive relief.

§II. FOUR CONTEXTS

Context 1: The burning of fossil fuels

10. It is a significant understatement to say that climate change and the existence or not of an environmental emergency are controversial, highly contested issues. There has been a mass of litigation in both civil and criminal courts as a result of this vital public debate. The most recent expression in the courts comes from our highest court, the Supreme Court, in *R (on the application of Finch on behalf of the Weald Action Group)(Appellant) v Surrey County Council and others (Respondents)* [2024] UKSC 20. Neither party had provided the court with this authority, but the court drew it to their attention and ensured both parties had an opportunity to read its material passages and make submissions on it. Lord Leggatt, delivering the unanimous judgment of the court, said at the very outset of the court's judgment:

> "1. Anyone interested in the future of our planet is aware by now of the impact on its climate of burning fossil fuels—chiefly oil, coal and gas. When fossil fuels are burnt, they release carbon dioxide and other "greenhouse gases"—so called because they act like a greenhouse in the earth's atmosphere, trapping the sun's heat and causing global surface temperatures to rise. According to the United Nations Environment Programme ("UNEP") Production Gap Report 2023, p 3, close to 90% of global carbon dioxide emissions stem from burning fossil fuels.
>
> 2. The whole purpose of extracting fossil fuels is to make hydrocarbons available for combustion. It can therefore be said with virtual certainty that, once oil has been extracted from the ground, the carbon contained within it will sooner or later be released into the atmosphere as carbon dioxide and so will contribute to global warming. This is true even if only the net increase in greenhouse gas emissions is considered. Leaving oil in the ground in one place does not result in a corresponding increase in production elsewhere: see UNEP's 2019 Production Gap Report, p 50, which reported, based on studies using elasticities of supply and demand from the economics literature, that each barrel of oil left undeveloped in one region will lead to 0.2 to 0.6 barrels not consumed globally over the longer term."

11. It is that "virtual certainty" noted by the Supreme Court that is of concern to the defendants in this case, objecting to Shell's involvement in the fossil fuel business due to its damaging impact, they maintain, on climate change and the environmental emergency. Shell's position is simple: its business is lawful. It has rights under the law. These rights have been violated by protesters and there is a real and imminent risk of future unlawful interference by direct action activists. This is Shell's rationale for seeking, securing and continuing injunctive relief. Shell seeks the court's legal protection against direct action which breaches its "civil rights" as the Supreme Court termed them in the recent seminal case of *Wolverhampton CC v London Gypsies and Travellers* [2024] 2 WLR 45 at para 167 ("*Wolverhampton*"). The term "civil rights", coming to prominence in the 1960s, here simply means Shell's rights under the civil law. It is important to note that the draft orders sought by Shell do not seek to prevent lawful protest. Direct action is action that seeks to prevent, obstruct or interfere with other people's ability to carry out their lawful activity. However, the two defendants

who appeared and represented themselves in the case claim that their acts of protest are lawful (or not unlawful) because they are necessary and proportionate infringements of Shell's rights. This is because their protests, and those of others, must be seen in the context of the damage they claim Shell is causing through its fossil fuel commercial activities. Indeed, Ms Ireland submits that if Shell properly understood the damage it is producing across the world, it would "consent" to the protests. Shell disputes this.

Context 2: The Special Rapporteur's mission

12. The second context is the recent "mission" visit to the United Kingdom by the United Nations Special Rapporteur on Environmental Defenders. This office was established in October 2021 by a consensus of parties to the Aarhus Convention, including the United Kingdom, to provide "a rapid response mechanism for the protection of environmental defenders" (UN Economic Commission for Europe website ("UNECE") unece.org; examined in detail later in **Section X**). This international treaty played a significant role in the submissions before me, and I must deal with its status in domestic law and assess its significance for the discretionary decisions the court is being invited to make in these claims.

13. The role of the Special Rapporteur is to "take measures to protect any person experiencing, or at imminent threat of experiencing, penalization, persecution, or harassment for seeking to exercise their rights under the Aarhus Convention". The Aarhus Convention protects not just individuals but non-governmental organisations seeking to safeguard the environment. The Special Rapporteur is "the first mechanism specifically safeguarding environmental defenders to be established within a legally binding framework either under the United Nations system or other intergovernmental structure" (both quotes UNECE, ibid.).

14. The Special Rapporteur who visited the United Kingdom is Michael Forst. Mr Forst was elected at an extraordinary meeting of signatory parties in October 2022. He visited between 10-12 January 2024. I set out parts of his mission report since it is cited by and relied on by both Ms Ireland and Mr Laurie, who took part in direct action protests at Shell's Cobham petrol station in August 2022 (Claim 3). They emphasise the significance of the mission report, coming as it does from an officeholder appointed by the parties to this important international convention that the United Kingdom has chosen to become party to. Mr Forst writes:

> "On 10 – 12 January 2024, I made my first visit to the United Kingdom since I was elected as UN Special Rapporteur on Environmental Defenders under the Aarhus Convention in June 2022. During my visit I met with government officials and with environmental defenders, including NGOs, climate activists and lawyers. I am issuing this statement in the light of the extremely worrying information I received in the course of these meetings regarding the increasingly severe crackdowns on environmental defenders in the United Kingdom, including in relation to the exercise of the right to peaceful protest.
>
> These developments are a matter of concern for any member of the public in the UK who may wish to take action for the climate or environmental protection. The right to peaceful protest is a basic human right. It is also an essential part of a healthy democracy. Protests, which aim to express dissent and to draw attention to a particular issue, are by their nature disruptive. The fact that they cause

> disruption or involve civil disobedience do not mean they are not peaceful. As the UN Human Rights Committee has made clear, States have a duty to facilitate the right to protest, and private entities and broader society may be expected to accept some level of disruption as a result of the exercise of this right.
>
> During my visit, however, I learned that, in the UK, peaceful protesters are being prosecuted and convicted under the Police, Crime, Sentencing and Courts Act 2022, for the criminal offence of "public nuisance", which is punishable by up to 10 years imprisonment. I was also informed that the Public Order Act 2023 is being used to further criminalize peaceful protest. In December 2023, a peaceful climate protester who took part for approximately 30 minutes in a slow march on a public road was sentenced to six months imprisonment under the 2023 law.
>
> …
>
> In addition to the new criminal offences, I am deeply troubled at the use of civil injunctions to ban protest in certain areas, including on public roadways. Anyone who breaches these injunctions is liable for up to 2 years imprisonment and an unlimited fine. Even persons who have been named on one of these injunctions without first being informed about it – which, to date, has largely been the case – can be held liable for the legal costs incurred to obtain the injunction and face an unlimited fine and imprisonment for breaching it. The fact that a significant number of environmental defenders are currently facing both a criminal trial and civil injunction proceedings for their involvement in a climate protest on a UK public road or motorway, and hence are being punished twice for the same action, is also a matter of grave concern to me.
>
> As a final note, during my visit, UK environmental defenders told me that, despite the personal risks they face, they will continue to protest for urgent and effective action to address climate change. For them, the threat of climate change and its devastating impacts are far too serious and significant not to continue raising their voice, even when faced with imprisonment. We are in the midst of a triple planetary crisis of climate change, biodiversity loss and pollution. Environmental defenders are acting for the benefit of us all. It is therefore imperative that we ensure that they are protected. While the gravity of the information I received during my visit leads me to issue the present statement to express my concerns without delay, I will continue to look more deeply into each of the issues raised during my visit and in the formal complaints submitted to my mandate. In this regard, I also look forward to engaging in a constructive dialogue with the Government of the United Kingdom in order to ensure that members of the public in the UK seeking to protect the environment are not subject to persecution, penalization or harassment for doing so.
>
> 23 January 2024"

Context 3: Abandonment of costs

15. The third context is a development in court at the very end of legal submissions on the second listed day of the hearing. Shell announced through counsel that it would not be seeking costs against the named defendants in this claim. This was announced in open court without notice to the court or the two attending defendants, Ms Ireland and Mr

Laurie. Shell's change of position caused them to be overwhelmed by emotion, given the strain they have been under as litigants in person. They had feared being bankrupted through an award of Shell's costs against them. The court directed that Shell's new stance on costs be reduced to writing so there could be no future misunderstanding. The script ultimately filed is in these terms:

1. "In this particular case [Claim 3], [Shell U.K. Oil Products Limited] has taken the decision not to seek costs against Named Defendants in the event that it secures the injunctive relief sought.
2. That decision has been arrived at in the specific circumstances of these proceedings including by having regard to the fact that: (i) the Court was addressed by unrepresented Named Defendants who acted in person and who had not breached the injunctions since they have been in place; (ii) substantive new issues of public importance were raised by those Defendants namely the applicability of the Aarhus Convention as a consideration to the Court's discretion under s.37 Senior Courts Act 1981 in the context of environmental protest injunctions, which had not been previously considered by any Court to date; and (iii) they conducted themselves throughout the proceedings in a respectful and constructive manner to everyone and were of assistance to the Court.
3. However, this is a bespoke decision which is limited to the present case and does not reflect Shell policy or its approach in any future case.
4. In deciding not to pursue costs in this case, C3 is giving up its *in principle* entitlement to its reasonable and proportionate costs against those persons who have been joined pursuant to the obligations under *Canada Goose* and against whom a final injunction is secured on the application of the usual costs rules CPR r.44.2(2)(a). Costs should follow the event and a successful party's entitlement to such costs is necessary in a democratic society for the purposes of Articles 10 and 11 of the ECHR. C3's *in principle* entitlement is reinforced by the fact that: (i) that the Named Defendants were invited to sign undertakings in order to avoid potential costs consequences; (ii) the consequence of refusing to sign such undertakings was repeatedly explained to them; and (iii) the desire to make submissions is no justification for refusing to sign such undertakings, in circumstances where interested persons may address the Court pursuant to CPR r.40.9 and/or the Cotter J Petrol Stations Order provide for any other person who "claims to be affected by the Order and wishes to vary or discharge it or to be heard at the final hearing" (§15)."

Context 4: The cautionary approach to PUs

16. Each of the three applications for final orders includes applications for injunctive relief against PUs. This is a serious step. It should not be underestimated or taken for granted as the senior courts have repeatedly observed. The Court of Appeal noted in *Ineos Upstream v Persons Unknown* [2019] 4 WLR 100 (CA) ("*Ineos*") at para 31:

> "A court should be inherently cautious about granting injunctions against unknown persons since the reach of such an injunction is necessarily difficult to assess in advance."

17. This cautionary note was repeated by the court in *Bromley LBC v Persons Unknown* [2020] 4 All ER 114 (CA) at para 34:

> *"*a court should always be cautious when considering granting injunctions against persons unknown.*"*

18. This is because the precautionary prohibition may seriously impinge on the right to freedom of expression and the right to protest of very large numbers of members of the public. This is why such injunctions are sometimes called injunctions "against the world" (contra mundum). While such far-reaching scope is sometimes authorised in intellectual property and privacy cases, when it occurs in public protest situations, its seriousness attains a different complexion. It is not something that can or should go through as a matter of routine, and is an aspect of these claims I have anxiously considered.

19. I have taken the non-conventional step of providing these four contexts at the beginning of the judgment to illustrate how complex, important and multifaceted these claims are. To offer another crude measure: the papers provided to me exceeded 8000 pages. Inevitably, this judgment, which must deal with all three claims, is lengthy. I have tried to simplify wherever possible. However, some of the complexity remains indispensable to an informed understanding of the court's reasoning, and for that there can be no apology.

§III. PARTIES

20. I now detail the parties to the claims. In all three claims the Shell corporate entity involved is represented by Ms Stacey KC and Mr Semakula. No defendant appeared in any of the claims save for Claim 3 (petrol stations), where Ms Ireland and Mr Laurie appeared in person. Both counsel and both litigants in person made submissions to the court, for which it is grateful. The court particularly wishes to note the thoughtful and respectful way in which Ms Ireland and Mr Laurie conducted themselves throughout. Further, the public gallery was invariably filled with their supporters, who also conducted themselves responsibly throughout. This demonstrates how this serious and contentious issue can be explored in public in a productive and constructive way.

Claim 1: Haven

21. In the first claim, the claimant is Shell U.K. Limited. This company is the freeholder of the Shell Haven Oil Refinery facility, on the Thames Estuary, south of Basildon and between Tilbury and Southend-on-Sea. The defendants are PUs. The torts relied on are trespass, public nuisance, private nuisance (interference with access from the public highway) and private nuisance (interference with private right of way).

Claim 2: Tower

22. In the second claim, the claimant is Shell International Petroleum Company Limited. This company is the freehold owner of the Shell Centre Tower, a large office building rising prominently on the South Bank's Belvedere Road near to the London Eye. The defendants are PUs. The torts relied on are trespass, public nuisance in the form of

obstruction of the highway, private nuisance in the form of interference with access from the highway, and private nuisance in the form of interference with private right of way.

Claim 3: Petrol stations

23. In the third claim, the claimant is Shell U.K. Oil Products Limited. This company supplies fuel to Shell-branded petrol stations across the country. While Shell has a proprietary right in the land on which some petrol stations are situated, it does not in all the outlets it wishes to protect through injunctive relief. Therefore, rather than trespass or nuisance, the tort relied on is a conspiracy to injure. The claim, put very shortly, is that jointly conducted direct action at or on petrol station forecourts creates very real risk of significant harm and injury. The defendants are PUs and a number of named defendants. Fourteen identified individuals were joined to the claim by Soole J at a review and case management hearing on 15 March 2024. They had been arrested on suspicion of criminal damage and/or aggravated trespass and/or conspiracy to destroy or damage property and/or wilful obstruction of the highway and/or causing a public nuisance and/or being in possession of an offensive weapon at the petrol station sites in connection with certain environmental protest groups.

24. On 16 October 2023, Shell's solicitors wrote to 29 of the 30 protesters identified as being arrested at petrol stations protests at Cobham Services and Acton Vale in August 2022. One person had died in the interim. Shell invited the remaining 29 protesters to agree to undertakings not to engage in certain protest activities, the breach of such promise exposing them to fine, asset seizure or imprisonment for contempt of court. A further letter was sent on 16 November 2023. Fourteen people gave undertakings. That left 15 people. One person gave an undertaking on 5 March 2024. Therefore, when the matter came before Soole J on 15 March, the remaining 14 people were joined to the claim as named defendants. Of these named defendants, on 26 September 2024, the third named defendant gave an undertaking in the terms the claimant sought. That left 13 defendants, including Ms Ireland as the seventh defendant and Mr Laurie as the eighth.

§IV. ISSUES

25. The issues before the court were:

    (1) Whether to grant final orders in respect of each of the three claims;

    (2) Whether the duration of the final orders should be 5 years;

    (3) Whether alternative service orders should be granted;

    (4) Whether to grant the application to remove the third defendant from Claim 3 (petrol stations) and consequently amend the claim form and particulars of claim to reflect the strike out.

26. I can deal with Issue 4 immediately. I have carefully reviewed the evidence and it is appropriate to grant the application to remove the third defendant in the petrol stations

claim. She has given the undertaking sought. I need say no more about it. That leaves the three prime issues for the court to determine.

§V. APPROACH TO JUDGMENT

27. I make plain that my approach to the judgment text is heavily informed by the approach of the Court of Appeal in *Re B (A Child) (Adequacy of Reasons)* [2022] EWCA Civ. 407. The court stated at para 58:

> "... a judgment is not a summing-up in which every possible relevant piece of evidence must be mentioned."

28. Therefore, I focus on what has been essential to my determinations in this case. Numerous side issues were thrown up. I do not need to resolve them all. The critical issues are clear. I focus on those as are necessary to determine the remaining three prime identified issues here. While I do not set out all the evidence the court received, and it is extensive, I emphasise that as part of my review I considered or reconsidered all the prime evidence. I reserved judgment for precisely that reason.

§VI. THE PROTESTS

29. The targeting of Shell in the first part of 2022 led to its seeking injunctive relief from the court. That said, Shell has repeatedly emphasised that it does not oppose lawful protest. The most recent evidential expression of this sentiment can be found in the statement of Paul Eilering, the Interim Cluster Security Manager for the Shell businesses' UK assets, in a statement filed on 1 July 2024 in support of the final injunctions:

> "The Claimants have not sought orders which stop protesters from undertaking peaceful protests whether near the Shell Sites or otherwise. That remains the case. The Claimants' concern continues to be the need to reinforce its proprietary rights and to mitigate the serious health, safety and wellbeing risks (to the Claimants' employees, contractors, visitors and indeed protesters themselves) posed by the kind of unlawful actions and activities which prompted the Claimants to seek injunctive relief back in April 2022."

30. Against this, the protesters maintain that Shell is in truth more concerned about its profits and brand reputation than the welfare of people or the planet. As Mr Laurie put it, Shell "just doesn't care" and "does not take the climate emergency seriously". As Ms Ireland says, if Shell did actually care, and understood the consequences of its actions, "it would consent to the protests". How have matters come to this? I now provide a brief account of the protests.

Haven

31. Mr Prichard-Gamble, a security manager with Shell, provided evidence that Shell became aware in early 2022 that environmental campaign groups, including XR and JSO, intended to target the fossil fuel industry, including Shell. XR called for a

campaign of civil disobedience, which would include "testing the limits of the protest law", to end "the fossil fuel economy". One of Shell's Distribution Operations Managers Ian Brown provided Bennathan J with a statement dated April 2022 detailing protest activity around Haven. This included a six-hour incident on 3 April 2022 whereby a group of protesters blocked the main access road to Haven, boarded tankers and blocked a tanker, requiring police attendance. Further, protesters tried to access the jetty at Haven; and similar incidents at fuel-related sites near to Haven caused concern that Haven was an imminent target. Deep anxiety arose because the Haven site is used for the storage and distribution of highly flammable hazardous products. Unauthorised access could cause a fire or explosion. Unauthorised access to the jetty could lead to a significant release of hydrocarbons into the Thames Estuary resulting in serious pollution and risk to health and the local environment. Thus Shell's stated concern was for the safety and well-being of Shell's staff and contractors, the protesters themselves and the local environment.

Tower

32. On 6 April 2022, what appeared like paint was thrown on the walls and above one of the staff entrances to the Tower, resulting in black marks and substantial spattering. On 13 April 2022 approximately 500 protesters closed on the Tower, banging drums and carrying banners stating, "Jump Ship" and "Shell=Death", clearly directed at Shell staff, several glued themselves to the reception area of the Tower and another Shell office nearby. On 15 April 2022, approximately 30 protesters with banners obstructed the road outside the Tower. On 20 April 2022, 11 protesters with banners, used a megaphone and ignited smoke flares. Protesters also inscribed the XR logo on the outside of the Tower. On several occasions the Tower was placed in security "lockdown".

Petrol stations

33. Benjamin Austin is a Health, Safety and Security Manager with Shell. He provided a statement to Johnson J about protests directed at petrol stations. He narrated how on 28 April 2022, two petrol stations on the M25 were the targets of protest activity. Forecourt entrances were blocked and the displays of fuel pumps were either obscured with spray paint or smashed with hammers. Kiosks were interfered with "to stop the flow of petrol", while protesters glued themselves to one another or fuel pumps or the roof of a tanker. In total, 55 fuel pumps were damaged, including 35 out of the 36 pumps at Cobham. They became unsafe for use and the forecourt was closed. Johnson J noted at para 9 that the protesters were "committed to protesting in ways that are unlawful, short of physical violence to the person". The campaign websites referred to "civil disobedience", "direct action", and a willingness to risk "arrest" and "jail time". He continued at para 18:

> "18. Petrol is highly flammable. Ignition can occur not just where an ignition source is brought into contact with the fuel itself, but also where there is a spark (for example from static electricity or the use of a device powered by electricity) in the vicinity of invisible vapour in the surrounding atmosphere. Such vapour does not disperse easily and can travel long distances. There is therefore close regulation …

19. The use of mobile telephones on the forecourt (outside a vehicle) is prohibited for that reason. The evidence shows that at the protests on 28 April 2022 protesters used mobile phones on the forecourts to photograph and film their activities. Further, as regards the use of hammers to damage pumps, Mr Austin says: "Breaking the pump screens with any implement could cause a spark and in turn potentially harm anyone in the vicinity. The severity of any vapour cloud ignition could be catastrophic and cause multiple fatalities. Unfortunately, Shell Group has tragically lost several service station employees in Pakistan in the last year when vapour clouds have been ignited during routine operations." I was not shown any positive evidence as to the risks posed by spray paint, glue or other solvents in the vicinity of fuel or fuel vapour, but I was told that this, too, was a potential cause for concern."

34. On 24 August 2022, there was another protest at the Cobham M25 petrol station. This was the direct action that Ms Ireland and Mr Laurie took part in. The forecourt was blocked by seated protesters. Two petrol pump screens were smashed. Ms Ireland did not do this. Mr Laurie had intended to smash petrol pump screens, but "changed course", as he put it in his witness statement, when he saw police at the scene. He glued himself to the ground instead, blocking the forecourt. Both Ms Ireland and Mr Laurie were arrested. They stand trial at Winchester Crown Court in August 2025 and are on bail pending that hearing.

§VII. INJUNCTION TERMS

35. The future acts of protest that the claimants seek to restrain vary according to the site. The shared intention is to avoid interference with the claimants' right under the civil law not to be subject to the torts specifically pleaded by Shell.

Claim 1: Haven

36. In respect of Haven, the acts sought to be restrained are:

a. Entering or remaining upon any part of Haven without the consent of the Claimant;

b. Blocking access to any of the gateways to Haven the locations of which are identified and marked blue on "Plan 1" and "Plan 2" which are appended to this Order in the Third Schedule;

c. Causing damage to any part of Haven whether by:

i. Affixing themselves, or any object, or thing, to any part of Haven, or to any other person or object or thing on or at Haven;

ii. Erecting any structure in, on or against Haven;

iii. Spraying, painting, pouring, sticking or writing with any substance on or inside any part of Haven; or

iv. Otherwise.

Claim 2: Tower

37. The Tower injunction is applied for in similar terms to Claim 1.

Claim 3: Petrol stations

38. In respect of Petrol Stations, the acts relate to the disruption or interference with the supply or sale of fuel (to those premises or outlets connected to Shell). They are specified as:

a. Directly blocking or impeding access to any pedestrian or vehicular entrance to a Petrol Station forecourt or to a building within the Petrol Station;

b. Causing damage to any part of a Petrol Station or to any equipment or infrastructure (including but not limited to fuel pumps) upon it;

c. Operating or disabling any switch or other device in or on a Petrol Station so as to interrupt the supply of fuel from that Petrol Station, or from one of its fuel pumps, or so as to prevent the emergency interruption of the supply of fuel at the Petrol Station; and

d. Causing damage to any part of a Petrol Station, whether by:
   i. Affixing or locking themselves, or any object or person, to any part of a Petrol Station, or to any other person or object on or in a Petrol Station;
   ii. Erecting any structure in, on or against any part of a Petrol Station;
   iii. Spraying, painting, pouring, depositing or writing in any substance on to any part of a Petrol Station.

39. Each draft order further specifies that the defendant must not do any of these acts by means of another person acting on his/her/their behalf, or acting on his/her/their instructions, or by another person acting with his/her/their encouragement.

§VIII. LAW

40. Frequently in judgments, judges have the advantage of saying that the law is uncontroversial and can be stated shortly. I do not have that advantage. The law around protests and particularly injunctive relief against PUs - what is sometimes called "against the world" - has rapidly evolved in the last few years. Few areas of law in the recent past have undergone development of such rapidity accompanied by stringent scrutiny all the way to the Supreme Court. Therefore, the legal context for these claims is markedly different to that of a decade ago, or even five years previously, as the Court of Appeal noted in *London Borough of Barking and Dagenham and Others v Persons Unknown and Others* [2022] EWCA Civ 13 ("*Barking*").

41. This has, as Lord Reed put it in *Wolverhampton* at para 22:

> "illustrate[d] the continuing ability of equity to innovate both in respect of orders designed to protect and enhance the administration of justice … [and] in respect of orders designed to protect substantive rights."

42. I will set down the main features of this evolution, simplifying wherever possible, dealing first with the discretionary power confirmed by section 37 of the Senior Courts Act 1981 ("SCA 1981") before reviewing the main features of the common law. I stress that I have considered and adopt the law as previously set down in the claims at the interlocutory stage by Johnson, Hill and Cotter JJ in the judgments tabulated above, and am grateful to them for it.

1. Statute

43. The authority to grant an injunction in the exercise of the court's general "equitable discretionary power" (*Wolverhampton*, para 167) is set down in section 37 of the SCA 1981. It provides:

> "the High Court may by order (whether interlocutory or final) grant an injunction, in all cases in which it appears to the court to be just and convenient to do so"
>
> and
>
> "on such terms and conditions as the court thinks fit."

44. Injunctions are equitable in origin and section 37 is a statutory "confirmation" of how decisions about them should be approached (*Wolverhampton*, para 17). Section 37, as explained by Lord Scott in *Fourie v Le Roux* [2007] UKHL 1, simply confirms and restates the power of the courts to grant injunctions which existed before the Supreme Court of Judicature Act 1873 ("the 1873 Act") and still exists. That power was transferred to the High Court by section 16 of the 1873 Act (see Spry, *Equitable Remedies* (9th ed) at 333). The power of courts with equitable jurisdiction to grant injunctions is, subject to any statutory limitations, unlimited.

2. Common law

45. Survey of the authorities involving recent protest cases reveals different formulations of the "test" (if that it is) to be applied. This is inevitable: the senior courts have repeatedly stated that there is no uniform and invariable test or standard. This was recognised as long ago as *Hooper v Rogers* [1975] Ch 43, where at 50, Russell LJ, giving the judgment of the Court of Appeal said:

> "In di□erent cases, di□ering phrases have been used in describing circumstances in which mandatory injunctions and quia timet injunctions will be granted. In truth, it seems to me that the degree of probability of future injury is not an absolute standard: what is to be aimed at is justice between the parties, having regard to all the relevant
> circumstances."

46. In this case, while recognising the existence of no "absolute standard" to definitively measure how to do justice between the parties, I adopt the approach of the Supreme Court in *Wolverhampton* at para 218. The claimant

> "must satisfy the court by full and detailed evidence that there is a compelling justification for the order sought (see para 167(i) above). There must be a strong probability that a tort or breach of planning control or other aspect of public law is to be committed and that this will cause real harm. Further, the threat must be real and imminent."

47. For assistance, I add para 167(i) since it was referred to:

> "if:
> (i) There is a compelling need, sufficiently demonstrated by the evidence, for the protection of civil rights (or, as the case may be, the enforcement of planning control, the prevention of anti-social behaviour, or such other statutory objective as may be relied upon) in the locality which is not adequately met by any other measures available to the applicant local authorities (including the making of byelaws). This is a condition which would need to be met on the particular facts about unlawful Traveller activity within the applicant local authority's boundaries."

48. Linden J was, to my mind, right to sound a note of caution in *Esso Petroleum v PUs* [2023] EWHC 1837 (KB) at para 63 about reducing any formulation to an invariable test:

> "With respect, I confess to some doubts about whether the two questions which he [Marcus Smith J in *Vastint Leeds BV v Persons Unknown* [2018] EWHC 2456 (Ch)] identified are part of a *"test"* or a *"two stage"* test. To my mind they are questions which the Court should consider in applying the test under section 37 Senior Courts Act 1981, namely what is *"just and convenient"* but they are not threshold tests."

49. Linden J then went on quote from *Gee on Commercial Injunctions* (7th Edition) which says at 2-045:

> "There is no fixed or 'absolute' standard for measuring the degree of apprehension of a wrong which must be shown in order to justify quia timet relief. The graver the likely consequences, and the risk of wrongdoing the more the court will be reluctant to consider the application as 'premature'. But there must be at least some real risk of an actionable wrong."

50. This, it seems to me, must be right. This is precisely why the Supreme Court has identified questions of the probability of rights breach with attendant harm. The court will inevitably and rightly be concerned by the risk of very grave consequence and may be prepared to grant injunctive relief where the risk of occurrence is lower than a case where the harm is less severe. All these factors have to be weighed together. Therefore, *solely* for organisational purposes, and without suggesting the existence of a universal test, I examine the case approaching the relevant questions by separating out two vital factors that need to be assessed holistically:

> (1) **Consequences**: of conduct in terms of (a) breach of rights and (b) level of harm ("Limb 1");
> (2) **Risk**: of the conduct's future occurrence ("Limb 2").

51. The approach to be adopted when granting a final injunction in the context of protests against PU (including newcomers) is not materially altered by the decision of the Supreme Court in *Wolverhampton*. The Supreme Court confirmed that injunctions can be granted against PUs, including "newcomers" (para 167) and expressly stated at para 235 that:

> "nothing we have said should be taken as prescriptive in relation to newcomer injunctions in other cases, such as those directed at protesters who engage in direct action by, for example, blocking motorways, occupying motorway gantries or occupying HS2's land with the intention of disrupting construction".

52. Therefore, the following seven "procedural guidelines" in *Canada Goose v Persons Unknown* [2020] 1 WLR 2802 ("*Canada Goose*") at para 82 remain good law and must still be satisfied in claims for protest injunctions against PUs and have been applied in all subsequent protest injunction cases:

> "(1) The "persons unknown" defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The "persons unknown" defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the "persons unknown".
> (2) The "persons unknown" must be defined in the originating process by reference to their conduct which is alleged to be unlawful.
> (3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify quia timet relief.
> (4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as "persons unknown", must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.
> (5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights.
> (6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in nontechnical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.

> (7) The interim injunction should have clear geographical and temporal limits. It must be time limited because it is an interim and not a final injunction. We shall elaborate this point when addressing Canada Goose's application for a final injunction on its summary judgment application."

53. Ritchie J said in *Valero Energy Ltd v PU* [2024] EWHC 134 (KB) ("*Valero*") at para 57 that:

> "in summary judgment applications for a final injunction against unknown persons ("PUs") or newcomers, who are protesters of some sort, the following 13 guidelines and rules must be met for the injunction to be granted. These have been imposed because a final injunction against PUs is a nuclear option in civil law akin to a temporary piece of legislation affecting all citizens in England and Wales for the future so must be used only with due safeguards in place."

54. The Supreme Court stated in *DPP v Ziegler* [2021] UKSC 23 ("*Ziegler*") that if the PUs' rights under the European Convention on Human Rights (for instance under Articles 10(2) and 11(2)) are engaged and restricted by the proposed injunction, a careful balancing exercise is required. The injunction must be necessary and proportionate to the need to protect the claimants' right.

55. The situation is different with trespass to private land. A landowner whose title is not disputed is prima facie entitled to an injunction to restrain a threatened or apprehended trespass on her or his land (*Snell's Equity* (34th ed) at para 18-012). Further, Convention rights under the ECHR do not confer a right to trespass onto private land. The basis for this conclusion is that the rights under Articles 9, 10 and 11 are qualified rights. This matter has been explored by the courts at senior level. In *Cuciurean v Secretary of State for Transport* [2021] EWCA 357, Warby LJ said:

> "9. The following general principles are well-settled, and uncontroversial on this appeal.
>
> (1) Peaceful protest falls within the scope of the fundamental rights of free speech and freedom of assembly guaranteed by Articles 10(1) and 11(1) of the European Convention on Human Rights and Fundamental Freedoms. Interferences with those rights can only be justified if they are necessary in a democratic society and proportionate in pursuit of one of the legitimate aims specified in Articles 10(2) and 11(2). Authoritative statements on these topics can be found in *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23 [43] (Laws LJ) and *City of London v Samede* [2012] EWCA Civ 160 [2012] 2 All ER 1039, reflecting the Strasbourg jurisprudence.
>
> (2) But the right to property is also a Convention right, protected by Article 1 of the First Protocol ('A1P1'). In a democratic society, the protection of property rights is a legitimate aim, which may justify interference with the rights guaranteed by Article 10 and 11. Trespass is an interference with A1P1 rights, which in turn requires justification. In a democratic society, Articles 10 and 11 cannot normally justify a person in trespassing on land of which another has *the right to possession*, just because the defendant wishes to do so for the purposes of protest against government policy. Interference by trespass will rarely be a necessary and proportionate way of pursuing the right to make such a protest."

56. In *DPP v Cuciurean* [2022] EWHC 736 (Admin), an HS2 protest case before the Divisional Court, Lord Burnett CJ said:

> "45. We conclude that there is no basis in the Strasbourg jurisprudence to support the respondent's proposition that the freedom of expression linked to the freedom of assembly and association includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded. The Strasbourg Court has not made any statement to that effect. Instead, it has consistently said that articles 10 and 11 do not "bestow any freedom of forum" in the specific context of interference with property rights (see *Appleby* at [47] and [52]). There is no right of entry to private property or to any publicly owned property. The furthest that the Strasbourg Court has been prepared to go is that where a bar on access to property has the effect of preventing any effective exercise of rights under articles 10 and 11, or of *destroying* the *essence* of those rights, then it would not exclude the possibility of a State being obliged to protect them by regulating property rights.
>
> 46. The approach taken by the Strasbourg Court should not come as any surprise. Articles 10, 11 and A1P1 are all qualified rights. The Convention does not give priority to any one of those provisions. We would expect the Convention to be read as a whole and harmoniously. Articles 10 and 11 are subject to limitations or restrictions which are prescribed by law and necessary in a democratic society. Those limitations and restrictions include the law of trespass, the object of which is to protect property rights in accordance with A1P1. On the other hand, property rights might have to yield to articles 10 and 11 if, for example, a law governing the exercise of those rights and use of land were to destroy the essence of the freedom to protest. That would be an extreme situation. It has never been suggested that it arises in the circumstances of the present case, nor more generally in relation to section 68 of the 1994 Act. It would be fallacious to suggest that, unless a person is free to enter upon private land to stop or impede the carrying on of a lawful activity on that land by the landowner or occupier, the essence of the freedoms of expression and assembly would be destroyed. Legitimate protest can take many other forms."

57. For these reasons, in *HS2 v PUs* [2022] EWHC 2360 (KB), Julian Knowles J said at para 80:

> *"*In relation to defences to trespass, genuine and *bona fide* concerns on the part of the protesters about HS2 or the proposed HS2 Scheme works do not amount to a defence, and the Court should be slow to spend significant time entertaining these: *Samede*, [63]."

58. In similar vein, in *Halsbury's Law*s (5th ed) at para 325, it is said that generally "it is not a defence to show that although the act complained of is a nuisance with regard to the highway, it is in other respects beneficial to the public."

§IX. ANALYSIS OF THE 15 FACTORS: PART I

59. To assist in the analysis, I reduce the "guidelines" Ritchie J identifies to tabular form for ease of reference, remaining indebted to him for his analysis. I perceive these to amount to a series of 15 factors that together form a vital checklist. I use the term "factor" to underline that these are matters for the court to examine and then weigh in the overall equitable discretionary exercise under section 37 of the SCA 1981. Once the court has evaluated the factors globally and holistically, an accurate decision on whether it is "just and convenient" to exercise the section 37 discretion in favour of granting the injunction applied for is possible. Only then may terms be properly determined. The statutory working of section 37 is deliberately framed as "may" grant not "must", and the court retains an overall equitable discretion whether to grant the injunction or not depending on the overall justice of the case. The court must exercise its necessarily wide discretion judicially. I take that to mean rationally, reasonably and based on the totality of evidence, fairly considered.

Factor	**Summary**
1.	Cause of action clearly identified
2.	Full and frank disclosure by claimant
3.	Sufficient evidence to prove claim
4.	No defence (or no realistic defence where no defence filed)
5.	Balance of convenience / compelling justification or need
6.	Proportionate interference with ECHR rights
7.	Damages not adequate remedy
8.	Clear identification of defendants: (a) Named defendants identified in claim form and injunction order by tortious acts prohibited (b) PUs capable of being identified and served
9.	Terms of injunction: (a) Sufficiently clear and precise (b) Only prohibiting lawful conduct where no other proportionate means to protect claimant's rights
10.	Correspondence between terms of injunction and threatened tort
11.	Clear and justifiable geographical limit
12.	Clear and justifiable temporal limit
13.	Service: all reasonable steps taken to notify defendants
14.	Right to set aside or vary
15.	Review

60. I now examine each of the 15 factors in turn, comprising as they do a structured and essential checklist.

1 Cause of action clearly identified

61. The next table sets down the prime elements of each of the torts pleaded by the claimants.

Trespass	(a) entry onto land in the possession of another (b) without justification or the other's consent
Private nuisance	(a) substantial and unreasonable interference (b) with the land of another or the enjoyment of that land
Public nuisance	(a) wrongful acts or omissions on or near a highway (b) causing the public ("all the King's subjects") or all members of an identifiable class proximate to the acts' operation (c) to be hindered or prevented from freely, safely and conveniently passing along the highway (d) [and] possessors of land must demonstrate substantial inconvenience or damage to them
Conspiracy to injure by unlawful means	(a) an unlawful act by the defendant (b) with the intention of injuring the claimant (c) pursuant to an agreement with others (d) which injures the claimant

Haven and Tower

62. These sites share a common feature: Shell has a proprietary right in the land. The torts relied on reflect that interest, being trespass to land and private nuisance. It is unarguable but that they have been clearly identified. As noted by Julian Knowles J in *HS2 Ltd v Persons Unknown* [2022] EWHC 2360 (KB) at para 85:

> "Private nuisance is any continuous activity or state of affairs causing a substantial and unreasonable interference with a [claimant's] land or his use or enjoyment of that land: *Bamford v Turnley* (1862) 3 B & S; *West v Sharp* [1999] 79 P&CR 327, 332:
>
> Not every interference with an easement, such as a right of way, is actionable. There must be a substantial interference with the enjoyment of it. There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. Thus, the grant of a right of way in law in respect of every part of a defined area does not involve the proposition that the grantee can in fact object to anything done on any part of the area which would obstruct passage over that part. He can only object to such activities, including obstruction, as substantially interfere with the exercise of the defined right as for the time being is reasonably required by him".

63. The unlawful interference with the claimant's right of access to its land via the public highway, where a claimant's land adjoins a public highway, can be a private nuisance (*Cuadrilla Bowland Ltd v Persons Unknown* [2020] 4 WLR 29) ("*Cuadrilla*"). In *Cuadrilla* the Court of Appeal said at para 13:

> "The second type of wrong which the Injunction sought to prevent was unlawful interference with the claimants' freedom to come and go to and from their land.

> An owner of land adjoining a public highway has a right of access to the highway and a person who interferes with this right commits the tort of private nuisance. In addition, it is a public nuisance to obstruct or hinder free passage along a public highway and an owner of land specially affected by such a nuisance can sue in respect of it, if the obstruction of the highway causes them inconvenience, delay or other damage which is substantial and appreciably greater in degree than any suffered by the general public: see *Clerk & Lindsell on Torts*, 22nd ed (2017), para 20–181."

Petrol stations

64. The petrol stations claim sits in a different legal context as Shell does not possess proprietary rights or a sufficient degree of control over all the service station locations. For simplicity's sake, Shell relies on the tort of conspiracy to injure by unlawful means. The claim is that Shell has been the target of a coordinated campaign of protest activity directed at and intended to harm it economically and commercially by disrupting its supply and sale of fuel, which is a lawful activity. The elements of the tort are set out in *Cuadrilla* by Leggatt LJ (as he then was) at para 18 and in the immediately preceding table. This tort was relied on by Julian Knowles J in *Esso Petroleum v PUs* [2023] EWHC 2013 (KB). It was also examined and approved in connection with these claims by Johnson J in *Shell U.K. Oil Products Limited v Persons unknown* [2022] EWHC 1215 (QB) at para 26.

65. On element (a), it is not necessary for the claimant to establish that the underlying conduct is actionable by itself. This was noted by Johnson J at para 29:

> "29. For the purposes of the present case, it is not necessary to decide whether a breach of statutory duty can found a claim for conspiracy to injure, or whether every (other) tort can do so. It is only necessary to decide whether the claimant has established a serious issue to be tried as to whether the torts that are here in play may suffice as the unlawful act necessary to found a claim for conspiracy to injure. Those torts involve interference with rights in land and goods where those rights are being exercised for the benefit of the claimant (where the petrol station is being operated under the claimant's brand, selling the claimant's fuel). Recognising the torts as capable of supporting a claim in conspiracy to injure does not undermine or undercut the rationale for those torts. It would be anomalous if a breach of contract (where the existence of the cause of action is dependent on the choice of the contracting parties) could support a claim for conspiracy to injure, but a claim for trespass could not do so. Likewise, it would be anomalous if trespass to goods did not suffice given that criminal damage does. I am therefore satisfied that the claimant has established a serious issue to be tried in respect of a relevant unlawful act."

66. On (b): the intention of the activities of the protesters is evident from their conduct and the published statements on the websites of the protest groups: it is to disrupt the sale of fuel in order to draw attention to the contribution that fossil fuels make to climate change. That is a prime objective of their protests.

67. On (c): no one suggests that this was anything but a coordinated and agreed joint group protest.

68. On (d): there can be little debate about loss. The petrol stations were unable to sell fuel, with the forecourts being blockaded, petrol pumps damaged and the service station shut to the public. That was all part of the objective of the protest as a stepping stone to raising awareness about fossil fuels. There can be no doubt that the tort relied on by the claimant in the petrol stations claim has been clearly identified with evidence filed by the claimant going to each of the elements. This tort was considered in detail by Johnson J at para 30. He said:

> "The intention of the defendants' unlawful activities is plain from their conduct and from the published statements on the websites of the protest groups: it is to disrupt the sale of fuel in order to draw attention to the contribution that fossil fuels make to climate change. They are not solitary activities but are protests involving numbers of activists acting in concert. They therefore apparently undertake their protest activities in agreement with one another. Loss is occasioned because the petrol stations are unable to sell the claimant's fuel."

69. When the case came before Hill J for review, powerful argument was advanced by Mr Simblet KC on behalf of one defendant that reliance on wide-ranging economic torts, such as conspiracy to injure through unlawful means, was discouraged by the Court of Appeal in *Boyd v Ineos* [2019] 4 WLR 100. The court discharged those parts of an order based on public nuisance and unlawful means conspiracy, leaving only those based on trespass and private nuisance. Hill J concluded at para 129:

> "in *Cuadrilla*, the prohibitions were made out on the facts from claims in private nuisance and at para 81 the court described the prohibition corresponding to unlawful means conspiracy as "a different matter" on which Cuadrilla did not need to rely. However, as Ms Stacey highlighted, the discharge of the injunction based on conspiracy by the Court of Appeal in *Ineos* involved materially different facts, namely, a challenge to an injunction sought before any offending conduct had taken place; and terms which were impermissibly wide. In *Cuadrilla* at para 47 the Court of Appeal noted that the fact that the injunction had been made before any alleged unlawful interference with the claimant's activities had occurred was "important in understanding the decision" and I agree. In contrast, the injunction granted by Johnson J was based on past conduct having already occurred and was suitably narrow in focus."

70. I find in respect of each of the three claims that this requirement has been met.

2 Full and frank disclosure

71. With regard to PUs, the injunctions sought are without notice, by definition. As such, the claimant must act fairly in all material respects, including "a duty to act in the utmost good faith and to disclose to the court all matters which are material to be taken into account by the court in deciding whether or not to grant relief without notice, and if so on what terms" (*Gee on Commercial Injunctions* at para 9-001; there is nothing new in this: see *Thomas A. Edison Ltd v Bullock* (1912) 15 C.L.R. 679 at 682, per Isaacs J; *Dormeuil Freres SA v Nicolian Ltd* [1988] 1 WLR. 1362 at 1368).

72. In respect of named defendants, there remains a high duty of full and frank disclosure. Here Shell has filed and served many thousands of pages of evidence and background material. I detect no want of frankness as opposed to extensive and candid disclosure. It is noticeable that this point was not taken by any named or appearing defendant. I find this requirement met.

3 Sufficient evidence to prove claim

73. The two-limbed approach outlined by the Supreme Court in *Wolverhampton* is useful organisationally here.

Limb 1: strong probability

74. For the reasons given above, I am satisfied that should the acts that the claimants fear take place that there is a "strong probability" of a breach of the claimants' rights in civil law by committing a tort. In large measure the rationale of the direct action as opposed to other forms of protest is avowedly to interrupt, interfere and disrupt. The defendants' case is not that there is no interference, but that it is justified, in the sense of proportionate to the damage they claim Shell is causing.

Limb 2: real and imminent risk

75. As noted by Hill J, Mr Prichard-Gamble on behalf of Shell provided evidence of harm and risk (see Hill judgment at paras 38-40). He stated that (i) the incidents described demonstrate a clear nationwide targeting of members of the wider Shell group of companies and its business operations since April/May 2022; (ii) such demonstrations will continue for the foreseeable future; and (iii) the injunctions need to be extended as they provide a strong deterrent effect and mitigate against the risk of harm which unlawful activities at the sites would otherwise give rise to. Unlawful activity at the sites, he states, presents an unacceptable risk of continuing and significant danger to the health and safety of staff, contractors, the general public and other persons visiting them. In a recent statement, Mr Eilering states:

> "2.4 Each of the Injunction Orders have been carefully considered and drawn so as to ensure that they are not too wide and only prohibit activity which would be clearly unlawful.
>
> 2.6 The Injunction Orders have been obeyed and have acted as an effective deterrent against unlawful protest activity. They continue to have that deterrent effect and ensure that damage and harm is avoided."

76. Mr Prichard-Gamble has provided an updated witness statement emphasising that the risk of rights violation to Shell and risk of harm should it occur continues. Marcus Smith J addressed the question of future harm in his judgment in *Vastint* at para 31(5):

> "it is necessary to ask the counterfactual question: assuming no quia timet injunction, but an infringement of the claimant's rights, how effective will a more-or-less immediate interim injunction plus damages in due course be as a remedy for that infringement? Essentially, the question is how easily the harm of

> the infringement can be undone by an ex post rather than an ex ante intervention, but the following other factors are material:
>
> > (a) The gravity of the anticipated harm. It seems to me that if some of the consequences of an infringement are potentially very serious and incapable of ex post remedy, albeit only one of many types of harm capable of occurring, the seriousness of these irremediable harms is a factor that must be borne in mind."

77. In this case, Shell has filed evidence about grave concern that direct action protests could cause localised leaks and pollution through the release of highly toxic substances, serious or severe injury or death through combustion of dangerously flammable liquids, resulting in harm to employees, contractors, members of the public and protesters that cannot be or cannot be easily undone.

78. That evidence is compelling. Indeed, in respect of damaging petrol pumps, Ms Ireland has circulated the information about the risk it produces within protest "circles" and she now says that she would not endorse future protest action involving damage to petrol pumps due to the risk presented by it. Mr Laurie's position is more nuanced. Coming from his engineering background, he told the court that risk is not "binary". It exists along a spectrum and damaging petrol pumps "is not a straightforward situation". There is a "gradient of risk we all exist on". However, he recognised that "just because we think some form of protest is safe, that does not make it [objectively] safe".

79. The court accepts the evidence that direct action that involves damaging petrol pumps plainly carries with it the risk of serious injury and Ms Ireland is right to recognise and change her stance in light of that risk. Protests that may release the highly toxic and flammable substances that Shell store and supply plainly carries with it the associated danger of serious harm.

80. I will deal with general risk first before turning to three categories of defendants (1) Ms Ireland and Mr Laurie; (2) named defendants in Claim 3 (see Annex A for details); (3) PUs generally. I examine Ms Ireland's evidence before Mr Laurie simply because she precedes him in the list of named defendants and addressed the court first.

General risk

81. In terms of general risk of future direct action against Shell, I begin by noting the observations of Cotter J at para 41:

> "There have been 63 separate protests at Shell Tower since the April renewal hearing. Apart from three incidents in June 2023 when protesters accessed the entrance to the Tower, these appear, I say no more, to have been lawful protests. I pause to observe that this is also of significance as it gives credence to the claimants' repeated assertion that it does not seek to prevent protesters from undertaking lawful peaceful protests, whether or not such protests arise near to its premises. It also highlights how it is possible to protest against the use of fossil fuels without infringing the rights of the claimants or others."

82. Cotter J added at para 43:

> "the Protest Groups had made comments reiterating that this is "an indefinite campaign of civil resistance" and (in March 2024) that "non violent civil resistant to a harmful state will continue with coordinated radical actions."

83. In June 2024, JSO repeated its statements that supporters will continue to take action to "demand necessary change" that this UK government "end the extraction and burning of oil, gas and coal by 2030" and will continue "the resistance" if the Government fails to "sign up to a legally binding treaty to phase out fossil fuels by 2030". Student members of JSO have posted that "[t]his November, hundreds of students are coming to London – this is going to be the biggest episode of civil disobedience this country has ever since. Be there, November 12." As Linden J put it in *Esso Petroleum Company Ltd v PUs* [2023] EWHC 1837 (KB) ("*Esso Petroleum*") at para 67:

> "it appears that the effect of the various injunctions which have been granted in this case and others has been to prevent or deter them from taking the steps prohibited by the orders of the court although, of course, not invariably so. If, therefore, an injunction is refused in the present case the overwhelming likelihood is that protests of the sort which were seen in 2021/2022 will resume."

84. Similarly, Ritchie J noted in *Valero* (at para 64):

> "I find that the reduction or abolition of direct tortious activity against the Claimants' 8 Sites was probably a consequence of the interim injunctions which were restraining the PUs connected with the 4 Organisations and that it is probable that without the injunctions direct tortious activity would quickly have recommenced and in future would quickly recommence".

85. I find that similar considerations apply to the direct action protests against Shell as at autumn 2024. In her careful analysis, Hill J noted at para 30 the ending of direct action protests at Haven following the injunction, but noted wider fossil fuel protests elsewhere:

> "30. There do not appear to have been any further unlawful protest incidents at the Haven. However, the evidence shows a significant number of incidents in relation to oil refinery sites between August 2022 and February 2023. These included protest action at a number of oil refineries located in Kingsbury. The main road used to access the site was closed as a result of protesters making the road unsafe, by digging and occupying a tunnel underneath it, access roads were also blocked by protesters performing a sit-down roadblock. Similar activity occurred at the Gray's oil terminal in West Thurrock in August/ September 2022. On 28 August 2022 eight people were arrested after protesters blocked an oil tanker in the vicinity of the Gray's terminal, climbing on top of it and deflating its tyres. On 14 September 2022 around fifty protesters acted in breach of the North Warwickshire local authority injunction in relation to the Kingsbury site."

86. Hill J then continued at para 39:

> "(i) the incidents described demonstrate a clear nationwide targeting of members of the wider Shell group of companies and its business operations since April/May 2022; (ii) such demonstrations will continue for the foreseeable future; and (iii) the injunctions need to be extended as they provide a strong deterrent

effect and mitigate against the risk of harm which unlawful activities at the sites would otherwise give rise to. Unlawful activity at the sites presents an unacceptable risk of continuing and significant danger to the health and safety of staff, contractors, the general public and other persons visiting them."

87. In respect of petrol stations, Hill J noted:

"18 Johnson J was provided with witness statements from Benjamin Austin, the claimant's health, safety and security manager, dated 3 and 10 May 2022. In his judgment, he explained that, on 28 April 2022, there were protests at two petrol stations (one of which was a Shell petrol station) on the M25, at Clacket Lane and Cobham. Entrances to the forecourts were blocked. The display screens of fuel pumps were smashed with hammers and obscured with spray paint. The kiosks were "sabotaged … to stop the flow of petrol". Protesters variously glued themselves to the floor, a fuel pump, the roof of a fuel tanker or each other. A total of 55 fuel pumps were damaged (including 35 out of 36 pumps at Cobham) to the extent that they were not safe for use, and the whole forecourt had to be closed: paras 12–13. Johnson J also referred to wider protests in April/early May 2022 at oil depots in Warwickshire and Glasgow: paras 14–15.

19 Johnson J explained that he had not been shown any evidence to suggest that XR, JSO or Insulate Britain had resorted to physical violence against others. He noted, however, that they are "committed to protesting in ways that are unlawful, short of physical violence to the person". He observed that their websites demonstrate this, with references to "civil disobedience", "direct action", and a willingness to risk "arrest" and "jail time": para 9.

20 He summarised the various risks that arise from these types of protest, in addition to the physical damage and the direct financial impact on the claimant (from lost sales), as follows [quoting paras 18-19 in the Johnson J judgment quoted at this judgment's para 33 ante, before continuing at para 21]:

> "21. Aside from the physical damage that has been caused at the petrol stations, and the direct financial impact on the claimant (from lost sales), these types of protest give rise to additional potential risks. Petrol is highly flammable. Ignition can occur not just where an ignition source is brought into contact with the fuel itself, but also where there is a spark (for example from static electricity or the use of a device powered by electricity) in the vicinity of invisible vapour in the surrounding atmosphere. Such vapour does not disperse easily and can travel long distances. There is therefore close regulation, including by the Dangerous Substances and Explosives Atmosphere Regulations 2002, the Highway Code, Health and Safety Executive guidance on "Storing petrol safely" and "Dispensing petrol as a fuel: health and safety guidance for employees", and non-statutory guidance, "Petrol Filling Stations – Guidance on Managing the Risks of Fire and Explosions."
>
> "22. The use of mobile telephones on the forecourt (outside a vehicle) is prohibited for that reason (see annex 6 to the Highway Code: "Never smoke, or use a mobile phone, on the forecourt of petrol stations as these are major fire risks and could cause an explosion."). The evidence shows that at the protests on 28 April 2022 protesters used mobile phones on the forecourts to

> photograph and film their activities. Further, as regards the use of hammers to damage pumps, Mr Austin says: "Breaking the pump screens with any implement could cause a spark and in turn potentially harm anyone in the vicinity. The severity of any vapour cloud ignition could be catastrophic and cause multiple fatalities. Unfortunately, Shell Group has tragically lost several service station employees in Pakistan in the last year when vapour clouds have been ignited during routine operations." I was not shown any positive evidence as to the risks posed by spray paint, glue or other solvents in the vicinity of fuel or fuel vapour, but I was told that this, too, was a potential cause for concern."

88. Hill J stated at para 21 that Johnson J:

> "noted the evidence that the campaign orchestrated by the groups in question looked set to continue and cited JSO's statement on its website that the disruption would continue "until the government makes a statement that it will end new oil and gas projects in the UK: para 16."

89. In the exhibit to his statement in the core bundle, Mr Eilering on behalf of Shell appends the online report of Shell's AGM. The report dated 21 May 2024 documents how protesters from "numerous" climate campaigning groups, including XR, disrupted the AGM by singing "Shell Kills", while outside the hotel where the meeting took place, protesters unfurled a sign saying "SHELL PROFITS KILL". Beyond this, Mr Eilering exhibits several hundred pages of articles and documents recording recent protest activity not only in the United Kingdom but internationally directed towards the fossil fuel industry. This documentation builds on the earlier filed statements by Mr Prichard-Gamble attesting to the ongoing threat to the business interests of Shell from those who object to their involvement in fossil fuel extraction and supply.

90. During the course of the hearing before me, the claimants provided the court with an updated 19-page chronology of protest activity from 1 July to 15 October 2024. As Mr Laurie points out, many of the incidents listed took place in other countries or were not directed at Shell. These included protests or results of courts cases around protests with different targets, including JSO supporters spraying orange pain at departure boards at Heathrow Airport; JSO activists throwing soup at Van Gogh's Sunflowers painting and stopping traffic in Parliament Square; and the occupation of the offices of Policy Exchange by XR activists.

91. The filed chronology documents that no direct action protests have breached Shell's rights. That said, there have been regular peaceful protests outside Shell Tower. These have involved small numbers of protesters usually in silent vigils with banners:

> 3 and 10 July
> Peaceful protest outside Shell Tower – one member of Christian Climate Action.
>
> 17 July
> Similarly at Shell Tower, with two protesters.
>
> Same day in Manchester: Extinction Rebellion activists have protested at the National Cycling Centre in Manchester to call on the former policy adviser for British Cycling, Chris Boardman, to convince British Cycling to drop Shell as its

sponsor of the Paris Olympics. Protesters held signs and placards carried messages like ‘Shell Lie, Cyclists Die’ and ‘[Heart] Chris, Hate Shell’.

24 July
One female protester from Christian Climate Action protested peacefully outside Shell Tower on Belvedere Road. Protester was carrying Placard that reads "I Pray Shell Stops Climate Chaos".

30 July
Twelve XR protesters set up outside Shell Tower. The protesters held up large banners reading "REVEAL THE TRUTH" and "SHELL KILLS". The protesters made speeches and sang a song.

31 July
Three protesters from Christian Climate protested peacefully outside Shell Tower.

1 August
5 protesters peacefully protested outside Shell Tower. They were carrying placards that read " Thousands of Children Killed by Oil Pollution in Niger Delta " "Was It Worth It". They took pictures of Shell Centre on Belvedere Road.

3 August
Climate activists from Shropshire cycle from London to the Paris Olympics to protest against Shell’s sponsorship of British Cycling.

7 and 14 August
Two protesters from Christian Climate protested peacefully outside Shell Tower.

21 August
Two Christian Climate protesters protested peacefully outside Shell Tower.

28 August
One protester from Christian Climate Action peacefully protested outside Shell Tower. Protester was carrying Placard that reads "To Ignore The Climate Science Is Insane" & a Banner reading "We Are Crucifying our planet".

5 September
2 protesters from Christian Climate Action set up outside Shell Tower. Protesters were carrying a placard that read 'To Ignore The Climate Science Is Insane' and a banner reading 'We Are Crucifying Our Planet'.

11 September
1 male protester from Christian Climate Action set up outside Shell Tower carrying a placard reading "To Ignore The Climate Science Is Insane" & a Banner reading "We Are Crucifying Our Planet".

12 September

2 male protesters from Asthma and Lung UK set up outside Shell Tower with two bicycles with large digital displays on the back stating:
Toxic air stunts lung growth in children.
Air pollution affects our health before we're born.
99% of people in the UK breathe unsafe air.
Toxic air causes up to 43000 premature deaths in the UK every year.

18 September
1 female protester from Christian Climate Action set up outside Shell Tower. A second protester then turned up with a placard reading "To Ignore The Climate Science Is Insane" & a Banner reading "We Are Crucifying our Planet".

25 September
1 male and 1 female protester from Christian Climate Action set up to protest outside Shell Tower. They carried a placard reading "To Ignore Climate Science Is Insane" and a banner reading "We Are Crucifying our Planet".

2 October
2 Protesters from Christian Climate Action set up outside Shell Tower and sat next to planters. They were carrying placards that read “To Ignore The Climate Science Is Insane" & a Banner reading "We Are Crucifying Our Planet".

8 October
Protesters stood outside the Royal Court displaying placards and banners ahead of a key appeal case against Shell.

9 October
2 protesters from Christian Climate Action set up outside Shell Tower. They produced banners and a flag and knelt down to carry out their silent protest.

15 October
Shell's Chief Energy Advisor, Peter Wood, was giving a presentation at the World Energies Summit in London. While walking to the event he was questioned by a member of Fossil Free London who questioned him about Shell in the Niger Delta.

92. Further, there is evidence filed by Shell that senior executives have been “doorstepped” and subject to abusive and threatening messaging on social media.

Ms Ireland and Mr Laurie

Ms Ireland

93. Emma Ireland is currently “job free”, as she puts it, and lives in Bristol. She has a long track record of dedicating herself to others. Ms Ireland filed a skeleton argument and a witness statement dated 17 October 2024 with the court. To provide an overview of her defence, I extract and combine her submissions by combining both documents. She states:

> “I trained as a social worker from 2009-2011. Since 2012 I have worked in mental health, sometimes as a support worker and other times at more senior

levels, as a care co-ordinator. I am currently job free. I have recently been volunteering with food cycle, cooking 3 course community meals with waste food. I have a work contract starting on 1st November working in a mental health setting, with people who have been street homeless for a long time. I care deeply for others and look for ways to support fellow human beings and the earth, be it in my paid work, with family and friends, neighbours, or volunteering. For 3 months of this year I have volunteered on organic farms in the UK.

We do not agree that this injunction is necessary. We believe that Shell should not be protected from lawful protest. We have not yet faced criminal trial for the acts that led to our inclusion on this injunction, so it remains to be seen whether the protest will be judged as lawful. We believe our actions have to date, been entirely within the law as it stood on 24.08.22. Since then the Government has, after much lobbying from Fossil Fuel Companies, passed even stronger laws protecting companies such as Shell. For clarity, I am asking for the Shell Petrol Station injunction to be discontinued.

Events of August 24th 2022
On that day, I attended Cobham Service Station with other supporters of the Just Stop Oil campaign. I walked towards the entrance of the forecourt and sat down on the ground. There were 5 others who sat down too. There was a banner that read Just Stop Oil. The entrance to the forecourt was blocked. Cars continued to leave the petrol station via the exit road. When asked to move I continued to stay seated on the ground. I had my back to the petrol pumps. I am aware that there was damage caused to 2 petrol pump screens by one or two other people.

I sat in the entrance of the Shell Petrol station, as an act of protest, to demand that the government stop issuing new licences for the discovery, development and production of new oil and gas in the UK.

I also took this action to get this message out to Shell and to the public, who were there on the day, and other members of the public and the government via the media. To raise the alarm that we are in a climate emergency and we have to act like it. I put my body on the line and 2 petrol pump screens were decommissioned, to temporarily pause the flow of new petrol into some cars for a limited time. By jolting the status quo, I hoped that this more embodied message, would get through to some more people. Because we all need to be doing more, every day, at all times, to reduce our harmful impact on the climate and to encourage others to do so as well.

I was arrested for causing a public nuisance, and was taken to Staines police station. I pleaded not guilty at the first appearance at Guildford Crown Court. I have been released on unconditional bail for this matter and the trial is currently listed for 11 August 2025 [now at Winchester Crown Court].

My spiritual faith, beliefs and views regarding climate change are set out in my witness statement. These views are sincerely held, reflecting those of many citizens who are concerned about climate change and the role of fossil fuels in perpetuating further man-made global warming.

The health and safety concerns of potential future actions at Shell petrol stations has been discussed in evidence. I too take this point very seriously. I agree that a protest should not be allowed that causes physical harm to staff, customers, passers by and protesters.

I hold the belief that if those that run Shell fully understood the part that they were playing in the climate crisis, in the deepest part of their heart and sole [sic], they would have consented to the damage having been caused the pumps and the disruption to the sale of their fuel.

Since the injunction was made the law relating to protest has changed significantly, offering greater protection to the fossil fuel industry. For instance, s.7 Public Order Act 2023 means that people can be arrested almost immediately after the protest begins and they will face up to a year in prison. I do not understand why there is any need for the injunction to continue to exist in addition to these draconian laws.

Shell requested the interim injunction when these new laws were not yet in force. I propose that the criminal laws of this country are protection enough for Shell to be able to continue to effectively and safely sell petrol to the public. Who can say whether it is the injunction, or the criminal laws, or something else that has meant that there have been no more actions by environmental groups on any petrol station of any brand in England and Wales since August 2022. The evidence since August 2022 given by the claimant talks about other types of actions on other sites in the UK, that are not petrol stations.

[A]nalysis from Carbon Majors Database, has proposed that just 57 oil, gas and cement producers are directly linked to 80% of the world's global fossil fuel CO2 emissions since the 2016 Paris Agreement. Shell has been named as one of these.

We are in a climate emergency. Let us not be a country that continues to use injunctions to create new laws that are overly harsh for environmental defenders and protect big oil companies.

The scientific consensus on the climate emergency could not be clearer. We are in a climate crisis, driven by rising temperatures and extreme weather. An average of over 1.5°C warming would be catastrophic for humanity. The International Panel for Climate Change (IPCC) reports state that we are already overshooting the targets of liveability. We cannot keep burning fossil fuels if we are to have any chance of a liveable future.

I feel that it is my calling to do all I can to reduce the negative impact of climate change at this time. I feel that part of this is to invite others to question what they can do, within their sphere of influence. I understand that for each of us this may be different. In 2022 I became a supporter of Just Stop Oil in order to demand that the government stop issuing licences for the exploration, discovery and development of new oil and gas projects in the UK. For me, this demand felt necessary, clear and reasonable.

> I feel so privileged to be saying this from a place where I have a home, enough food and I am well. The reality for many today, especially in the global south, is that their lives are being ripped apart due to fires, floods, famine caused by climate change. It is us in the global north who have played the biggest part in climate change. I feel it is our responsibility to do all we can as individuals, and to ask those, with different spheres of influence, to do what they can too. This is why I protested on that day, and why I am defending myself at this trial.
>
> Since that day I have been arrested a further five times, each time for participating in protests as a supporter of Just Stop Oil. The demand to the government, on each of these occasions was to stop issuing new oil and gas licences:
>
> - On August 26 2022 I was arrested for blocking the entrance to a petrol station forecourt in London.
> - On 8 October 2022 I was arrested for sitting in a road in London , causing a disruption to traffic. For this I was charged, pleaded not guilty to wilful obstruction of the highway, and later the case was dropped.
> - On 21 October 2022, I was arrested for sitting in a road in London, causing a disruption to traffic. For this I was found guilty of Wilful Obstruction of the Highway. I was sentenced to £200 court costs £26 surcharge and conditional discharge of 12 months.
> - On 10 July 2023, I was arrested for continuing to walk slowly down a road in London, causing traffic to move more slowly. I was arrested for breaching s.12. I was later found guilty for breaching s.12. I was sentenced to £120 court costs and £120 fine. I was also given £120 fine for the above action, due to the conditional discharge.
> - On 10 November 2023 I was arrested for walking slowly down a London road. I was later found guilty of Wilful Obstruction of the Highway and sentenced to £348 costs, £200 fine, £80 surcharge."

Conclusion on Ms Ireland

94. Ms Ireland has devoted her life to supporting and helping others. She sees her environmental activism as being connected to that life's work. She is a person with an acute empathetic sensibility, and as she puts it, "I have always been able to feel the suffering of others". It is commendable that in her career she has sought to assist vulnerable people because of that insight. She is committed to protecting the environment, has never owned a car, and indeed cycled to London for the court hearing all the way from Bristol over several days.

95. The claimant submits that the court should draw an inference against Ms Ireland from her declining to sign an undertaking. The inference is that her refusal makes it more likely that she would take unlawful direct action against Shell again in future should the injunction be discharged. I listened very carefully to Ms Ireland's explanation for wishing to attend the court hearing and not signing the undertaking. It is true, as the claimant submits, that it would be possible for Ms Ireland to sign the undertaking and apply to attend the hearing as an interested party. However, Ms Ireland appears in person. I am not convinced that she has the confidence and legal wherewithal to take this more sophisticated legal course. Further, I am persuaded by the sincerity of her comments to the court that she wished to address it personally to explain the reasons

for her protest activities and felt her ability to do so would be compromised by the undertaking. Therefore, I decline to make an inference against her. I turn to the other matters.

96. Two days after her protest in Cobham 24 August 2022, Ms Ireland was arrested on the forecourt of another petrol station, this time in the Acton area of west London. In October of that year, she was arrested for disrupting the traffic in London, although no further action was ultimately taken. Later in October 2022, she disrupted the traffic and was found guilty of Wilful Obstruction of the Highway. In July 2023, she again disrupted the traffic and was again found guilty. In November 2023, she again disrupted the London traffic. She was again found guilty of Wilful Obstruction of the Highway. Therefore, Ms Ireland's commitment to environmental activism has continued following the Cobham protest. She has been convicted of criminal offences for it and that has not dampened her moral commitment.

97. That said, she submits to the court that "the criminal law might well be enough of a factor to deter future protests [rendering] an injunction unnecessary", pointing to the coming into force of the Public Order Act 2023. She supports this point with the fact that "there have been no further protests at petrol stations since August 2022".

98. I have no doubt whatsoever that Ms Ireland is a selfless and committed person. She feels the suffering of others acutely. That extends beyond those in her immediate circle whom she has helped and includes people who are partially sighted or without sight, and people living with mental health problems and trauma. That act of imaginative empathy extends to the many millions of people in the Global South who she says are suffering because of climate change. It also extends, as she powerfully put it, to "the suffering of the Earth". She does not think that Shell has changed since her action at Cobham in August 2022, except that it has resiled from its "green and sustainable commitments". Ms Ireland stated that 57 producers are responsible for 80 per cent of global fossil fuel carbon dioxide emissions. Shell is one of them. Lives in the Global South are being "ripped apart" by this climate emergency. This is why she feels the obligation to protest and "do all we can".

99. While she is committed to relieving the suffering of others "from a peaceful place", the court is left in little doubt that should the injunctions be discharged, such is the passion and strength of Ms Ireland's commitment to trying to effect change, there is a real and imminent risk of her engaging in direct action protests and breaching the claimant's rights and there is a strong probability that it would constitute a tort committed against Shell. I am not persuaded that the coming into force of the Public Order Act 2023 with the 12-month maximum sentence would be effective to deter Ms Ireland. It is unlikely that Ms Ireland would act alone, because as she told the court in terms, she is "still a supporter of JSO" and has circulated information to protest groups. The overwhelming probability is that her future direct action would again be joint and coordinated tortious action. This is because since her arrest at Cobham in August 2022, and despite it, she has risked arrest and repeated arrest and that has not deterred her from continuing to intervene.

100. Ms Ireland told the court that "to do nothing is not within my nature". Therefore, I find that as against Ms Ireland the claimant has produced sufficient evidence to prove its claim on both limbs identified in *Wolverhampton*.

Mr Laurie

101. Charles Phillip Laurie lives in Faversham, Kent. Mr Laurie is a retired civil engineer and Quaker, whose faith is immensely important to him and closely connected to his activism. He filed a skeleton argument and a witness statement with the court dated 16 October 2024. Once more, extracts from both are melded to provide an overview of Mr Laurie's defence. He states:

> "We do not agree that this injunction is necessary. We believe that Shell should not be protected from lawful protest.
>
> On 24th August 2022 – Cobham Service Station – I was arrested for public nuisance and possession of articles with the intent to cause or damage property. On that day, I attended Cobham Service Station with other protesters from JSO group. Initially my plan was to cause damage to the petrol pumps of the service station with two other protesters, whilst five other protesters blocked the entrance to the station forecourt and glued themselves to the ground.
>
> Whilst I was walking towards the petrol pumps, I changed my mind about causing damage to the petrol pumps and I changed course to join the other protesters at the entrance to the forecourt. I sat down with them and glued myself to the ground. I was arrested.
>
> The interim injunction and its extension are "immensely troubling for me because it curtails my right to peacefully protest outside petrochemical facilities, offices and retail facilities are which are owned and operated by Shell.
>
> On 26 August 2022, Shell's Petrol Stations at Acton Park and Acton Vale were subjected to action by protesters that went well beyond peaceful protest. As part of what Just Stop Oil described as a week-long "series of actions disrupting oil terminals and petrol stations in support of [Just Stop Oil's] demand that the UK government end new oil and gas projects in the UK", individuals once again blocked the entrance to the petrol station and caused damage to 10 fuel pumps in total across the two Shell Petrol Stations.
>
> I would ask that you consider if the cost is actually a big or small number. I am sure that the numbers are big for those Shell trading businesses actually impacted but at the highest level in terms of a business making 19.5 billion dollars profit in the past year, it is very, very small. Whether you want to regard it as being large or small is down to you. For me it is very small, and fits exactly for the requirement protest to be proportional.
>
> All protests that gave rise to this injunction where at locations directly connected with the harm being caused by the ongoing operations of Shell.
>
> There is no evidence that I will act in breach of the Claimant's rights in the future such that "imminent and real risk of harm test" for an anticipatory injunction is met.

> Another way to look at this might be that this injunction shields Shell from the consequences of public discontent at the decisions made at senior levels within the company.
>
> I am a Quaker. I integrate my faith in everything I do in my life but particularly through my activism. Quakerism calls for Quakers to live by our values and actively participate in the upholding of these values where we see it is necessary. Activism is the practical side of my faith. It is interconnected. Quakerism is not about heaven or an afterlife, it is about the world we are in now. That's why so many Quakers are involved in activism about climate change.
>
> Human induced climate change is real. It is happening now. My Environmental Science degree tells me that there is cause and effect in the laws of physics. If you increase CO2 in the atmosphere the temperature has to increase.
>
> The products sold by fossil fuel companies such as Shell are one of the major causes of climate change. These companies know the risks their products pose. Their role is totally malign. They deny the impact, delay action, destroy lives and environments. They take no responsibility for the output of their products, at all times seeking to maximise their sales which is a death sentence to many people and the planet.
>
> In general, business is unable to see past profit. Generally, if they think taking action to reduce their impact on climate change will undermine their profits they prefer to continue with business as usual and where necessary green wash past any issues.
>
> This is why it is important to me to protest; my faith requires me to take action to alert people to the dangers of climate change and put pressure on the Government and fossil fuel companies to change their ways, while the Government and big business are failing to do so."

Conclusion on Mr Laurie

102. For similar reasons to Ms Ireland's case, I refuse to draw an adverse inference against Mr Laurie that the claimant invites me to make. I judge that it is neither safe nor reasonable.

103. Mr Laurie engages in environmental activism and protest animated by his religious, spiritual and moral beliefs. His Quakerism compels him to take action against what he perceives to be a vast societal and global wrong, the climate emergency. He is entitled to hold these views. Some will agree with him; others will not. His right to hold that belief must be respected and protected by the law. The issue in this case is how he seeks to intervene in the public sphere in furtherance of that belief. His sincerely held Quaker views, and the moral imperative to take action that arises because of them, have not changed. He continues to believe that Shell and fossil fuel companies like it are "one of the major causes of climate change". He maintains that the role of Shell is "totally malign". Shell and others "destroy lives and environments". He regards the impact of the protests on Shell to be "small" and "proportional", given the vast resources at its disposal. I judge that the strength of Mr Laurie's sincerely held religious and moral beliefs significantly outweigh any further deterrent effect that the operation of the

Public Order Act 2023 might have. He has been willing to risk arrest previously. He had gone to the Cobham petrol station in August 2022 with the intention of causing criminal damage himself, such is the force of his conviction. He was one of the protesters arrested outside Inner London Crown Court for holding placards, although it must be emphasised that the case against him for that protest was discontinued. The fact that at Cobham he did not damage any petrol pump is no real answer as the presence and deployment of the police caused him to alter his approach. Further, I found his comments about the risk that smashing petrol pumps may cause indicative of his belief, grounded in his scientific background and training, that such direct action is not as risk—laden as Shell's evidence maintains. That increases the risk that he would engage in future similar direct action. It is noteworthy that despite the presence of the police at Cobham, he was still prepared to protest and be arrested in the furtherance of his cause and moral concerns.

104. He spoke passionately and emotionally when addressing the court. He stated:

> "Shell have abandoned all the promises that they were going to be become the greenest energy company in the world. Shell say they are going to drill a new gas field in the North Sea, so 'how is that green ambition going?'."

105. He continued, "I cannot make a promise that I will not protest again, but cannot say I will." If the injunctions are discharged, he says he may resume the protests against Shell but tells the court he is unable to say he will or not. He provided a different analysis of the changes in the law and increased sentencing under section 7 of the Public Order Act 2023. He emphasises that:

> "Maximum sentences are artificial as rarely used. Instead, the real change is the new police powers. The police only have to determine the action is 'more than minor' disruption [through obstruction] and they do that really quickly. The change enables the police to break up the protests more quickly and it is not the sentences that 'protects Shell'."

106. On Mr Laurie's analysis, then, the increased sentencing powers are not the material difference in deterring protests: it is rather the police's ability to break up protests far earlier. He concluded his submissions by telling the court:

> "This is a very serious issue. But Shell is putting this CO2 into the atmosphere causing thousands and millions of deaths, even hundreds of millions of deaths, not in the future, but in the next few years, probably in my lifetime and certainly the lifetime of my children. It is so serious we must look in the mirror and take action."

107. It seems to me that the real and imminent risk remains that without a final and continuing injunction, Mr Laurie would in pursuit of his sincere beliefs take unlawful direct action again against Shell and there is a strong probability that this would result in a breach of Shell's rights under the civil law. Therefore, I find that as against Mr Laurie the claimant has produced sufficient evidence to prove its claim on both limbs of *Wolverhampton*.

Other named defendants

108. As to the risk or threat attaching to the other named defendants, I draw an adverse inference from their failure to sign the undertakings, enter a defence, attend the final hearing or otherwise engage in these proceedings. I note the observations of Linden J in *Esso Petroleum* at para 45:

> "it would have been easy for Defendants to give assurances or evidence to the court that there was no intention to carry out direct action at the various sites, but a decision was taken not to do so. As I have indicated in other cases, this provides an insight into the mindset of those who would, unless restrained, engage in unlawful activities with the aim of halting the Claimants' business in fossil fuels."

PUs

109. In respect of PUs, I cannot draw an inference regarding undertakings.

110. However, in respect of the other named defendants and PUs, I find that the claimants have provided sufficient evidence to prove the claim and meet the two limbs of the *Wolverhampton* approach. The argument that direct action against Shell since the granting of the injunctions has significantly diminished must be seen in light of the observation of Cotter J at para 19 that injunctions are granted on the assumption that they will be obeyed and thus have a material effect. Indeed, the likely effectiveness of an injunction must be one of the factors in the section 37 discretionary assessment of whether to grant it at all. There have been, as set out in the claimant's chronology, repeated unlawful acts directed at airports and universities.

111. It is significant that the series of recent protest injunction cases touching on various elements of the energy and fossil fuel sector, this court has found a continuing real and imminent risk of direct action resulting in tortious breach of the claimants' rights. While it would be naïve to ignore that context of diverse and disparate targeting of the fossil fuel sector, I emphasise that I judge this case on the evidence before me. I note what Ritchie J said in *Valero* at para 64:

> "I find that the reduction or abolition of direct tortious activity against the Claimants' 8 Sites was probably a consequence of the interim injunctions which were restraining the PUs connected with the 4 Organisations and that it is probable that without the injunctions direct tortious activity would quickly have recommenced and in future would quickly recommence".

112. Finally on this point, Hill J noted at para 36:

> "The claimants liaise regularly with the police, whose intelligence indicates that there continues to be an ongoing threat; that the protest campaign is not over; and that protest groups will continue to attempt to put pressure on the Government to halt new investment in fossil fuels. It is apparent that JSO continues to have the ability to draw on a large group of protesters who are willing to be arrested; that they take action using a variety of tactics and target locations across the UK; and that they employ tactics that attract the media and public interest. Further, there is a high level of crossover between the individual protest groups, who appear to share disruptive tactics between them. His view was that activities of the sort described above would be likely to increase as a result of the Government's recent approval of the building of a new power station, the cost-of-living crisis and the

likely increase in support for JSO given that environmental concerns affect the majority of the public."

113. Stepping back and assessing the totality of the evidence before me, I find that should the injunctions be discharged, a real and imminent risk arises of direct action tortious interference with the claimants' rights by the named defendants and PUs.

4 Defences

5 Balance of convenience/compelling need

6 Proportionate interference with ECHR rights

114. Only two defences have been filed, those of Ms Ireland and Mr Laurie. They share a common approach. The main lines of their defence can be reduced to three key features:

(1) An injunction amounts to an unlawful, that is unnecessary and disproportionate, interference with their Article 9, 10 and 11 Convention rights;

(2) The disruption caused and Shell's loss is "proportional" to the acts committed by Shell in pursuit of its business interests;

(3) The Aarhus Convention protects "environmental defenders" from the "excessive" use of law.

115. Since the analysis of these points engages questions of balance of convenience and compelling need and proportionality, I consider Factors 5 (balance of convenience) and 6 (proportionality) within this section. I examine the defences of Ms Ireland and Mr Laurie first, before considering the position of PUs.

Convention rights and proportionality

116. Article 9 of the ECHR provides:

> "Article 9 – Freedom of thought, conscience and religion
>
> 1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

117. I cannot see that the granting of anticipatory injunctions interferes with the defendants' freedom of thought or conscience or indeed religion. They can adhere and continue to believe what they wish. Equally, I am not persuaded that the injunctions interfere with

the right of defendants to "manifest" their beliefs. However, and in any event, any interference is subject to the proportionality analysis in respect of other Convention rights that follows and what is crucial to appreciate is that Article 9 is a qualified right and explicitly limited to matters "prescribed by law" which are necessary "in a democratic society". It is protection not just of public order and health (which must include bodily safety and integrity), but the protection of the rights and freedoms of others, which are capable of including rights under the civil law, such as those claimed by Shell.

118. I turn to Articles 10 and 11, the rights to freedom of expression and freedom of peaceful assembly and association with others.

> "**Article 10 of the Convention**
>
> **Freedom of expression**
>
> 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.
>
> **Article 11 of the Convention**
>
> **Freedom of assembly and association**
>
> Everyone has the right to freedom of peaceful assembly and to freedom of association with others …"

119. The argument advanced by the defendants is a repeat of the argument that was fully developed by Mr Simblet KC before Hill J. Nevertheless, I reconsider it here. Both rights are once more qualified rights. Art 10 is qualified in this way:

> "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."

120. The qualification to Article 11 is in these terms:

> "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."

121. The first point is that in respect of interferences with or entry onto the private property belonging to Shell, ECHR rights do not confer a right to enter onto private land (*DPP*

v Cuciurean [2022] EWHC 736 (Admin), para 45 and paras 76-77; *Ineos* at para 36, per Longmore LJ). Johnson J at paras 55-56 identified the four-part approach to issues of rights violation and proportionality taken by the Supreme Court in *Ziegler*:

> "55. The injunction interferes with the defendants' rights to assemble and express their opposition to the fossil fuel industry.
>
> 56. Unless such interference can be justified, it is incompatible with the defendants' rights under articles 10 and 11 ECHR and may not therefore be granted (see sections 1 and 6 of the Human Rights Act 1998). Articles 10 and 11 ECHR are not absolute rights. Interferences with those rights can be justified where they are necessary and proportionate to the need to protect the claimant's rights: articles 10(2) and 11(2) ECHR. Proportionality is assessed by considering if (i) the aim is sufficiently important to justify interference with a fundamental right, (ii) there is a rational connection between the means chosen and the aim in view, (iii) there is no less intrusive measure which could achieve that aim, and (iv) a fair balance has been struck between the rights of the defendants and the general interest of the community, including the rights of others: *DPP v Ziegler* [2021] UKSC 23 [2022] AC 408 *per* Lord Sales JSC at [125]."

122. Of course, this is a familiar rubric and echoes the widely cited four-part proportionality test set down by Lord Reed in *Bank Mellat* v *HM Treasury No. 2* [2013] UKSC 39 at para 74:

> "It is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."

123. I consider in turn each of the four *Ziegler* elements.

Ziegler (i): legitimate aim

124. The legitimate aim of the proposed final injunction is the protection of the claimants' right to carry on their business, which, despite falling under severe criticism as it does from the defendants, remains under the law a lawful business. I have received no argument identifying the illegality of Shell's core business under the law of England and Wales. The defendants argue that Shell contributes to the climate emergency, but that is distinct from identifying a clear basis in law that the sale of fuel from service stations in the United Kingdom, as but one example, is unlawful. On that point, I received no argument. It was, of course, open to the defendants or any of them to argue that there is no legitimate aim worthy of protection as the core business of fuel sale is illegal. That was not an argument advanced.

125. Instead, the focus was on the balance between the risk to global environmental factors created, it is said, by Shell and the far less intrusive infringements of Shell's rights by the protests. That is essentially an evaluative (balance) argument and not one about

legitimate aim. However, Johnson J while touching on this point, focused on aim and *Ziegler* (i) at para 57:

> "The defendants might say that there is an overwhelming global scientific consensus that the business in which the claimant is engaged is contributing to the climate crisis and is thereby putting the world at risk, and that the claimant's interests pale into insignificance by comparison. This is not, however, "a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important" – *City of London v Samede* [2012] EWCA Civ 160 [2012] 2 All ER 1039 *per* Lord Neuberger at [41]. It is not for the court, on this application, to adjudicate on the important underlying political and policy issues raised by these protests. It is for Parliament to determine whether legal restrictions should be imposed on the trade in fossil fuels. That is why the defendants' actions are directed at securing a change in Government policy. The claimant is entitled to ask the court to uphold and enforce its legal rights, including its right to engage in a lawful business without tortious interference. Those rights are prescribed by law and their enforcement is necessary in a democratic society. The aim of the injunction is therefore sufficiently important to justify interferences with the defendants' rights of assembly and expression: cf. *Ineos Upstream v Persons Unknown* [2017] EWHC 2945 *per* Morgan J at [105] and *Cuadrilla per* Leggatt LJ at [45] and [50]."

126. I find that the objectives of the injunctions do constitute a legitimate aim.

Ziegler (ii): rational connection

127. As to rational connection, it is important to be clear what this means. I take it to mean that not only is there a clear and logical connection between the measure and the objective or legitimate aim sought and that the measure can be seen to be an effective means to further the aim – to achieve it. In this case, I judge that the injunctions sought clearly have the capacity to deter and protect the claimants' rights. Indeed, it is likely that they have materially contributed to achieving that aim since their granting on an interim basis. I find that that is a reasonable inference from the significant falling away of direct action breaches of Shell's civil law rights.

Ziegler (iii): least intrusive measure

128. It is essential that the measure is the least intrusive action consistent with achieving the legitimate aim. Both Johnson J and Hill J (and indeed Cotter J in the April 2024 review) so found. Indicative of the level of intrusion is that the injunctions as drafted, as before, in terms only prohibit future acts of unlawful protest. For similar reasons, the court finds that the injunctions are the least intrusive measure, being directed exclusively at unlawful rights breaches.

Ziegler (iv): fair balance

129. As to the fourth element, Hill J considered the question of balance between the competing rights and concluded at paras 179-80:

> "the injunctions strike a fair balance between the Defendants' rights to assembly and expression and the Claimants' rights: they protect the Claimants' rights insofar as is necessary to do so but not further;
>
> "the interferences with the Defendants' rights of free assembly and expression caused by the injunctions are necessary for and proportionate to the need to protect the Claimants' rights."

130. Hill J's conclusion was adopted by Cotter J at para 59, when he held:

> "As for interference with the defendants' rights to free assembly and expression necessary for the proportionate need to protect the claimants' rights under Articles 10(2) and 11(2), read with section 6(1) of the Human Rights Act, it is right to note that all three of the injunctions interfere with the defendants' rights under Articles 10(1) and 11(1). However, such interference can be justified when it is necessary and proportionate to protect the claimants' rights. I adopt Hill J's reasoning and conclusions at paragraphs 179 to 180 in this regard."

131. To the extent that it is necessary to consider proportionality separately, and invoke the four-part *Bank Mellat* test enunciated by Lord Reed, I reach the same conclusions as in the *Ziegler* analysis. As Ms Stacey put it with accuracy, in fact the point "overlaps". However, before reaching my decision on "fair balance" and the infringement of the defendants' rights, I must address the question of the Aarhus Convention. The court considers whether (1) it is relevant to the exercise of its discretion in granting an injunction; (2) if so, in what way and to what extent, whether as part of the *Ziegler* analysis or as a freestanding point.

132. Before I consider the Aarhus Convention, I reflect on the argument that was put before Cotter J that the creation of additional criminal offences relating to protesting and increased police powers represent a material change of circumstances since the granting of the injunctions in 2022 and 2023. Cotter J held from para 22:

> "22. Mr Laurie's submission is that the coming into force of the Public Order Act 2023 represents a material change, since the orders were made by Hill J, as sections 1, 2 and 7 create new offences. Sections 1 and 2 create the offences of locking-on and being equipped for locking-on; and section 7, interference with use or operation of key national infrastructure.
>
> 25 Mr Laurie's admirably brief submission was that in light of these new offences, the orders were no longer necessary. Put simply, fear of prosecution will prevent the unlawful activity which is prohibited by their terms. Where the criminal law provides that conduct will be an offence, with the potential for significant penalties, including imprisonment, the civil law does not need to provide additional protection.
>
> 26 No authorities have been cited to me in support of (or against) this proposition."

133. Part of the Aarhus argument that I must turn to, and as noted at the start of the judgment as reported by the Special Rapporteur, is that the simultaneous use of criminal and civil proceedings is oppressive and "excessive" use of the law. I make three initial observations about this.

134. **First**, that I agree with Cotter J that the change in criminal law is potentially relevant as a material change in circumstances.

135. **Second**, however, what is essential is to assess the evidence about what the significance of that change is or is likely to be. As to the deterrent effect of increased criminal sanction and powers, the submission is advanced without any or any solid evidence. It is just as possible that the reduction in direct action unlawful protests targeting Shell is a result of the interim injunctions granted. It seems to me speculative to assign the change in pattern of protest to the coming into force of the Public Order Act 2023. Indeed, Mr Eilering notes in his statement at para 8.5.2 in relation to protests that postdate the coming into force of the new statute that:

> "both the Fourth and Tenth Defendant in the Shell Petrol Station Proceedings were recently arrested under the Public Order Act. Pages 304-306 of Exhibit PE1. I am also aware that the Fifteenth Defendant was arrested after spraying a University of Leeds building with orange paint."

136. The ongoing nature of protests was noted by Ritchie J in *Valero*, where he reviewed the evidence filed on behalf of the claimant up to December 2023, and thus after the enactment of the new Public Order Act on 3 May 2023. He summarised the evidence of Ms Pinkerton in this way at para 41:

> "41. Miss Pinkerton extracted some quotes from the Just Stop Oil press releases including assertions that their campaign would be "*indefinite*" until the Government agreed to stop new fossil fuel projects in the UK and mentioning their supporters storming the pitch at Twickenham during the Gallagher Premiership Rugby final. Further press releases in June and July 2023 encouraging civil resistance against oil, gas and coal were published. In an open letter to the police unions dated 13th September 2023 Just Stop Oil stated they would be back on the streets from October the 29th for a resumption after their 13 week campaign between April and July 2023 which they asserted had already cost the Metropolitan Police more than £7.7 million and required the equivalent of an extra 23,500 officer shifts."

137. **Third**, and vitally, the argument confuses the focus of the criminal law and civil injunctive relief. It is certainly the case that one of the stated objectives of criminal sentencing is to deter as well as punish. As the Sentencing Act 2020 provides:

> "57 Purposes of sentencing: adults
>
> (1) This section applies where—
>
> (a) a court is dealing with an offender for an offence, and
>
> (b) the offender is aged 18 or over when convicted.
>
> (2) The court must have regard to the following purposes of sentencing—
>
> (a) the punishment of offenders,
>
> (b) the reduction of crime (**including its reduction by deterrence**),
>
> (c) the reform and rehabilitation of offenders,
>
> (d) the protection of the public, and

> (e) the making of reparation by offenders to persons affected by their offences."
>
> (emphasis provided)

138. Thus deterrence is both a recognised and legitimate aim of criminal sanction and one shared by jurisdictions across the world. However, in any specific case one must carefully assess whether the evidence supports that the particular enactment has in fact attained the powerful (here additional) deterrent effect claimed. Indeed, Mr Laurie in oral submissions argued that the real impact of the Public Order Act 2023 was not the increased sentencing powers, empowering the court to impose sentences of imprisonment up to 12 months (section 7(3)(b)). Instead, he argues that it is the ability of the police to intervene earlier and when the levels of disruption through protest were lower. This is all a matter of debate and speculation. It is not a reliable or safe basis to make important discretionary judgments.

139. Another of the chief aims of criminal sentencing is to punish offenders, as the Sentencing Act 2020 made clear. That is looking, as Mr Semakula put it succinctly, at the past. By contrast, injunctive relief is looking towards the future and seeking to prevent future harm. This point was considered by Hill J at para 178:

> "178. On the other hand, as Johnson J observed at para 60, simply leaving it to the police to enforce the criminal law would not adequately protect the rights of the claimant in the petrol stations claim: such enforcement could only take place after the event, meaning inevitable loss to the claimant; and some of the activities that the injunction sought to restrain are not breaches of the criminal law and could not be enforced by the exercise of conventional policing functions. The same is true of the claimants' rights at the Haven and Tower sites. Indeed the balance is even clearer in those respects given that the sites involve the claimants' private property, as to which see *Cuciurean*, paras 45–46, 76 and the conclusion at para 77, that articles 10 and 11 "do not bestow any 'freedom of forum' to justify trespass on private land or publicly owned land which is not accessible by the public".

140. Therefore, while I do accept that the enactment of the Public Order Act 2023 is a material change, it remains evidentially unclear what material impact it has on deterring future protest and to what extent it operates on the minds of those who would protest against Shell. Further, given that criminal and civil proceedings are directed at distinctly different objectives, the argument that the parallel proceedings are a form of, as Mr Laurie put it, "double punishment", is misplaced. An anticipatory injunction is granted not to punish, but to prevent identifiable future harm. As the Supreme Court put it in *Wolverhampton* at para 141, an injunction is not granted "as stage one in a process intended to lead to committal for contempt" (per Lord Reed). Punishment may result if there is contemptuous breach; punishment is not the objective of the injunction, preventing future harm is.

141. I break off the systematic analysis of the 15 factors to examine the substance of the Aarhus argument.

§X. AARHUS CONVENTION ANALYSIS

142. There is a significant amount of analysis to undertake, so I divide it into four subsections and flag them as follows:

(1) Short history and context;

(2) Status of Special Rapporteur;

(3) Status of the Aarhus Convention;

(4) Discussion.

143. The significance of the Aarhus Convention (here "Aarhus" or "the Convention") for this case is that both appearing defendants rely on it in their defence. Their common position is that Aarhus "protects environmental defenders from excessive use of the law" and the grant of final injunctions against them would "breach Aarhus" and particularly Article 3(8).

144. The claimants submit that Aarhus is an unincorporated convention and thus is "not justiciable" in these courts. Only certain narrow, highly specific - and for these purposes irrelevant – exceptions have been incorporated into domestic law. These are irrelevant provisions about costs in judicial statutory review by dint of the Civil Procedure Rules 1998 Part 46.24-28 (indeed, two of the historic referrals of the UK to the Convention's Compliance Committee have concerned the high costs of legal challenge in environment matters: *ACCC 'Findings and Recommendations with Regard to Communication ACCC/C/2008/27 Concerning Compliance by the United Kingdom of Great Britain and Northern Ireland' UN Doc ECE/MP.PP/C.1/2010/6/Add.2* (24 September 2010) (ACCC/C/2008/27 UK); *ACCC 'Findings and Recommendations with Regard to Communication ACCC/C/2008/23 Concerning Compliance by the United Kingdom of Great Britain and Northern Ireland' UN Doc ECE/MP.PP/C.1/2010/6/Add.1* (24 September 2010)). Thus, Mr Semakula, who very ably took the Aarhus issue on behalf of the claimants, submitted that "none of the circumstances for Aarhus to be taken into account apply here". It should not factor in the court's discretionary decision. However, even if it should be considered, there would be no breach of Aarhus by granting the proportionate injunctions sought by Shell.

(1) Short history and context

145. On 25 June 1998, the Aarhus Convention was adopted at the Fourth "Environment for Europe" Ministerial Conference in Aarhus, Denmark. The United Kingdom signed the treaty and had been involved in its evolution and formulation. A series of meetings of the signatories took place, before in May 2005 the United Kingdom ratified Aarhus. Aarhus enshrines Principle 10 of the 1992 Rio Declaration on Environment and Development:

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in

> their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

146. To achieve these objectives, the Convention is grounded in three foundational "pillars":

(1) Access to information (Articles 4-5)
(2) Public participation (Articles 6-8)
(3) Access to justice (Article 9)

147. The UNECE guide to the Convention states that the instrument is "unique" because it "explicitly links environmental rights with human rights" (while this connection is not made explicit in the text of the Convention, it has been frequently recognised by the Convention's institutional bodies: see the rapid response mechanism decision, post at para 151). In making such connection, the UNECE emphasises the Convention's confirmation that "you have a right to information about, to have a say in, and if necessary, seek justice regarding important decisions that affect you and your environment." The "three pillars" act to provide a "mutually reinforcing mechanism to hold Governments to decision-makers accountable." Further:

> "progressive Governments increasingly recognize and understand that environmental decisions will only be sustainable if reached through transparent, participatory and accountable process. The Aarhus Convention provides Governments with standards to ensure that this happens."
>
> And the Convention:
>
> "makes clear that we have an obligation to protect and improve the environment for the benefit of present and future generations."

148. The UNECE document emphasises that the Convention is "a living treaty" to be interpreted in "a dynamic way". A further aspect of the history of the Convention is provided by Lord Leggatt in *Finch* at paras 19-21:

> "19. The Aarhus Convention was itself partly based on Council Directive 85/337/EEC of 27 June 1985, which introduced the EIA procedure within the European Economic Community (as it was then called). That Directive was amended after the Aarhus Convention came into force by Directive 2003/35/EC to implement obligations arising under the Aarhus Convention and was later codified in the EIA Directive. Recital (18) to the EIA Directive refers to the Aarhus Convention and recital (19) records that:
>
> > 'Among the objectives of the Aarhus Convention is the desire to guarantee rights of public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and wellbeing.'
>
> 20. Obligations arising under the Aarhus Convention have been built into articles 6, 8 and 9 of the EIA Directive. Thus, article 6 imposes obligations on member states to inform the public early in the decision-making procedure of various

matters, which include details of the arrangements made for public participation in the process; to make available to the public concerned the information gathered where an EIA is required; and to give the public concerned early and e□ective opportunities to express comments and opinions before the decision on the request for development consent is taken. The "public concerned" is defined in article 1(2)(e) as "the public a□ected or likely to be a□ected by, or having an interest in, the environmental decision-making procedures" required by the EIA Directive and specifically includes NGOs promoting environmental protection. Article 8 of the EIA Directive requires the results of such public consultation to be "duly taken into account" in the decision-making procedure; and article 9(1) provides that the public must be promptly informed of the decision taken and of "the main reasons and considerations on which the decision is based, including information about the public participation process".

21. The rationale underpinning these public participation requirements is expressed in recital (16) to the EIA Directive:

> "E□ective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken."

Two important ideas are included within this rationale. First, public participation is necessary to increase the democratic legitimacy of decisions which a□ect the environment. Second, the public participation requirements serve an important educational function, contributing to public awareness of environmental issues. Guaranteeing rights of public participation in decision- making and promoting education of the public in environmental matters does not guarantee that greater priority will be given to protecting the environment. But the assumption is that it is likely to have that result, or at least that it is a prerequisite. You can only care about what you know about."

149. This authoritative exposition by the Supreme Court identifies the focus of the Convention, and highlights how parts of it have been incorporated. The corollary of that is that large parts of the text of the Convention have quite deliberately not been incorporated into domestic law by the United Kingdom. I now deal with the most relevant parts of the Convention for this case, citing Article 3(8) in full.

> "Article 1
> OBJECTIVE
> In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.
>
> Article 3

> 4. Each Party shall provide for appropriate recognition of and support to associations, organizations or groups promoting environmental protection and ensure that its national legal system is consistent with this obligation.
>
> 8. Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings. "

150. There has been growing international recognition of the importance of environmental human rights defenders and concern about the obstacles and threats they have faced (see UN General Assembly, Resolution adopted by the Human Rights Council on 21 Mary 2019, "Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development"; among numerous UNECE records voicing such concerns, see "Information note on the situation regarding environmental defenders in Parties to the Aarhus Convention from 2017 to date", 24th meeting of Working Group of the Parties, Geneva, 1-3 July 2020).

151. Thereafter, there was a proposal for the creation of a "rapid response mechanism" for the protection of environmental defenders, resulting in a new mandate. The Meeting of Parties to the Aarhus Convention seventh session in Geneva on 21 October 2021 adopted the rapid response proposal. At its third extraordinary session (Geneva, 23-24 June 2022), the Meeting of the Parties by consensus elected Mr. Michel Forst as Special Rapporteur on Environmental Defenders under the Aarhus Convention (decision VII/9 of the Meeting of the Parties ("the Decision")). The Special Rapporteur's role is to take measures to protect any person experiencing or at imminent threat of penalization, persecution, or harassment for seeking to exercise their rights under the Aarhus Convention. The terms of reference make plain how the mandate is closely linked to Article 3(8). This is the first international mechanism specifically safeguarding environmental defenders to be established within a legally binding framework either under the United Nations system or other intergovernmental structure.

152. The Decision recognised in terms:

> "the critical importance of establishing and maintaining a safe environment that enables members of the public to exercise their rights in conformity with the Convention" and to ensure "due protection of environmental defenders."

153. The Decision expressed "alarm" at:

> "the serious situation faced by environmental defenders, including, but not limited to, threats, violence, intimidation, surveillance, detention and even killings, as reported by States Members of the United Nations, and by intergovernmental and non-governmental organizations and other stakeholders"

154. The Decision clarified the definition of environmental defenders which are:

> "any person exercising his or her rights in conformity with the provisions of the Convention"

and the decision acknowledged:

> "that the safety of environmental defenders is critical in achieving the entire 2030 Agenda for Sustainable Development, and in particular its Sustainable Development Goal 16."

155. Therefore, the mandate of the Special Rapporteur is to monitor the treatment of environmental defenders and, where necessary, raise the issue with the relevant national government through a "letter of allegation". Should the response not satisfy the Special Rapporteur, the matter can be referred on to the Convention's Compliance Committee, which has a mandate operating in parallel to the Rapporteur's. The Compliance Committee oversees the compliance of member states with their obligations under the Convention.

(2) Status of the Special Rapporteur

156. Shell submits that Michel Forst's statement is simply "an opinion" and "has little or no status in a domestic law claim". While what he says is an opinion, this to my mind cannot reduce his detailed observations and concerns to insignificance. While it is true that what Mr Forst says is not the determination of a court of law, it is the assessment of the official with a mandate granted by the United Nations to monitor and safeguard the rights of those who express concern about pressing environmental issues that have the potential to affect us all. Out of respect to Mr Forst and indeed the United Nations, I have carefully read and considered what Mr Forst has said in his mission statement.

(3) Status of the Convention

157. While the United Kingdom has withdrawn from the European Union, Brexit did not alter the United Kingdom's ratification of Aarhus, and the UK remains a signatory and party. The question here is the Convention's enduring status in domestic law. My focus is on the unincorporated parts of the treaty. There can be no argument but that due to their being unincorporated they cannot be directly applied in domestic law. But that is not an end to it. The question of the legal relevance of international treaties that are not incorporated was considered by the Supreme Court in *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 (SC) ("*SG*"). Put shortly, in considering Convention rights under the ECHR, regard may be had to international law conventions. Lord Reed said:

> "82 As an unincorporated international treaty, the UNCRC [United Nations Convention on the Rights of the Child] is not part of the law of the United Kingdom (nor, it is scarcely necessary to add, are the comments on it of the United Nations Committee on the Rights of the Child). The spirit, if not the precise language of article 3.1 has been translated into our law in particular contexts through section 11(2) of the Children Act 2004 and section 55 of the Borders, Citizenship and Immigration Act 2009: *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166, para 23. The present case is not however concerned with such a context.
>
> 83 The UNCRC has also been taken into account by the European Court of Human Rights in the interpretation of the Convention, in accordance with article

31 of the Vienna Convention on the Law of Treaties. As the Grand Chamber stated in *Demir v Turkey* (2008) 48 EHRR 1272 ["*Demir*"], para 69,

> "the precise obligations that the substantive obligations of the Convention impose on contracting states may be interpreted, first, in the light of relevant international treaties that are applicable in the particular sphere". It is not in dispute that the Convention rights protected in our domestic law by the Human Rights Act can also be interpreted in the light of international treaties, such as the UNCRC, that are applicable in the particular sphere."

(4) Discussion on Aarhus

158. Relevance or applicability cannot amount to surreptitious incorporation. What cannot happen is for the common law to be used to incorporate otherwise unincorporated international conventions "through the back door" (*A v Secretary of State for the Home Department* (No 2) [2005] 1 WLR 414 (CA)). That is because the court cannot do what Parliament declined to do: give direct effect to an international treaty that remains, in its relevant provisions for these purposes, unincorporated.

159. Upon enquiry by the court, the parties agree that Aarhus does not explicitly mention "excessive use of the law". That phrase is the defendants' characterisation of the essential thrust of the Convention read as a whole. In particular, they rely on Article 3(8) and the obligations of signatory parties to protect environmental defenders from penalisation, persecution and harassment.

160. The United Kingdom has not incorporated Article 3(8). However, in line with *SG* (Supreme Court), *Demir* (Grand Chamber) and the Vienna Convention on the Law of Treaties, I find that the Aarhus Convention:

> (1) Is a relevant treaty in the sphere of environmental rights and protest about environmental issues;
>
> (2) Is relevant to the interpretation of substantive rights under the ECHR, and particularly the rights under ECHR Articles 9, 10 and 11.

161. While it is submitted by the claimants that the court's focus should strictly remain on the ECHR as it is incorporated into domestic law by the Human Rights Act 1998, that misses the point of the Supreme Court's observations about relevance of unincorporated international treaties. While the United Kingdom has not incorporated Article 3(8), nor has it disowned it. This country continues to be a signatory to Aarhus. Thus, it must be taken to respect its terms and all of them save for any reservations. There is no reservation that has been brought to my attention in respect of Article 3(8). There is, of course, an understandable and material overlap between Articles 10 and 11 of the ECHR and Article 3(8) of Aarhus. The rights enjoyed under the ECHR are meaningless if states decline to protect them. What Article 3(8) of the Aarhus Convention achieves in the protection of the rights of protesters is to provide a poignant focus on the importance of ensuring that environmental defenders are not penalised, persecuted or harassed for exercising right in conformity with the Aarhus Convention. To repeat: the three pillars of Aarhus are (1) access to information (Articles 4-5); (2) public participation (Articles 6-8); and (3) access to justice (Article 9) in relation to decision-making around environmental matters. It can be said that protest is part and parcel of

public participation in a wider understanding of decision-making that "may have a significant effect on the environment", to borrow from Article 6(1)(b). Article 6(1)(a) provides:

> "Article 6
>
> PUBLIC PARTICIPATION IN DECISIONS ON SPECIFIC ACTIVITIES 1.
>
> Each Party: (a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I"

162. Annex I then provides a list of relevant activities:

> "Annex I LIST OF ACTIVITIES REFERRED TO IN ARTICLE 6, PARAGRAPH 1 (a) 1. 2. Energy sector:- Mineral oil and gas refineries; Installations for gasification and liquefaction"

163. Stepping back to consider all this, people who protest about and wish to draw attention to the fossil fuel industry (Annex I) seem to me to be capable of falling within the "public participation" provisions of Article 6, which in turn is connected to the Article 3(8) protections. It should also be remembered that Article 3(3) provides:

> "3. Each Party shall promote environmental education and environmental awareness among the public, especially on how to obtain access to information, to participate in decision-making and to obtain access to justice in environmental matters."

164. While there is a focus on participation in decision-making, I recognise that the concept of environmental defender is capable of extending to those engaging in protests about environmental projects (see the communication of the Compliance Committee against Belarus about protests against a new nuclear plant: *ACCC 'Findings and Recommendations with Regard to Communication ACCC/C/2014/102 Concerning Compliance by Belarus'*).

165. I accept that the terms of the Convention do not spell out a necessity for peaceful or non-violent action. This is a point made by Mr Forst in his UK mission report ("The fact that they cause disruption or involve civil disobedience do not mean they are not peaceful."). That said, I can find no basis within Aarhus that authorises environmental defenders to deliberately break or flout the law or materially violate the lawful rights of others. This appears to extend to "civil disobedience", should that be in deliberate breach of the law in the Rawlsian sense (*A Theory of Justice*, ibid., where what is being avowedly "disobeyed" is the law, for a claimed higher purpose, framed by those protesting often as the protection of human and environmental ecosystems, ecology and life). No Aarhus authorisation or exemption for unlawful acts has been brought to my attention, including for acts of civil disobedience in violation of national law. Contrast that with the putative case of arrests and prosecutions or the granting of an injunction to prohibit entirely peaceful protesters such as those who have regularly gathered with placards near to Shell without infringing any of Shell's rights. Then it is strongly arguable that Aarhus would be engaged, with possible breaches of Article 3(8). I do not rule on that scenario as I have not been invited to, the situation not arising here. However, in cases of Aarhus breach, the mechanism is for the Special Rapporteur to

bring the concern to the attention of the national government through a letter of allegation, and if not satisfied with the response, or if none were forthcoming, to refer the matter to the Convention's Compliance Committee. On the question of acts of intentional or deliberate disobedience, I note what Leggatt LJ said in *Cuadrilla* at para 94:

> "… the disruption caused was not a side-effect of protest held in a public place but was an intended aim of the protest…this is an important distinction. …intentional disruption of activities of others is not 'at the core' of the freedom protected by Article 11 of the Convention …. one reason for this [is] that the essence of the rights of peaceful assembly and freedom of expression is the opportunity to persuade others… …persuasion is very different from attempting (through physical obstruction or similar conduct) to compel others to act in a way you desire….;"

166. What Aarhus is directed at explicitly in Article 3 is imposing obligations on signatories ("Each Party") to ensure that the exercise of rights under the Convention is not subject to penalisation, persecution and harassment. I cannot see how that would protect a protester who causes, for example, criminal damage and creates a significant hazard risk to health and the immediate environment by smashing the glass of petrol pumps. Each case, I emphasise, must be examined on its own facts and merits. However, I find nowhere in the Aarhus Convention an endorsement or authorisation of the right to break the law by committing crimes or unlawfully violating the rights of others or causing deliberate damage.

167. As to legal principle, the Aarhus Convention is not and cannot be determinative of these claims. However, I am persuaded, and find, that the substance of the Convention is relevant to the court's assessment of interferences with the Convention rights of protesters under the ECHR and proportionality analyses. It consequently has relevance for the court's equitable discretion confirmed by section 37 of the Senior Courts Act 1981. I must explain what relevance means in this context. It is a matter for the court to have regard to in making its discretionary decision rather than a freestanding and independently justiciable right, Aarhus not having been incorporated. It is relevant to recognise, and I do, that the United Kingdom remains a party to an international treaty that obliges member states to guarantee the rights of public participation in decision-making and access to justice in environmental matters in conformity with the provisions of Aarhus Convention and ensure that those who act in such conformity are not penalised, persecuted or harassed.

168. Having concluded the Aarhus analysis, I apply it to the overall questions of defences, balance of convenience and compelling need and proportionality under *Ziegler*. I have carefully considered whether the granting of the injunctive relief sought by Shell in this case exclusively directed at unlawful acts, while explicitly exempting lawful protest, would be, as the defendants maintain, contrary to Article 3(8) of the Aarhus Convention. Given that there is nothing in Aarhus authorising, for example, committing criminal offences, and that lawful protest is not prohibited under the terms of the injunction, I cannot find a putative breach of Aarhus.

169. I therefore add the Aarhus analysis to the four-part *Ziegler* analysis. I include the recognition of the United Kingdom's unincorporated treaty obligations under Aarhus in the proportionality assessment overall. Having done so, I concur with Hill and Cotter

JJ that the granting of the injunctive relief sought by Shell is necessary and proportionate, even including full Aarhus obligation recognition. The balance of convenience, which can be alternatively understood as the balance of prejudice, significantly favours the grant of injunctive relief as what is being prohibited in future is unlawful protest in breach of the lawful rights vested in the claimants where the potential damage caused by future unlawful breaches have the capacity to be irreversible, certainly should it involve serious physical injury or death. There is undoubtedly a compelling need to prohibit future unlawful protests in the way that the Supreme Court identified in *Wolverhampton* at para 167, in other words, to prevent the claimants from being subject to the torts pleaded. The explicit inclusion of the lawful protest exemption within the orders strikes the right balance between the competing interests. Defendants can apply to vary or set aside the injunctions or any of them and they will be regularly reviewed. While breaches of the claimants' rights in civil law may not be capable of remedy, there is no evidence that the defendants would in any event be able to provide a remedy in damages. The damage may be "grave and irreparable" as Marcus Smith J put it in *Vastint* at para 31(4)(d).

170. The question with regard to PUs is whether there is a realistic defence. The court has examined the filed defences of Ms Ireland and Mr Laurie in detail and concluded that they do not provide a defence to the claims. There is no logical basis to envisage that the position of PUs would be superior to the rejected defences of the appearing defendants.

171. Having analysed the relevance of the Aarhus Convention and completed the *Ziegler* analysis, including analysing balance of convenience and compelling need and proportionality, I return to my systematic analysis of the 15-part factor checklist and reach Factor 7.

§XI. ANAYSIS OF THE 15 FACTORS: PART II

7 Damages not adequate remedy

172. There is no evidence that either Ms Ireland or Mr Laurie would have the financial resources to compensate Shell for the damage caused by their protests, particularly if serious injury or the leaking of toxic substances resulted. I note that Ms Ireland has said in future she would not be prepared to participate in protests that damaged petrol pumps. However, presently Ms Ireland receives limited income. Mr Laurie was less clear about his future intentions about petrol pumps and spoke about the spectrum of risk in a way that suggested that he may indeed participate in such a protest in future should the injunctions be discharged. These are very specific examples, but there is a wider picture about economic torts. There is no undertaking from any of the named defendants to pay damages or costs. Against this, Shell has offered cross-undertakings in damages. I am satisfied that this would be an adequate remedy for the defendants. Hill J summarised the position as it had evolved before the court in these claims at paras 133-37:

> 133 "The note of Bennathan J's judgment indicates that he accepted that (i) the activities at the Haven and Tower sites would cause grave and irreparable harm; (ii) trespassing on the sites could lead to highly dangerous outcomes,

> especially given the presence on the sites of flammable liquids; and (iii) the blocking of entrances could lead to business interruption and large scale cost to the Claimant's businesses. He concluded that given the sorts of sums involved and the practicality of obtaining damages, the latter would not be an adequate remedy.
>
> 134 Johnson J accepted at [34] that the Defendants' conduct with respect to the petrol stations gives rise to potential health and safety risks and if those risks materialise they could not adequately be remedied by way of an award of damages. He took into account the fact that there is no evidence that the Defendants have the financial means to satisfy an award of damages, such that it is "very possible that any award of damages would not, practically, be enforceable."
>
> 135 The evidence before me shows that all of these considerations remain valid.
>
> 136 There is also an element to which the losses at the Haven and Tower sites may be impossible to quantify, though like Johnson J at [33], I do not find the Claimants' argument to similar effect with respect to the petrol stations persuasive.
>
> 137 However, for the other reasons set out at [133]-[135] above I am satisfied that damages would not be an adequate remedy for the Claimants."

173. I have separately and independently assessed the situation in respect of damages. I accept the submission of Ms Stacey that essentially "nothing has changed". I also note that Hill J's analysis was adopted by Cotter J at para 51.

174. I endorse the finding of Johnson J that the losses at Haven and Tower may be impossible to quantify, although I agree with Hill J that this is not the same for the petrol stations claim. That said, the potential harm through serious injury has the capacity to be irreversible. The cross-undertakings in damages offered by the claimants, I am satisfied, would be an adequate remedy for any future Convention breach caused by the operation of the injunctions. There is no doubt that the claimants have the resources to meet any award due.

175. Overall, I am satisfied that this requirement has been met.

8(a) Whether the defendants are identified in the claim forms and the injunctions by reference to their conduct.

176. As to PUs, I am satisfied that the claim forms and the subsequent injunctions identify any person falling into that category with the requisite clarity and proportionality. Geographical boundaries, where relevant, have been identified. Evidence before the court about the efficacy of the identification process is gleaned from the fact that in the petrol stations claim a large number of named individuals were joined to the claim when the matter came before Soole J. I am satisfied that this requirement has been met.

8(b) Whether PUs are capable of being identified and served

177. As explained, this process has been successfully conducted on an interim basis. As Ms Oldfield points out in her statement, the claimants have been liaising with relevant police forces and individuals have previously been identified and served. Shell undertakes to continue this approach: if any PUs are identified, Shell will serve them and make an application to join them to the claim as soon as reasonably practicable. In the meantime, there are provisions in the draft order for alternative service, a connected requirement I will come to.

178. The court finds that requirement 8(b) is met.

9 (a) Whether the terms of the injunctions are sufficiently clear and precise

179. The claimants seek final orders on terms that are substantially and materially identical to those previously sought by Shell and approved and granted by this court. That this was not a rote or routine approval process can be seen from the meticulous way in which Hill J examined the terms and directed changes to the geographical limits. Aside from that, she approved the terms of the injunctions at paras 154-56 in this way:

> "154. In my judgment the wording of all three injunctions is in clear and simple language, save for two caveats with respect to the petrol stations injunction: (i) some wording should be inserted before clauses 3.4-3.6 to reflect that the acts are only prohibited if they cause damage (such wording being clear on the face of the Tower and Haven injunctions but not on the petrol stations one); and (ii) clause 3.7 should be removed as it duplicates paragraph 4.
>
> 155. In respect of the petrol stations injunction, as Johnson J noted at [46], it is usually desirable that such terms should, so far as possible, be based on objective conduct rather than subjective intention. However, for the reasons he gives, the element of subjective intention in paragraph 2 ("with the intention of disrupting the sale or supply of fuel to or from a Shell Petrol Station") is necessary because of the nature of the tort of conspiracy to injure and to avoid the language being wider than is necessary or proportionate (noting the sweet wrapper example he gave at [21]).
>
> 156. I do not accept Mr Simblet's contention that the "encouragement" provisions are unduly vague: they are clearly defined as being linked with the underlying acts and are intended to ensure that the injunctions are effective. To the extent that they capture lawful activity, they are proportionate as explained under sub-issue (10) below."

180. The terms of the injunctions were also approved by Cotter J at para 55. I have independently scrutinised each draft order and conclude that the terms bear the qualities of clarity and precision.

9(b) Whether the injunctions only prohibit lawful conduct where no other proportionate means to protect claimant's rights

181. All three draft orders specify in terms that lawful protest is exempted. Hill J held at para 153:

> "153. Each injunction contains an order making clear that it is not intended to prohibit behaviour which is otherwise lawful. To the extent that it does, the same is a proportionate means of protecting the Claimant's rights for the reasons given under sub-issue (10) below."

182. I have considered the question of proportionality in the *Ziegler* analysis, and as part of the four-element analysis have considered whether the measure sought is the least interference with the Convention rights of the defendants consistent with achieving the legitimate aim of preventing future material breach of the claimants' civil law rights. I have found that this was the case. Overall, I find that requirement 9(b) is met.

10 Whether there is correspondence between terms of injunction and threatened tort

183. I have carefully considered each of the torts relied upon and compared the terms of each injunction to them. To that end, I prepared a table of the prime elements of each of the torts that the claimants rely on and have compared those elements with the acts to be prohibited under the draft orders. There is a clear and mirroring correspondence between the torts and the injunction terms. This issue has been previously considered by the court, with Hill J finding the necessary correspondence at paras 151-53 and Cotter J endorsing that conclusion after his consideration at para 54.

184. The issue of whether the injunction sought in the petrol stations claim corresponds to the tort of conspiracy to injure was litigated before Hill J. She ruled at para 151:

> "151. The acts prohibited in the petrol stations injunction reflect those in the petrol stations injunction necessarily amount to conduct that constitutes the tort of conspiracy to injure, provided that the injunction is read in full in the way described by Johnson J at [26 above]. This means that the concerns raised in Mr Simblet's submission to the effect that clause 3.4 ("affixing any object or person") would prohibit placing leaflets or signs on any objects on or in a Shell petrol station and his similar concerns about clauses 3.5 and 3.6 ("erecting any structure in, on or against any part of" or "painting or depositing or writing in any substance on any part of" a Shell petrol station) are to some degree mitigated by the fact that such activities are only prohibited by the injunction if they are (i) such that they damage the petrol station; (ii) done in agreement with others; and (iii) done with the intention of disrupting the sale or supply of fuel. These are similar to the "sweet wrapper" example given by Johnson J at [26] above: the prohibited acts in paragraph 3 need to be read in conjunction with the definition of Defendants. When that is done, it can be seen that they mirror the torts underlying the overarching tort of conspiracy to injure."

185. Nothing has changed since this analysis and no point was taken before me. I find that requirement 10 is satisfied.

11 Whether there is a clear and justifiable geographical limit

186. This matter was reviewed by Cotter J at para 56:

> "56. As for geographical and temporal limits, the extent of the Haven and Tower injunctions are made clear by the plans appended to them. In respect of the petrol stations injunctions, this matter was revised by Hill J, and again I am satisfied that the form of order is appropriate."

187. The geographical scope of the Haven and Tower injunctions are precisely set out in the plans attached to the draft orders. The extent of these protected areas makes evident sense and is plainly justifiable. For example, in respect of Tower, it does not – and critically has not – prevented ongoing and regular protests in the vicinity of the building complex as set out in the filed chronology.

188. As to petrol stations, as indicated, Hill J refined the geographical extent. The reason was that on objection from the defendants, the court agreed that there needed to be greater clarity about the scope of injunction not to impinge on the public highway. The terms endorsed by Hill J, were also approved by Cotter J at para 56. The finding of Hill J, endorsed by Cotter J, makes evident sense and is justifiable, being logically connected to and proportionate to the need to protect the sites. No point was taken about this factor or the draft orders, reflective of their necessity and proportionality.

189. I find that this requirement is met.

12 Clear and justifiable temporal limit

190. The application in respect of each injunction is for a duration of 5 years. I questioned Ms Stacey about why such a period was necessary, notwithstanding that it had been granted in other protest cases (such as by Ritchie J in *Valero*), the court wanting to be independently satisfied. She made two submissions. First, that several environmental groups have made demands of the Government that the extraction of fossil fuels ends by 2030. Mr Eilering notes in his statement at paras 2.8-2.9:

> "2.8 it is clear to me that there is still a very real risk that without the protection of the Injunction Orders, protest activity would very likely return to the levels of unlawful activity previously experienced.
>
> 2.9 For example, I am aware of an article in which Just Stop Oil were quoted saying "*whilst governments are allowing oil corporations to run amok destroying our communities, the actions of individuals mean very little. Failure to defend the people they represent will mean Just Stop Oil supporters, along with citizens from Austria, Canada, Norway, the Netherlands and Switzerland will join in resistance this summer, if their own governments do not take a meaningful action*." Pages 279-286 of **Exhibit PE1**."

191. He fears that their activist campaigns are highly likely to continue until the extraction of fossil fuels ends. Second, Ms Stacey points to the costs of refiling and reissuing these claims. The petrol stations claim, for example, covers 1000 petrol stations across the

jurisdiction. It involves a very significant undertaking to implement the necessary warning signs at the sites. In all these circumstances, it is proportionate to grant a 5-year period in the order because of another vital consideration: there is built into the structure of the orders an annual review along with provision to vary or set aside. Should therefore there be a significant or material change, the grant of the injunctions or any of them can be actively and promptly revisited. I find myself in a position analogous to Ritchie J, who held at para 75:

> "Temporal limits - duration
>
> 75. I have carefully considered whether 5 years is an appropriate duration for this quasi- final injunction. The undertakings expire in August 2026 and I have thought carefully about whether the injunction should match that duration. However, in the light of the threats of some of the 4 Organisations on the longevity of their campaigns and the continued actions elsewhere in the UK, the express aim of causing financial waste to the police force and the Claimants and the total lack of engagement in dialogue with the Claimants throughout the proceedings, I do not consider it reasonable to put the Claimants to the further expense of re-issuing for a further injunction in 2 years 7 months' time. I have seen no evidence suggesting that those connected with the 4 organisations will abandon or tire of their desire for direct tortious action causing disruption, danger and economic damage with a view to forcing Government to cease or prevent oil exploration and extraction."

192. It should be noted that the "4 organisations" are JSO, XR, Youth Climate Swarm and Insulate Britain. I find that this requirement is satisfied.

13 Service

193. It is essential that all practical steps are taken to notify defendants and potential defendants. The Supreme Court addressed this point in *Wolverhampton* from para 226:

> *"*226 We recognise that it would be impossible for a local authority to give effective notice to all newcomers of its intention to make an application for an injunction to prevent unauthorised encampments on its land. That is the basis on which we have proceeded. On the other hand, in the interests of procedural fairness, we consider that any local authority intending to make an application of this kind must take reasonable steps to draw the application to the attention of persons likely to be affected by the injunction sought or with some other genuine and proper interest in the application (see para *167*(ii) above). This should be done in sufficient time before the application is heard to allow those persons (or those representing them or their interests) to make focused submissions as to whether it is appropriate for an injunction to be granted and, if it is, as to the terms and conditions of any such relief.
>
> 227 Here the following further points may also be relevant. First, local authorities have now developed ways to give effective notice of the grant of such injunctions to those likely to be affected by them, and they do so by the use of notices attached to the land and in other ways as we describe in the next section of this

judgment. These same methods, appropriately modified, could be used to give notice of the application itself.

…

228 Secondly, we see merit in requiring any local authority making an application of this kind to explain to the court what steps it has taken to give notice of the application to persons likely to be affected by it or to have a proper interest in it, and of all responses it has received.

229 These are all matters for the judges hearing these applications to consider in light of the particular circumstances of the cases before them, and in this way to allow an appropriate practice to develop."

194. This is precisely what has happened in the claims before me. The court has original evidence and updating evidence from Ms Alison Oldfield on behalf of Shell to explain the numerous steps that have been taken (her tenth statement is dated 24 September 2024; the court has considered all of them). For example, in the draft order in respect of the petrol stations claim, it is stated that:

> 9 "Pursuant to CPR 6.15 and 6.27 and CPR 81.4(c) and (d), service of this Order (with the addresses in the Third Schedule and the social media addresses redacted) shall be validly effected on the First Defendant and any other non-parties as follows:
>
> a. the Claimant shall use all reasonable endeavours to arrange to affix and retain Warning Notices at each Shell Petrol Station by either Method A or Method B, as set out below:
>
> Method A
>
> Warning notices, no smaller than A4 in size, shall be affixed:
>
> (a) at each entrance onto each Shell Petrol Station
>
> (b) on every upright steel structure forming part of the canopy infrastructure under which the fuel pumps are located within each Shell Petrol Station forecourt
>
> (c) at the entry door to every retail establishment within any Shell Petrol Station
>
> Method B
>
> Warning notices no smaller than A4 in size shall be affixed:
>
> (a) at each entrance onto the forecourt of each Shell Petrol Station

(b) at a prominent location on at least one stanchion (forming part of the steel canopy infrastructure) per set/row of fuel pumps (also known as an island) located within the forecourt of each Shell Petrol Station

b. Procuring that a Warning Notice is uploaded to www.shell.co.uk;

c. Sending an email to each of the addresses set out in the Second Schedule of this Order providing a link to and, specifically notifying them that a copy of this Order is available at, https://www.noticespublic.com/

d. Uploading a copy of this Order to https://www.noticespublic.com/

e. Sending a link to www.noticespublic.com data site where this Order is uploaded to any person or their solicitor who has previously requested a copy of documents in these proceedings from the Claimant or its solicitors, either by post or email (as was requested by that person)."

195. CPR Part 6 requires "good reason" to justify such alternative service steps. Where there are PUs, doing what can reasonably be done to publicise the prohibitions generally to potential future protesters is required. Similar efforts apply to the general public. It will not do if people are not given fair warning. The point of alternative service methods is, as stated in *Canada Goose* at para 82, to take such steps as can be reasonably expected to bring the proceedings to the attention of people who may be affected by the restrictions in future. To that end, the claimants have filed evidence of the extensive steps they have taken to meet this requirement in the three claims. The efforts mirror what was approved by Johnson, Hill and Cotter JJ. As put by Hill J at para 201-04:

201 "The alternative means of service proposed for the order in the Tower claim are (i) affixing warning notices to and around the Tower which (a) warn of the existence and general nature of the order, and of the consequences of breaching it; (b) indicate when it was last reviewed and when it will be reviewed in the future; (c) indicate that any person affected by it may apply for it to be varied or discharged; (d) identify a point of contact and contact details from which copies of the order may be requested; and (e) identify http://www.noticespublic.com/ as the website address at which copies of the order may be viewed and downloaded; (ii) uploading a copy of the notice to http://www.noticespublic.com/; (iii) emailing a copy of the notice to a series of emails relating to the main protest groups listed in the schedule of the order; and (iv) sending a copy of the notice to any person who has previously requested a copy of documents in the proceedings.

202 The alternative means of service proposed for the order in the Haven claim are (i)-(iii) above.

203 The alternative means of service proposed for the order in the petrol stations claim are (i)-(iv) above. The interim orders which I made on 28 April 2023 mirrored the terms of Johnson J's order and provided for the notices to be affixed by use of conspicuous notices in prescribed locations in the petrol stations, in alternative locations in the stations, depending on the physical layout and configuration of the stations.

204 The alternative means of service proposed for the amended claim form and any ancillary documents in the petrol stations claim are (ii)-(iv) above."

196. The alternative service methods previously used remain relevant and the court authorises their continued use. This includes service through notification through social media accounts where necessary. The claimants' filed evidence on this point has not been disputed by the defendants and I accept it. The balance of fairness is maintained because any person committed for possible future breach can make the argument that the service provisions have operated in a way that was ineffective and unfair in her or his case (see *Secretary of State for Transport v Cuciurean* [2020] EWHC 2614 (Ch) at para 63(9)).

197. I find requirement 13 satisfied.

14 Right to set aside or vary

198. This right has been explicitly included in all draft orders and will form part of any final orders granted. I find this requirement met.

15 Review

199. The duty to keep an injunction under review is equally applicable to final injunctions as it is to interim injunctions (*Barking* at para 77). Indeed, in *Barking* at para 105 the court stated that even where final orders are granted "it is good practice to provide for periodic review". As already indicated, an annual review is included in the draft orders and will form part of any final orders granted. I find this requirement met. In her evidence and updating evidence, Ms Oldfield explains how the claimants continue to keep the necessity for the injunctions under anxious review. I have no reason not to accept that evidence, nor was it disputed.

§XII. OVERALL CONCLUSION

200. I have carefully considered each of the three claims separately. The applications do not stand or fall together. They are, I emphasise, separate applications in separate claims being managed and heard together for administrative convenience. In each claim, the requirements ("the 15 factors") identified in *Valero*, summarising *Canada Goose* and *Wolverhampton*, have been met and this is highly significant in the exercise of the court's equitable discretion. In such matters, a court will grant injunctions on the assumption that they will be effective and obeyed. This point was made by the Supreme Court in *Wolverhampton* at para 141, where Lord Reed said:

> "In considering whether injunctions of this type comply with the standards of procedural and substantive fairness and justice by which the courts direct themselves, it is the compliant (law-abiding) newcomer, not the contemptuous breaker of the injunction, who ought to be regarded as the paradigm in any process of evaluation. Courts grant injunctions on the assumption that they will generally be obeyed, not as stage one in a process intended to lead to committal

> for contempt: see para 129 above, and the cases there cited, with which we agree."

201. As to Mr Laurie's concern that parallel proceedings in both the criminal courts and the civil jurisdiction "trap" him, it is vital to note that the distinct proceedings are directed at different matters. The Crown Court at Winchester, through the historic device of a jury of the defendants' peers, will decide whether Ms Ireland and Mr Laurie broke the criminal law during their protest at the service station at Cobham in August 2022. About that important question, nothing determined in this judgment has any relevance. This court respects the sacrosanct province of the British jury and its right to make its own decision. The injunctions sought here are exclusively aimed at prohibiting future breaches of the lawful rights possessed by Shell. Justice must be blind; it does not have sides. It must respect the rights of all parties coming before the court, and the court's duty where they clash is to strike the fair balance, ensuring that any necessary interference with the Convention rights of a defendant is proportionate. These final orders achieve that. They are anticipatory injunctions, with the objective of prohibiting future unlawful breaches of the claimants' rights. The right and fair balance is struck by ensuring that lawful protest is not prohibited, and indeed I observe that such lawful protests have continued with great regularity near to the Shell Tower in London. The "way out" of the trap that Mr Laurie perceives himself to be in is, as Ms Stacey submits, to give the undertaking that other defendants have given, and thereby promise that he will not engage in the specified unlawful acts in future. He does not wish to do that. Neither does Ms Ireland. That is their right. But nothing in these final injunctions prohibits their engaging in future protest that is lawful.

202. Should they protest lawfully and in conformity with the Aarhus Convention, acts of penalisation, persecution or harassment would undoubtedly be matters of grave concern to the Special Rapporteur. In pursuance of the mandate, the Rapporteur is authorised to take "measures" such as public statements and raising the matter with the relevant government. If there were no satisfactory governmental response, the issue can be referred to the Aarhus Convention Compliance Committee. This is a mechanism now recognised on the international plane. The Compliance Committee can request the member state to submit a Plan of (remedial) Action. Should a domestic court be tasked with exercising its discretion confirmed by section 37 of the SCA 1981, recognition of United Kingdom's Aarhus Convention obligations would plainly be relevant to the assessment of incorporated substantive rights such as those under the ECHR. I have little difficulty in reaching that conclusion in a similar way to the Supreme Court in *SG*.

203. In *Finch*, the Supreme Court set down in unsparing terms the "virtual certainty" that oil extracted from the ground "will sooner or later be released into the atmosphere as carbon dioxide and so will contribute to global warming." These are unquestionably issues of generational and inter-generational significance. It is not part of this court's function to quell, suppress or deter legitimate debate about these vital matters, nor to prohibit genuine and lawful protest lawfully conducted by genuinely concerned and sincere citizens. But the lawful rights of others which are recognised by the law cannot be ignored in this equation. This is the balance that the granting of these final orders strikes. The question of infringing the rights of others out of necessity was considered by the Court of Appeal in *Monsanto PLC v Tilly & Ors*. [2000] Env LR 313 ("*Monsanto*"; and see *Clerk & Lindsell on Torts* (24th ed.) at para 18-58). In *Monsanto*, Mummery LJ said at 339:

> "Public confidence in the legal system and in the rule of law would be undermined if the courts refused to enforce the law on the ground that defendants, who wished to establish the validity of beliefs sincerely and genuinely held, were entitled to rely on the public interest to justify wrongs to the property of others who did not share their point of view. It is extremely improbable that a reasonable man would regard the [necessity] defence proposed as an acceptable reason for the unauthorised presence of anyone, public official or fellow citizen, on his property or on the property of anyone else.
>
> On the other hand, the unavailability of public interest as a justification for trespass does not in any way curtail or prejudice the exercise by the defendants of their undoubted right in a democratic society to use to the full all lawful means at their disposal to achieve the[ir] aims and objects … Supporters can peacefully and effectively pursue those aims and gain publicity and public support for them in many different ways without the need to commit unlawful acts of trespass."

204. Here starkly is the issue posed by these protests and indeed these claims: what is justifiable in a functioning democracy when the actions of genuinely concerned citizens interfere with the rights of others who wish to go about their business or wish to exercise their property rights in peace? In this, the court does not take sides about the policy and political debate; it applies the law. In *Wolverhampton* at para 170-71, the Supreme Court stated that it was relevant to the court's discretion to consider whether other "non-judicial" remedies lie open to the claimants. In those gypsy/traveller injunction cases, for example, it was relevant to consider whether local byelaws could be passed by the local authority. Here, however, the claimants have no such powers open to them. They have turned to the court for protection of their substantive rights under the law. The remedy of an equitable injunction has been sought because, as Lord Reed said in *Wolverhampton* at para 238(iii)(a):

> "equity provides a remedy where the others available under the law are inadequate to vindicate or protect the rights in issue."

205. It is vital to return to the basis of these claims. The claimants are not inviting the court to determine whether trespass to land or private or public nuisance has been proved. The question is vitally different. These are applications for anticipatory or precautionary injunctions. The question is simply whether there is a real and imminent risk of future direct action by the defendants or PUs that carries with it the strong probability that the claimants' rights under civil law will be breached. It is on that exclusive and focused basis that the court exercises its discretion confirmed by section 37 of the SCA 1981 to grant the final orders sought as satisfying the just and convenient test – the true and paramount test.

206. Regular review is built into the very structure of the orders to ensure that changing circumstances do not "outflank or outlast" (*Wolverhampton*, para 167(iv)) the compelling need that resulted in the grant, as is the liberty for defendants to apply to vary or set aside. These are essential safeguards and checks and balances. Ultimately, as the Supreme Court remarked in *Wolverhampton* at para 18, the High Court when exercising its equitable discretion in respect of injunctions

> "possesses the power, and bears the responsibility, to act so as to maintain the rule of law."

207. It is this high responsibility that this court must give effect to in these three claims.

§XIII. DISPOSAL

208. Therefore, on the issues the court was invited to determine:

(1) Whether to grant final orders in each of the three claims:

a. Claim 1 (Haven): final order **GRANTED**;

b. Claim 2 (Tower): final order **GRANTED**;

c. Claim 3 (petrol stations): final order **GRANTED**.

(2) Whether the duration of the final orders should be 5 years: **GRANTED**.

(3) Whether alternative service orders should be granted: **GRANTED**.

(4) Whether to grant the application to remove the third defendant from Claim 3 (petrol stations) and consequently amend the claim form and particulars of claim to reflect the strike out: **GRANTED**.

209. As noted, the claimant in Claim 3 does not seek its costs against the defendants. If there is any other consequential application, it should be notified to the court accompanied by a draft order and skeleton by 4pm, five working days after electronic publication of the judgment. The other parties are granted 3 working days to respond. The applicant(s) granted one further day for a short reply after that. The court will consider whether it can determine the application on the papers. If not, a hearing will be directed.

210. I intend for this judgment to be handed down electronically and published to the National Archives.

ANNEX A

Defendants in Claim 3

Persons Unknown
First Defendant

Louis McKechnie
Second Defendant

XXX XXX
(Struck out on order of court following undertaking)
Third Defendant

Callum Goode
Fourth Defendant

Christopher Ford
Fifth Defendant

Sean Jordan
(also known as Sean Irish, John Jordan,
John Michael Jordan and Sean O'Rourke)
Sixth Defendant

Emma Ireland
Seventh Defendant

Charles Philip Laurie
Eighth Defendant

Michael Edward Davies
also previously known as Michael Edward Jones
Ninth Defendant

Tessa-Marie Burns
(also known as Tez Burns)
Tenth Defendant

Simon Reding
Eleventh Defendant

Kate Bramfit
Twelfth Defendant

Margaret Reid
Thirteenth Defendant

David Nixon

Fourteenth Defendant

Samuel Holland

Fifteenth Defendant

Annex B

Procedural history

Date	Event
3 April 2022	Haven protests
6-20 April 2022	Tower protests
28 April 2022	Initial petrol stations protests
5 May 2022	Bennathan J grants Haven and Tower interim injunctions
20 May 2022	Johnson J continues Haven and Tower interim injunctions
24 August 2022	JSO petrol station protest at Cobham services
26 August 2022	JSO petrol stations protest at Acton Vale and Acton Park
23 May 2023	Hill J grants petrol stations injunction and continues Haven and Tower and Petrol injunctions
15 March 2024	Soole J review (joinder and case management directions)
24 April 2024	Cotter J review and interim injunctions continued
7 May 2024	Mr Laurie's defence filed
16 May 2024	Ms Ireland's defence filed
16 October 2024	Mr Laurie's witness statement and skeleton argument

16 October 2024	Claimants' skeleton argument
17 October 2024	Ms Ireland's witness statement and skeleton argument
17 October 2024	Mr Laurie's skeleton argument
22-23 October 2024	Substantive hearing

Annex C

Materials

Item	**Pages**
Core hearing bundle Previous service bundle	1-413 414-7234
Miscellaneous bundle	7235-7766
Authorities bundle	636
Additional authorities bundle	166
Claimants' skeleton	31
Ms Ireland's skeleton	7
Mr Laurie's skeleton	10

Annex D

Draft undertaking (Claim 3)

Form of Undertaking

Shell U.K. Oil Products Limited V Persons Unknown (etc) and others with the claim number: QB-2022-001420 (the "Petrol Stations Injunction")

I promise to the Court that, whilst the Petrol Stations Injunction remains in force (including for the avoidance of doubt where it is continued at a renewal hearing or final hearing and in each case as amended by further order of the Court), I will not engage in the following conduct:

a) Directly blocking or impeding access to any pedestrian or vehicular entrance to a Shell Petrol Station forecourt or to a building within the Shell Petrol Station;

b) Causing damage to any part of a Shell Petrol Station or to any equipment or infrastructure (including but not limited to fuel pumps) upon it;

c) Operating or disabling any switch or other device in or on a Shell Petrol Station so as to interrupt the supply of fuel from that Shell Petrol Station, or from one of its fuel pumps, or so as to prevent the emergency interruption of the supply of fuel at the Shell Petrol Station; and

d) Causing damage to any part of a Shell Petrol Station, whether by:

    i. Affixing or locking myself, or any object or person, to any part of a Shell Petrol Station, or to any other person or object on or in a Shell Petrol Station.

    ii. Erecting any structure in, on or against any part of a Shell Petrol Station.

    iii. spraying, painting, pouring, depositing or writing in any substance on to any part of a Shell Petrol Station.

e) I confirm I will not carry out such activities myself, by means of another person doing so on my behalf, or on my instructions with my encouragement or assistance.

I confirm that I understand what is covered by the promises which I have given and also that if I break any of my promises to the Court I may be fined, my assets may be seized or I may be sent to prison for contempt of Court.

Signed …….

Name ……

Dated ……..

Neutral Citation Number: [2025] EWCA Civ 109

Case No: CA-2023-001319

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Mrs Justice Eady (President)
[2023] EAT 89

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/02/2025

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE BEAN
and
LADY JUSTICE FALK

- -

Between :

KRISTIE HIGGS	**Claimant/ Appellant**
- and –	
FARMOR'S SCHOOL	**Respondent**
- and –	
(1) THE ARCHBISHOPS' COUNCIL OF THE CHURCH OF ENGLAND	
(2) THE FREE SPEECH UNION LTD	
(3) THE ASSOCIATION OF CHRISTIAN TEACHERS	
(4) SEX MATTERS	
(5) THE EQUALITY AND HUMAN RIGHTS COMMISSION	**Interveners**

- -
- -

Richard O'Dair (instructed by **Andrew Storch Solicitors**) for the **Claimant**
Sean Jones KC and **Christopher Milsom** (instructed by **Browne Jacobson**) for the **Respondent**
Sarah Fraser Butlin KC (instructed by **Herbert Smith Freehills LLP**) for the **First Intervener**
Ben Cooper KC and **Spencer Keen** (instructed by **Branch Austin McCormick LLP**) for the **Second Intervener** (written submissions only)
Roger Kiska (of **Camerons Solicitors LLP**) for the **Third Intervener** (written submissions only)
Akua Reindorf KC (instructed by **Direct Access**) for the **Fourth Intervener** (written submissions only)
Joanne Clement KC (instructed by **the Equality and Human Rights Commission**) for the **Fifth Intervener**

Hearing dates: 2 and 3 October 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 12 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Underhill :

INTRODUCTION

1. The Respondent in these proceedings (to which I will refer as "the School") is a secondary school in Fairford in Gloucestershire. At the time relevant to these proceedings the Claimant had been employed by the School for six years, latterly as a pastoral administrator and work experience manager. In the first of those roles she was responsible for overseeing students who had been removed from class for disruptive behaviour. She has two children, the elder of whom was a pupil at the School. She is a Christian.

2. On 26 October 2018 a parent at the School emailed the Head Teacher, Matthew Evans, complaining that the Claimant had expressed "homophobic and prejudiced views" on her Facebook page: I give details below. Following an initial interview with the Claimant, on 30 October Mr Evans asked a member of staff called Sue Dorey to conduct an investigation. The Claimant was suspended. On the basis of Ms Dorey's report, disciplinary charges were brought against the Claimant. The charges were considered at a hearing on 19 December 2018 before a panel chaired by one of the governors, Stephen Conlan. By letter dated 7 January 2019 she was summarily dismissed for gross misconduct. An internal appeal was unsuccessful.

3. On 15 April 2019 the Claimant began proceedings in the Employment Tribunal ("the ET"). Although she initially raised other complaints, the complaints which eventually proceeded were of (direct) discrimination and harassment, within the meaning of sections 13 and 26 respectively of the Equality Act 2010, in both cases on the ground of religion or belief.

4. The claim was heard by the ET (Employment Judge Reed, Mrs England and Ms Maidment) in Bristol on 21-24 September 2020. The Claimant was represented by Mr Pavel Stroilov, of Andrew Storch Solicitors, and the School was represented by Ms Debbie Grennan of counsel. By a judgment sent to the parties on 6 October 2020 the Claimant's claims of discrimination and harassment were dismissed.

5. The Claimant appealed to the Employment Appeal Tribunal ("the EAT"). The appeal was heard by the President, Eady J, on 16 March 2023. The Claimant was represented by Mr Richard O'Dair of counsel and the School again by Ms Grennan. The Archbishops' Council of the Church of England was given permission to intervene and was represented by Mrs Sarah Fraser Butlin. By a judgment handed down on 16 June the Claimant's appeal was allowed and the claim remitted to the ET.

6. Although the Claimant had to that extent succeeded in her appeal, she believes that the EAT should have gone further and have held for itself that her claim succeeded; and by an Appellant's Notice dated 7 July 2023 she appealed to this Court on that basis. Permission to appeal was given by Elisabeth Laing LJ.

7. By a Respondent's Notice dated 5 February 2024 the School sought permission to cross-appeal on the basis that, while it accepted that the claim had to be remitted, the EAT's formulation of the question requiring determination was erroneous. By order dated 27 March Elisabeth Laing LJ refused that permission, and she subsequently refused permission to re-open that decision.

8. The Claimant has again been represented before us by Mr O'Dair. The School has been represented by Mr Sean Jones KC and Mr Christopher Milsom. The Archbishops' Council has been permitted to intervene and has again been represented by Mrs Fraser Butlin (now KC). Permission to intervene has also been given to the Free Speech Union Ltd ("the FSU"), the Association of Christian Teachers ("the ACT"), the charity Sex Matters, and the Equality and Human Rights Commission ("the EHRC"), though in the case of all but the EHRC by written submissions only. They have been represented by, respectively, Mr Ben Cooper KC, leading Mr Spencer Keen, Mr Roger Kiska of Camerons Solicitors, Ms Akua Reindorf KC, and Ms Joanne Clement KC. (I should say that the EHRC's written submissions were settled by Mr Tom Cross: Ms Clement was instructed to make the oral submissions when he fell ill, and she produced helpful short supplementary written submissions.) I am grateful for the work and thought that went into all the submissions, written and oral. I am also grateful for the immaculate way in which the bundles – particularly the bundles of authorities, which were voluminous – were prepared.

THE FACTS

THE COMPLAINT AND THE POSTS

9. The email referred to at para. 2 above reads as follows:

> "Dear Mr Evans,
>
> I've noticed that a member of your staff who works directly with children has been posting homophobic and prejudiced views against the lgbt community on Facebook. I'm concerned that this individual may exert influence over the vulnerable pupils that may end up in isolation for whatever reason. I find these views offensive and I am sure that when you look into it, you will understand my concern. I'd rather remain anonymous as the person in question is … . I've attached a couple of screen shots so you can see what I'm referring to."

The omitted words were redacted by the ET in order to preserve the anonymity of the complainant.

10. The attached screenshots were of the Claimant's Facebook page showing the following post, apparently made on 24 October 2018:

> "**PLEASE READ THIS! THEY ARE BRAINWASHING OUR CHILDREN!** On November 7th the Government Consultation into making Relationships Education mandatory in primary schools, and Relationships and Sex Education mandatory in secondary schools closes. Which means, for example, that children will be taught that all relationships are equally valid and 'normal', so that same sex marriage is exactly the same as traditional marriage, and that gender is a matter of choice, not biology, so that it's up to them what sex they are.
>
> At the same time it means that expressing and teaching fundamental Christian beliefs, relating to the creation of men and women and marriage will in practice become forbidden – because they conflict with

> the new morality and are seen as indoctrination into unacceptable religious bigotry.
>
> Which means that freedom of belief will be destroyed, with freedom of speech permitted only for those who toe the party line!
>
> We say again, this is a vicious form of totalitarianism aimed at suppressing Christianity and removing it from the public arena.
>
> ***Please sign this petition, they have already started to brainwash our innocent wonderfully created children and its happening in our local primary school now***"

There followed a link to a petition organised by CitizenGo.Org, an entity which describes itself as concerned to "uphold the right of parents to have children educated in line with their religious beliefs". The main text was not drafted by the Claimant but cut-and-pasted from another source. She had added the words between the asterisks at the beginning and the end. The account was in her maiden name (rather than the married name the Claimant used for her work at the School) and contained nothing which suggested any connection with the School; but it is clear that her identity was apparent at least to the complainant, who must have known that she worked there and of her role with children "in isolation". I refer to this as "the first post".

11. In response to an enquiry from Mr Evans about whether they had any further information, the complainant on 29 October 2018 sent another email, attaching further screenshots and saying:

> "I'm aware that not everyone has liberal views like myself but I do feel that people working directly with children should refrain from posting this type of view on social media. I know of several children at Farmors who might fit into the category of person your staff member seems to find so obnoxious, friends of my children even."

12. The additional screenshots were of what appear to be more than one (more recent) post by the Claimant, re-posting messages from campaigners in the U.S.A. objecting to materials used in schools there ("the re-posts"). I need not quote these in full. The following extracts sufficiently represent their gist and tone:

> "While normal Americans are busy at work trying to provide for their families, liberal school systems are busy indoctrinating their children. Kindergarten and first grade children are being primed for a gender fluid society. Of course, the schools are introducing the propaganda in the name of anti-bullying campaigns, but we know better.
>
> They are busy recruiting children for the transgender roster. Their agenda is not about bullying. They are using our children to promote their gender free society of madness.
>
> … They are stealing the innocence of our children with a devious scheme to supplant traditional gender roles by differentiating a child's gender assignment at birth with his perceived gender.

> …
>
> Not succumbing to the brainwashing of deranged educators is now a characteristic of bullying. The far-left zealots have hijacked the learning environment, and they insist on cramming their perverted vision of gender fluidity down the throats of unsuspecting school children who are a government mandated captive audience.
>
> …
>
> … Lying to children and convincing them that they can be anything they want to be when in reality they can't is a form of child abuse, especially when it entails the changing of one's genitalia or ingesting hormones.
>
> The LBGT [*sic*] crowd with the assistance of the progressive school systems are destroying the minds of normal children by promoting mental illness. Delusional thinking is a form of psychotic thinking, and we have professionals promoting it to our young kids."

13. I shall have to consider the content and language of those posts later. At this stage I will only note that they express two beliefs – (1) that gender is binary and not "fluid" (a view often labelled "gender-critical") and (2) (though this only appears in the first post) that same-sex marriage cannot be equated with traditional marriage between a man and a woman – and accordingly that it is wrong to teach anything different to children, and particularly primary school children. Although all the posts are hyperbolically expressed, that is markedly more so in the case of the re-posts.

THE INVESTIGATION AND THE DISCIPLINARY CHARGES

14. We do not have details of the School's disciplinary process, but it appears to follow the conventional two-stage pattern comprising an "investigation" to establish whether there is a case to answer, followed if necessary by a disciplinary hearing based on formal allegations (in effect, charges). As noted above, the investigation stage started on 30 October 2018, and in a report dated 30 November Ms Dorey found that there was a case to answer on four allegations, which I summarise below. I need not give the full details of the report but it is important to record the substance of the Claimant's response on the points raised. These are summarised at paras. 9-15 of the judgment of Eady J, the key parts of which I gratefully reproduce below.

15. In an initial interview with Ms Dorey on 30 October the Claimant confirmed that she had made the first post and the re-posts (save where it is necessary to distinguish I will refer simply to "the posts"). She accepted that it was possible that they might have been seen by parents of pupils at the School. She was asked whether other people might consider the posts offensive or prejudiced. She was recorded in the note of the meeting as responding:

> "Yes. I am not against gay, lesbian or transgender people. It's about making sure people are aware of what's going on in the primary school. It's not about the schools, they are just following government policy, it's about the government."

The "primary school" referred to was a school attended by her younger child. She also said:

> "I don't regret making the posts, it's about the children in the primary school. I don't have any issues with gay, lesbian or transgender people, I love all people."

16. At a meeting on 8 November the Claimant again told Ms Dorey that the posts were concerned with what was happening at her son's primary school, as a result of Government policy, and that she had wanted them to be seen by other parents there. She acknowledged that her term "brainwashing" was "not the best language to use", and that as regards the re-posts she should have used her own words or included a link. She was again asked whether she thought other people might consider the posts offensive or prejudiced. She replied:

> "I know that there are transgenders and gays who do have the same beliefs as me. … I am not against gay people, it doesn't say that."

She was asked whether she considered her posts might compromise her position of trust in working with children, some of whom might be LGBT. She answered:

> "No I don't. Students know me and I know gay students, I wouldn't treat any of them any different. … I wouldn't bring this into school."

As for the risk of reputational damage to the School, she said:

> "People should know my belief … as people on [Facebook] … are my friends. They would know me as a person and know I wouldn't discriminate. If anything I am being discriminated against as I have shared what the government is doing, this is what I stand for …"

17. It is important to record that in her report Ms Dorey referred to no evidence that the Claimant had ever expressed her views about gender fluidity or same-sex marriage to pupils or staff in the School or treated gay, lesbian or transgender pupils or staff differently.

THE DISMISSAL

18. The hearing before the disciplinary panel lasted several hours. The essential points about what transpired at it appear in the dismissal letter, which is full and carefully structured. For the most part it is sufficient to say that the Claimant adopted substantially the same position as in the investigation. But I should quote one passage, which is headed "The Language". This reads:

> "We discussed whether the two posts were yours and your position was that you were simply reposting existing articles and had only added a few words; they were not your posts. However, you confirmed that you had read the articles you re-posted and agreed with the content of them. Indeed, you wanted these articles to be circulated more widely as you felt it important for people to be aware of the content. We discussed at length whether the language used within these posts could be deemed as offensive or discriminatory and highlighted the specific words

> '*brainwashing, transgender roster, madness, devious scheme, child abuse and mental illness*' amongst others (I will not repeat them all here). We were keen to understand whether, upon reflection, you understood that the use of such language could be deemed as offensive and that it has the ability to cause damage to the reputation of the school. You stressed that whilst you may not have chosen to use the same language as used in the articles, you agreed with the content and upon reflection you would not have acted differently. When asked specifically what language you would not use you identified the words brainwashing, delusional thinking and psychotic thinking. You did not say you would not endorse or use any of the other words."

19. The letter finds allegations 1, 2 and 4 to be proved. Detailed reasoning is given as regards allegations 1 and 2 (though not allegation 4, which added nothing of substance). Those reasons can be sufficiently summarised for our purposes as follows.

Allegation 1

20. Allegation 1 had two limbs – "illegal discrimination" and "serious inappropriate use of social media, e.g. Facebook or other online comments, that could bring the school into disrepute".

21. As to the first limb, the Claimant's posts were found to constitute "discrimination against [the] complainant in the form of harassment on the grounds of sexual orientation and/or gender reassignment". It was common ground before us that the finding under the first limb of allegation 1 that the Claimant was guilty of unlawful harassment of the complainant was misconceived. Even if, which is unlikely but possible, the complainant was employed at the School, a post on the Claimant's personal Facebook account could not be said to create, as required by section 26 of the 2010 Act, "an intimidating, hostile, degrading, humiliating or offensive environment" for them.

22. As to the second limb, the panel referred to the "inflammatory and quite extreme" language of the posts. It noted that, although the Claimant had said that she "did not agree with the wording" of the original messages, she had nevertheless copied/re-posted them because she agreed with their content, and that she had said that she did not regret doing so and had not taken the posts down. The letter says:

> "You were unable to confirm that you would not do it again, only qualifying that you would not have used the word 'brainwashing' and would have added a link to the articles."

I should quote in full what it says about the potential for damage to the School's reputation:

> "Regarding bringing the school into disrepute/damaging the reputation of the school, we agree that there is no direct evidence that as a matter of fact the reputation of the school has to date been damaged. The complainant did not appear to be criticising the school and Sue Dorey confirmed that to her knowledge, no other complaints had been received. You said that you were only sharing these posts with your Facebook friends, that you make no reference to working at Farmor's

> on your Facebook page and use your maiden name. However, you also said that your friends know where you work, that you are a local girl, went to Farmor's school as a child and have lived locally for years and people know you. Some of your friends are also members of staff at the school and others parents of pupils at Farmor's. You affirmed that you were aware that your posts could be reposted and seen by others outside your immediate 'Facebook Friends' group. We considered that these posts have the potential to be reposted and therefore potentially reach a far wider audience, many of whom will know you and your maiden name and where you work due to your local connections and long history in the area. Once posted, you lose a degree of control. You had also expressed your view that it was your intention to get the message across to others and you hoped it would be reposted. You confirmed that you had not removed the posts.
>
> We therefore concluded that whilst there was no actual evidence that the school's reputation had to date been harmed, there was the potential that it could be. Whilst we also agree that it is unlikely that anyone reading these posts would consider that they represented the school's views, we were concerned that there was sufficient association with the school by way of the fact that you and your place of work is well known locally and were therefore satisfied that your posts via facebook could have and may still bring the school into disrepute."

Allegation 2

23. Allegation 2 alleged breaches of the School's Code of Conduct. Three breaches were identified:

- The first breach was that the posts employed "inappropriate language and/or language which may demean or humiliate pupils": the pupils in question were defined as LGBT pupils. The letter does not however say, and it is no part of the School's case in these proceedings, that the language in the posts was directed at pupils in the School or that any LGBT pupils had in fact become aware of them, let alone felt demeaned or humiliated.

- The second was that the posts "call into question your suitability to work with children and young people", having regard in particular to her roles as pastoral assistant and work experience manager. However, the letter goes on explicitly to acknowledge that "there were no concerns raised relating to your conduct in your roles within the school"; and the finding of breach appears to have been on the basis that readers of the posts might nevertheless feel such a concern, as indeed the complainant had (see their reference to the Claimant's potential "influence over … vulnerable pupils"). It is important to appreciate that this is thus simply a particular aspect of reputational damage rather than a finding of actual risk.

- The third was that "your online persona is not consistent with the professional image expected of you for someone working in the school".

Sanction

24. The panel decided that the matters which it found proved constituted gross misconduct within the meaning of the School's Conduct Policy. It then turned to the question of sanction. I should set out its decision and reasoning in full:

> "Having made the finding of gross misconduct, we next considered the appropriate sanction. We had regard to the school's Conduct Policy section 6.1 where it is stated that in the absence of exceptional mitigating circumstances, offences of gross misconduct will result in summary dismissal.
>
> We had regard to the fact that we felt that throughout the hearing you were at times evasive, contradictory and despite having had time to reflect on your actions, appeared to have no insight into the impact that your posts had on the complainant, were dismissive of those that could take offence, calling them liberals and were unable to give us confidence that such actions would not be repeated. You had not removed the posts. We were concerned that upon reflection you demonstrated no understanding of the implications of your actions and how this may reflect upon your professional reputation as well as that of the school within the community which we serve. However, we also took into account that there were no complaints concerning your standards of work, we were unaware of any other disciplinary matters, that the posts had been made in the context of your personal facebook account and that you had six years' service with the school.
>
> Overall we were not satisfied that any lower level of disciplinary sanction would be appropriate in view of the nature of your misconduct and your lack of understanding of the potential impact upon the school. We concluded that there were no exceptional mitigating circumstances and therefore concluded that the correct sanction was summary dismissal."

25. The letter concluded by telling the Claimant that she was dismissed with immediate effect.

THE CLAIM

26. In her original Claim Form the Claimant complained not only of discrimination and harassment but of unfair and wrongful dismissal. The latter claims were, however, dismissed by consent at a case management hearing on 13 December 2019 on the basis that they were out of time. The discrimination claim was of direct discrimination within the meaning of section 13 of the 2010 Act. An application to amend the claim to include an allegation of indirect discrimination was refused.

27. The Claimant was not required at the case management hearing to be precise about the "religion or belief" on which she relied. However, she identified her case on this aspect

at the substantive hearing before the ET. At paras. 29-30 of its reasons the Tribunal records that she did not claim to have been discriminated against or harassed "for her Christianity *per se*" but for the following beliefs:

> "(a) Lack of belief in 'gender fluidity'.
>
> (b) Lack of belief that someone could change their biological sex/gender.
>
> (c) Belief in marriage as a divinely instituted life-long union between one man and one woman.
>
> (d) Lack of belief in 'same sex marriage'. Whilst she recognises the legalisation of same sex marriage she believes that this is contrary to Biblical teaching.
>
> (e) Opposition to sex and/or relationship education for primary school children.
>
> (f) A belief that she should 'witness' to the world, that is when unbiblical ideas/ideologies are promoted, she would publicly witness to Biblical truth.
>
> (g) A belief in the literal truth of the Bible, and in particular Genesis 1 v. 27: 'God created man in His own image, in the image of God He created him; male and female He created them'".

That is essentially an elaboration of the beliefs expressed in the posts. The belief that gender is binary is encapsulated in heads (a) and (b), but also (g). The belief that marriage can only be between a man and a woman is covered by heads (c) and (d). Head (e) is perhaps literally distinct, but the Claimant's main concern about sex education for primary school children would appear to be that it was being used as a vehicle for the inculcation of views in favour of gender fluidity and same-sex marriage. Since it is (now) common ground that these beliefs fall within the definition of the protected characteristic of "religion or belief" in the 2010 Act, I will refer to them as "the protected beliefs". Head (f) is of a rather different character: it does not state a substantive belief, but rather a commitment to publicly stating certain such beliefs.

28. The claim as originally pleaded identified numerous detriments/acts of harassment, but in his oral submissions Mr O'Dair made it clear that he was now relying on four – (a) the Claimant's suspension; (b) the investigation/disciplinary proceedings; (c) the dismissal; and (d) the rejection of her appeal. I will refer to (a)-(b) as "the disciplinary process claim" and heads (c)-(d) (though in truth it is hard to see that head (d) has any independent existence) as "the dismissal claim". The dismissal claim is evidently the primary claim in these proceedings, as Mr O'Dair acknowledged.

THE BACKGROUND LAW

29. The Claimant's claims are brought under Part 5 of the 2010 Act, which is concerned with discrimination at work. However, for reasons which will appear, it is necessary to consider also the effect of articles 9 and 10 of the European Convention on Human

Rights ("the Convention") and related articles; and it is more convenient to start with these and the relevant provisions of the Human Rights Act 1998.

THE RELEVANT CONVENTION RIGHTS

Article 9

30. Article 9 is titled "Freedom of thought, conscience and religion". It reads:

> "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

31. There is good deal of case-law, both domestically and in Strasbourg, about the effect of article 9. For present purposes I need refer only to two passages from the judgment of the Grand Chamber of the European Court of Human Rights ("the ECtHR") in *Eweida v United Kingdom* 48420/10, [2013] IRLR 231, both concerned with the issue of a person's right to manifest a belief – that is, to express it publicly or otherwise demonstrate it, in their actions or their clothing or appearance or otherwise, to all of which I will refer compendiously as "conduct".

32. The first passage identifies the limitations on the protection accorded to the manifestation of a belief. Para. 80 of the judgment reads:

> "Religious freedom is primarily a matter of individual thought and conscience. This aspect of the right set out in the first paragraph of Article 9, to hold any religious belief and to change religion or belief, is absolute and unqualified. However, as further set out in Article 9 §1, freedom of religion also encompasses the freedom to manifest one's belief, alone and in private but also to practice in community with others and in public. The manifestation of religious belief may take the form of worship, teaching, practice and observance. Bearing witness in words and deeds is bound up with the existence of religious convictions (see *Kokkinakis*, cited above, §31 and also *Leyla Şahin v. Turkey* [GC], no. 44774/98, §105, ECHR 2005-XI, 44 EHRR 5). Since the manifestation by one person of his or her religious belief may have an impact on others, the drafters of the Convention qualified this aspect of freedom of religion in the manner set out in Article 9 §2. This second paragraph provides that any limitation placed on a person's freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more of the legitimate aims set out therein."

33. In that passage the Court identifies a fundamental difference between the right to hold a religious belief and the right to manifest it. While the former is absolute, the latter is qualified by paragraph 2, which allows the right to manifest a belief to be limited if the limitation is (a) "prescribed by law" and (b) justified by reference to the other legitimate interests there specified. It is important to appreciate the reason given for that difference. Whereas the holding of a belief is in the nature simply of a characteristic (albeit one that is to a greater or lesser extent a matter of choice), its manifestation constitutes conduct which is outward-facing and for that reason, as the Court says, "may have an impact on others" and accordingly may require to be limited so as to take account of other interests.

34. As for the nature of the qualification imposed by article 9.2, both the elements which I have labelled (a) and (b) are familiar and they need no exposition here. I will only record, at the risk of stating the obvious, that the phrase "necessary in a democratic society in the interests of …" requires an assessment of the proportionality of the limitation in question. The classic exposition of the correct approach to such an assessment appears in the decision of the Supreme Court in *Bank Mellat v Her Majesty's Treasury (no. 2)* [2013] UKSC 39, [2014] 1 AC 700. At para. 74 of his judgment Lord Reed identified four questions, as follows:

> "(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right,
>
> (2) whether the measure is rationally connected to the objective,
>
> (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and
>
> (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."

He noted that "in essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure". I will in this judgment use the shorthand "objective justification" for the four steps taken as a whole and will also sometimes refer to the first step as requiring "a legitimate aim". That terminology is well recognised from the EU and domestic discrimination legislation and connotes essentially the same exercise.

35. The second passage from the judgment in *Eweida* addresses the question of what may constitute the manifestation of a belief. At para. 82 the Court makes the point that, although, as it had said in para. 80, the manifestation of a religious belief may take the form of "bearing witness in words and deeds", it does not extend to every act which is "in some way inspired, motivated or influenced by" that belief. I need not set out the whole of the paragraph. The essential point is made in the following passage:

> "In order to count as a 'manifestation' within the meaning of Article 9, the act in question must be intimately linked to the religion or belief.

> An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case."

36. I should mention one point about terminology. The Court in *Eweida*, following the language of article 9.2 refers to "limitations" on the right to manifest a belief. But of course that term covers not only rules or restrictions which prevent the exercise of the right but also detriments imposed on individuals by way of sanction for having done so; and I will sometimes use the term "interference" in order to reflect that.

Article 10

37. Article 10 is entitled "Freedom of expression". It reads:

> "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."

38. Although paragraph 2 is not identically worded to article 9.2 it was not suggested that it was for our purposes materially different in its effect. I cite later in this judgment various decisions of the ECtHR relevant to its effect.

Article 14 and Article 17

39. I should mention also the provisions of articles 14 and 17 of the Convention because although neither is directly in issue in this case they feature in the reasoning of authorities to which I will have to refer.

40. Article 14 provides that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as … religion, political or other opinion". The case-law establishes that the reference to "discrimination" embraces both direct and indirect discrimination and (in this respect differing from the EU and domestic legislation) that direct as well as indirect discrimination may in principle be justified. Unjustified discrimination against a person because they had manifested a religion or belief, or had exercised their right to free expression, would be a breach of their rights under article 9 or 10 irrespective of article

14, and it is in such cases relied on secondarily if at all: in *Eweida*, for example, the Court declined to decide the claim under article 14 on the basis that it was unnecessary to do so in the light of its finding that there had been a breach of article 9 (see para. 95 of its judgment).

41. Article 17 provides that:

> "Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

This provision has been deployed in the Strasbourg case-law to limit article 10 rights in the most serious kinds of "hate speech": see para. 126 below.

The Human Rights Act 1998

42. Section 3 (1) of the Human Rights Act 1998 provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

"The Convention rights" are defined in section 1 as (most of) the rights set out in the Convention, including those in articles 9 and 10.

43. Section 6 renders it unlawful for a public authority to act in a way which is incompatible with a Convention right (unless obliged to do so by primary legislation). A claim for breach of section 6 may be brought in the ordinary courts: see section 7.

THE EQUALITY ACT 2010

44. I will deal first with the relevant provisions of the 2010 Act and then identify two particular points arising out of the case-law concerning (1) the manifestation of a belief and (2) the so-called "separability principle".

The Relevant Provisions

45. *Proscription of discrimination against employees.* Section 39 (2) of the Act proscribes discrimination by an employer against an employee by (among other things) dismissing them or subjecting them to any other detriment.

46. *Direct discrimination.* Direct discrimination is defined in section 13 of the Act. The only relevant subsection for our purposes is (1), which reads:

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

The phrase "because of" in section 13 (1) connotes a causative link between the protected characteristic and the treatment complained of. There has been a fair amount

of exposition of the nature of that link in the case-law. The line of cases begins with the speech of Lord Nicholls in *Nagarajan v London Regional Transport* [2000] 1 AC 501 and includes the reasoning of the majority in the Supreme Court in *R (E) v Governing Body of the JFS* [2009] UKSC 15, [2010] 2 AC 728 ("the *JFS* case"). What it refers to is "the reason why" the putative discriminator or victimiser acted in the way complained of. In some cases that reason is inherent in the act complained of: these are often referred to as "criterion cases". But in others it consists in the "mental processes", conscious or unconscious, that caused the discriminator to act, often referred to as their "motivation" (though not their "motive"). Where convenient I will in this judgment sometimes use the phrase "on the grounds of" as an alternative to "because of": this was the language of the predecessor legislation to the 2010 Act, as also of the EU Framework Directive referred to below, and it is recognised as having the same effect.

47. *Protected characteristics: religion or belief.* Section 4 of the 2010 Act sets out a list of "protected characteristics". They include "religion or belief". Section 10 contains further provisions about that characteristic, but I need only note that subsection (2) provides that "[b]elief means any religious or philosophical belief".

48. *Indirect discrimination.* Although, as I have said, the Claimant in this case alleges only direct discrimination, the role of indirect discrimination in this field is material to the submissions before us. It is defined in section 19 of the 2010 as follows:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
>
> (3) The relevant protected characteristics are —
>
> …
>
> religion or belief;
>
> ... ."

I will adopt the usual shorthand of "PCP" for the "provision, criterion or practice" referred to in subsection (1); and I will borrow from the Framework Directive referred to below the paraphrase "apparently neutral" for the more elaborate language of subsection (2) (a).

49. *Harassment.* "Harassment" is elaborately defined in section 26 of the 2010 Act. For present purposes it is not necessary to quote the definition in full but only to note that the conduct in question must be "related to a relevant protected characteristic": the relevant protected characteristics include religion or belief. Section 40 (1) of the Act proscribes the harassment of an employee by their employer in relation to the employment.

The Framework Directive

50. The provisions of Part 5 of the 2010 Act, as regards discrimination on the grounds of religion or belief, have their origins in, and represent the United Kingdom's implementation of, EU Council Directive 2000/78/EC "establishing a general framework for equal treatment in employment and occupation" ("the Framework Directive"). Recital (1) to the Directive records, among other things, that the European Union "respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [i.e. the Convention]".

51. Article 1 defines the purpose of the Framework Directive as follows:

> "The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of *religion or belief* [my emphasis], disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."

52. Discrimination is defined in article 2. Paragraph 1 (a) defines direct discrimination as occurring "where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1": section 13 (1) (read with section 23) of the 2010 Act gives effect to that definition. Indirect discrimination is defined in paragraph 1 (b) in terms which have substantially the same effect as section 19 of the 2010 Act. Article 2.5 reads:

> "This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others."

As will be seen, that language is substantially to the same effect as, though not identical to, that of article 9.2 of the Convention.

53. I should mention, only because it is referred to in connection with the case-law cited below, that article 4 provides for a derogation from the right of equal treatment where a difference of treatment is a "genuine and determining occupational requirement".

(1) Manifestation of belief

54. It will be noted that, unlike article 9 of the Convention, the 2010 Act does not refer explicitly to discrimination on the grounds of the manifestation of a belief. However, it is clear, and was common ground before us, that the phrase "because of [the complainant's] religion or belief" must be read as extending to such discrimination.

That is authoritatively established by the decision of the Court of Justice of the European Communities ("the CJEU") in *Bougnaoui v Micropole SA* C-188/15, [2018] ICR 139, which concerned an employer's ban on the wearing of a headscarf by a Muslim employee (and more particularly whether it fell within the scope of the genuine occupational requirement exception in article 4). Having noted at para. 28 of its judgment that recital (1) to the Directive referred to the Convention, the Court said, at para. 30:

> "In so far as the ECHR and, subsequently, the Charter[1] use the term 'religion' in a broad sense, in that they include in it the freedom of persons to manifest their religion, the EU legislature must be considered to have intended to take the same approach when adopting Directive 2000/78, and therefore the concept of 'religion' in Article 1 of that directive should be interpreted as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public."

Since the 2010 Act constitutes the UK's compliance with the Framework Directive, and the acts complained of occurred prior to "IP completion day" (31 December 2020) the Court's decision is authoritative as to the scope of the protection afforded by section 13 read with section 4.

55. It is worth clarifying one point that came up in the submissions before us. There will be cases where the treatment complained of by the employee was ostensibly on the ground of conduct which manifested a religious or other belief but where it is found that the real reason was an animus against the belief in question. Such a finding may be straightforwardly because the employer's account of its reasons is disbelieved; but it may also be because, as I put it in *McFarlane v Relate Avon Ltd* [2009] UKEAT 0106/09/3011, [2010] ICR 507, it is in the circumstances of the particular case "impossible to see any basis for the objection other than an objection to the belief which it manifests" so that "[the employer's claim] to be acting on the grounds of the former but not the latter may be regarded as a distinction without a difference" (see para. 18). Neither kind of case is in truth a manifestation case at all, because the employer is motivated simply by the fact that the employee holds the belief[2]. In a manifestation case proper the employer genuinely has no objection to the employee holding the belief and is motivated only by the conduct which constitutes its manifestation. Most claims of discrimination on the ground of religion or belief are likely to be genuine manifestation cases of this kind.

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1 The reference to "the Charter" is to the Charter of Fundamental Rights of the European Union (2000/C 364/01). The CJEU's reference to it adds nothing to the point based on the Convention, and in the interests of simplicity, and because the Convention remains part of UK law and the Charter does not I will in this judgment refer only to the former.

2 In the argument before us these were referred to as "proxy cases", but I do not think that that label is quite apt. In the discrimination field at least the description "proxy" is reserved for cases where an employer discriminates on the basis of a feature or criterion which is nominally not a protected characteristic but is in fact necessarily indistinguishable from it – see para. 25 of the judgment of Lady Hale in *Lee v Ashers Baking Company Ltd* [2018] UKSC 49, [2020] AC 413, giving the well-known example of *James v Eastleigh Borough Council* [1990] 2 AC 751. That is a different situation.

56. At the risk of stating the obvious, the fact that the 2010 Act gives employees a right not to be discriminated against on the ground of manifesting a belief does not mean that that right is unqualified; but the basis on which it should be treated as qualified is contentious in this appeal, and I return to it below.

(2) "Separability"

57. In a case where the 2010 Act (or its predecessors), and other analogous legislation, affords protection to particular kinds of conduct by an employee – for example, in victimisation or whistleblowing cases, for making complaints of discrimination or making protected disclosures – the case-law recognises that it may be necessary to decide whether the real cause of the treatment is the conduct itself or is some properly separable feature of it. This is sometimes referred to as "the separability principle". This line of authority is potentially applicable in a (true) manifestation case, since in such a case the court is concerned (untypically for a direct discrimination claim) with a motivation based not on the possession of the protected characteristic but on particular conduct on the part of the employee.

58. The most recent discussion of the separability principle can be found in the judgment of Simler LJ in *Kong v Gulf International Bank (UK) Ltd* [2022] EWCA Civ 941, [2022] ICR 1513. The case concerned an alleged dismissal for making a protected disclosure. At paras. 47-55 of her judgment Simler LJ considered a number of authorities concerned with protected conduct of various kinds and quotes various passages from them which I need not identify. At paras. 56-57 she says:

> "56. I would endorse and gratefully adopt the passages I have cited as correct statements of law. They recognise that there may in principle be a distinction between the protected disclosure of information and conduct associated with or consequent on the making of the disclosure. For example, a decision-maker might legitimately distinguish between the protected disclosure itself, and the offensive or abusive manner in which it was made, or the fact that it involved irresponsible conduct such as hacking into the employer's computer system to demonstrate its validity. In a case which depends on identifying, as a matter of fact, the *real* reason that operated in the mind of a relevant decision-maker in deciding to dismiss (or in relation to other detrimental treatment), common sense and fairness dictate that tribunals should be able to recognise such a distinction and separate out a feature (or features) of the conduct relied on by the decision-maker that is genuinely separate from the making of the protected disclosure itself. In such cases, as Underhill LJ observed in *Page*[3], the protected disclosure is the context for the impugned treatment, but it is not the reason itself.
>
> 57. Thus the 'separability principle' is not a rule of law or a basis for deeming an employer's reason to be anything other than the facts disclose it to be. It is simply a label that identifies what may in a particular case be a necessary step in the process of determining what

[3] This is not the case of *Page v NHS Trust Development Authority* which I consider in detail below but the separate (though related) case of *Page v Lord Chancellor* [2021] EWCA Civ 254, [2022] ICR 924.

> as a matter of fact was the real reason for impugned treatment. Once the reasons for particular treatment have been identified by the fact-finding tribunal, it must evaluate whether the reasons so identified are separate from the protected disclosure, or whether they are so closely connected with it that a distinction cannot fairly and sensibly be drawn. Were this exercise not permissible, the effect would be that whistle-blowers would have immunity for behaviour or conduct related to the making of a protected disclosure no matter how bad, and employers would be obliged to ensure that they are not adversely treated, again no matter how bad the associated behaviour or conduct."

59. Simler LJ went on at para. 58 to refer to the decision of the EAT in *Martin v Devonshires Solicitors* UKEAT/86/10, [2011] ICR 352, in which I had said:

> "Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purports to object to 'ordinary' unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases."

The statement in that passage that the employer who purports to object to "ordinary" unreasonable behaviour "*should be treated as* objecting to the complaint itself" might suggest some kind of rule of law, but Simler LJ emphasised that that was not the case. The significance of the disproportionality of an employer's response was evidential only: that is, as evidence that their motivation was in fact the protected disclosure itself and not to the manner in which it was made (see para. 60).

60. Elisabeth Laing LJ in her concurring judgment in *Kong* expressed some hesitation about references to "the separability principle", given that, as Simler LJ had herself said, it did not connote a rule of law. I share that hesitation, but some label is required: I will in this judgment refer simply to "separability" or "the separability approach".

FREE SPEECH PRINCIPLES

61. The protection of the right of free speech, including speech expressing a person's religious or other beliefs, has always been regarded as a cardinal principle of the common law, and it is of course now also protected by the incorporation by the 1998 Act of articles 9 and 10 of the Convention. There are many decisions of the highest authority expounding the relevant principles, but I do not need to recapitulate them here. I only note three points to which Mr O'Dair, and the FSU in its written submissions, attached particular importance.

62. First, freedom of speech necessarily entails the freedom to express opinions that may shock and offend. The most authoritative statement to this effect is probably that of the ECtHR at para. 46 of its judgment in *Vajnai v. Hungary* [2008] ECHR 1910, where it said:

> "The Court further reiterates that freedom of expression, as secured in Article 10 §1 of the Convention, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to Article 10 §2, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend, shock or disturb; such are the demands of pluralism, tolerance and broad-mindedness, without which there is no 'democratic society' … . Although freedom of expression may be subject to exceptions, they 'must be narrowly interpreted' and 'the necessity for any restrictions must be convincingly established' (see, for instance, *Observer and Guardian v the United Kingdom*, 26 November 1991, §59, Series A no. 216)."

A very frequently-cited domestic authority to the same effect is *Redmond-Bate v Director of Public Prosecutions* [1999] EWHC Admin 733, where Sedley LJ, sitting with Collins J in the Divisional Court said, at para. 20:

> "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative … Freedom only to speak inoffensively is not worth having ..."

63. Second, the protection of freedom of speech is particularly important in the case of "political speech" – that is, expression of opinion on matters of public and political interest. At para. 47 of its judgment in *Vajnai* the ECtHR stressed "that there is little scope under Article 10 §2 of the Convention for restrictions on political speech or on the debate of questions of public interest".

64. Third, in any given case it is important to be alive not just to the effect of restrictions on freedom of speech in that case but to their chilling effect more widely. In *R (Miller) v College of Policing* [2021] EWCA Civ 1926, [2022] 1 WLR 4987, Sharp P said, at para. 68:

> "The concept of a chilling effect in the context of freedom of expression is an extremely important one. It often arises in discussions about what if any restrictions on journalistic activity are lawful; but in my judgment it is equally important when considering the rights of private citizens to express their views within the limits of the law, including and one might say in particular, on controversial matters of public interest."

65. These are principles which any court or tribunal must have at the forefront of its mind in considering a case involving freedom of speech, including the expression of religious or other beliefs. It should be noted, however, that in each of those cases the Court was concerned with limitations on free speech imposed by a public authority. The present case is concerned with an interference with free speech on the part of an employer against an employee, and it is necessary to assess whether the interference was justified in the context of the employment relationship and the law applicable to it. The relevant principles in such a case were considered by this Court in the case of *Page v NHS Trust Development Authority* [2021] EWCA Civ 255, [2021] ICR 941, which was central to the decision of the EAT and to which I now turn.

PAGE v NHS TRUST DEVELOPMENT AUTHORITY

The Ratio of *Page*

66. The claimant in *Page* was a non-executive director of an NHS Trust whose role was terminated by the respondent authority[4] because in media interviews he expressed controversial views, derived from his Christian beliefs, about the morality of homosexual acts and about same-sex marriage and same-sex adoption. He brought claims in the ET of direct and indirect discrimination on the ground of religion or belief: the beliefs in question were characterised in the alternative either as Christianity *tout court* or as "belief in the traditional family". It was accepted that this was a genuine manifestation case: the authority was not motivated by the fact that the claimant held those beliefs. The ET dismissed his complaint, and that decision was upheld both by the EAT and by this Court, in which I gave the leading judgment with which Peter Jackson and Simler LJJ agreed. We are only concerned with the reasoning as regards the direct discrimination claim.

67. The main thrust of the claimant's argument was that his treatment had constituted a breach of his rights under articles 9 and 10 of the Convention. We upheld the decision of the EAT, applying the decision of this Court in *Mba v London Borough of Merton* [2013] EWCA Civ 1562, [2014] ICR 357, that the ET had no jurisdiction to entertain a claim for breach of Convention rights as such, and accordingly that the claim could only be advanced under the 2010 Act. The claimant's counsel nevertheless argued that it was necessary in every case of belief discrimination under the 2010 Act to start by considering whether there had been a breach of the claimant's Convention rights. As to that, I said, at para. 37:

> "I do not think that there needs to be any such rule. It is, ultimately, the Act from which the claimant's rights must derive, and there can be nothing wrong in a tribunal taking that as the primary basis of its analysis."

68. Despite that, we found it more convenient, because of the focus of the argument, to address first the claimant's case that his Convention rights had been breached. The relevant part of my judgment is at paras. 38-67. We held that although there had been an interference with his right to manifest his beliefs under article 9 (and also his article 10 rights) the ET had been entitled to find that his termination was justified: see paras. 52-63. I need not summarise our reasons, which are specific to the facts of the case. At the end of this section of the judgment, having concluded that the ET had been entitled to find that the claimant's Convention rights had not been infringed, I continued (at para. 67):

> "It might be thought to follow that [the authority] cannot have discriminated against him on the grounds of his religion or belief, since the relevant protections under the Convention and the 2010 Act must be

[4] The authority was the body which under the NHS constitution had responsibility for the termination of the positions of Trust Directors. Its relationship with the claimant was accordingly not one of employer and employee, and the relevant proscription of discrimination was under section 50 rather than section 39 of the 2010 Act. But that is not a distinction that affects its relevance to the present case.

> intended to be co-extensive. In my view that is indeed the case, but that does not absolve me from considering the issues through the lens of the 2010 Act, which must be the formal basis of the Appellant's claim."

Thus, although I repeated that the claim had to be based on the 2010 Act, I expressed the view that his rights under the Act were "intended to be co-extensive" with his Convention rights.

69. The claim of direct discrimination contrary to the 2010 Act is considered at paras. 68-80 of the judgment. The dispositive issue is treated as being the applicability of the separability approach. At para. 68 I said:

> "In a direct discrimination claim the essential question is whether the act complained of was done because of the protected characteristic, or, to put the same thing another way, whether the protected characteristic was the reason for it … It is thus necessary in every case properly to characterise the putative discriminator's reason for acting. In the context of the protected characteristic of religion or belief the EAT case-law has recognised a distinction between (1) the case where the reason is the fact that the claimant holds and/or manifests the protected belief, and (2) the case where the reason is that the claimant had manifested that belief in some particular way to which objection could justifiably be taken. In the latter case it is the objectionable manifestation of the belief, and not the belief itself, which is treated as the reason for the act complained of. Of course, if the circumstances[5] are not such as to justify the act complained of, they cannot sensibly be treated as separate from an objection to the belief itself."

70. I went on at para. 69 to identify, and thus approve, the EAT cases referred to in that passage, being *Chondol v Liverpool City Council* [2009] UKEAT 0298/08 (a decision of my own), *Grace v Places for Children* [2013] UKEAT 0217/13 (Mitting J), and *Wasteney v East London NHS Foundation Trust* [2016] UKEAT 0157/15, [2016] ICR 643 (HH Judge Eady QC (as she then was)). These were all cases in which dismissal for inappropriate Christian proselytisation at work was held to be on a ground separable from "religion or belief". *Wasteney* is the most fully reasoned. At paras. 54-55 of her judgment Judge Eady said:

> "54. In domestic law, the expression of right and limitation – as allowed by Article 9 of the Convention – is most easily discernible when addressing cases of indirect discrimination under section 19 EqA (which may be the more obvious route of challenge in most cases involving the manifestation of a religious belief). Whilst there is no statutory means of 'justifying' direct discrimination or harassment, however, the Claimant accepts that the limitations permitted by Article 9.2 are relevant to the approach to be adopted to claims brought under sections 13 (direct discrimination) and 26 (harassment). Although the Claimant relies on the protection of the right to manifest religious belief

[5] The judgment in fact says "consequences", but I think this must be a slip.

> in the workplace, as recognised by the ECHR in *Eweida*, she (correctly) does not seek to suggest that right cannot be subject to limitation.
>
> 55. The concession is in some senses easier to state than apply, but the task will always be made easier by having a clear understanding of the nature of the claim and how it is being put. If the case is one of direct discrimination then the focus on *the reason why* the less favourable treatment occurred should permit an ET to identify those cases where the treatment is not because of the manifestation of the religion or belief but because of the inappropriate manner of the manifestation (where what is 'inappropriate' may be tested by reference to Article 9.2 and the case-law in that respect); see [*Chondol*] and [*Grace*]. Similarly, whilst the definition of harassment permits the looser test of 'related to', a clear sense of what the conduct did in fact *relate to* should permit the ET to reach a conclusion as to whether it is the manifestation of religion or belief that is in issue or whether it is in fact the complainant's own inappropriate conduct (and that must be right, otherwise an employer's attempt to discipline an employee for the harassment of a co-worker related to (e.g.) the co-worker's religion or belief could itself be characterised as harassment related to that protected characteristic)."

That reasoning, which I evidently approved, explicitly treats the limitations in article 9.2 of the Convention as "relevant to" a claim of discrimination (or harassment) under the 2010 Act. I noted that Judge Eady had referred to the distinction as being between the manifestation of the religion or belief and "the inappropriate manner" of its manifestation; I described that as an acceptable shorthand, "as long as it is understood that the word 'manner' is not limited to things like intemperate or offensive language".

71. I note in passing that *Chondol* and *Wasteney* had in fact already been approved by this Court in *Kuteh v Dartford and Gravesham NHS Trust* [2019] EWCA Civ 818, though this decision does not appear to have been cited to us in *Page*. At para. 64 of his judgment Singh LJ referred to them as setting out "an important principle, namely the distinction between the manifestation of a religious belief and the inappropriate promotion of that belief, which in turn reflects the jurisprudence of the European Court of Human Rights".

72. At paras. 70-72 I analysed the ET's reasoning. After dealing with one difficulty about how it had expressed itself, I said, at para. 72:

> "Once that point has been clarified, the Tribunal's reasoning is clear. Para. 71 applies the distinction which I have discussed at paras. 68-69 above. The Authority took disciplinary action against the Appellant not because he was a Christian or because he held the traditional family belief but because he expressed the latter belief (and his other views about homosexuality) in the national media in circumstances which, on the Tribunal's findings, justified the action taken."

At para. 74 I upheld the validity in principle of that distinction. I said:

> "So far as I am aware the distinction applied by the Tribunal has not been endorsed in this Court, but it is in my view plainly correct. It

> conforms to the orthodox analysis deriving from *Nagarajan*: in such a case the 'mental processes' which cause the respondent to act do not involve the belief but only its objectionable manifestation. An analogous distinction can be found in other areas of employment law – see paras. 19-21 of my judgment in *Morris v Metrolink RATP DEV Ltd* [2018] EWCA Civ 1358, [2019] ICR 90[6]. Also, and importantly, although it gets there by a different route (because the provisions in question are drafted in very different ways), the recognition of that distinction in the application of section 13 achieves substantially the same result as the distinction in article 9 of the Convention between the absolute right to hold a religious or other belief and the qualified right to manifest it. It is obviously highly desirable that the domestic and Convention jurisprudence should correspond."

The last two sentences are to essentially the same effect as para. 67 of the judgment.

73. At paras. 75-79 I addressed various particular arguments advanced on behalf of the claimant which I need not consider here. At para. 80 I concluded that there was no error of law in the ET's decision on direct discrimination.

74. In summary, *Page* was decided on the basis that adverse treatment in response to an employee's manifestation of their belief was not to be treated as having occurred "because of" that manifestation if it constituted an objectively justifiable response to something "objectionable" in the way in which the belief was manifested: it thus introduced a requirement of objective justification into the causation element in section 13 (1). Further, we held that the test of objective justification was not substantially different from that required under article 9.2 (and also article 10.2) of the Convention. I should clarify two points about language:

(1) The word "objectionable" in para. 74 is evidently a (possibly rather inapt) shorthand for the phrase in para. 68 "to which objection could justifiably be taken". Both have the same effect as the word "inappropriate" which is also used.

(2) The "way" in which the belief is manifested is a deliberately broad phrase intended to cover also the circumstances in which the manifestation occurs.

That is the ratio of *Page* (as regards the direct discrimination claim). I need to make five further points about it.

75. First, my formulation does not directly apply the four-step process identified in *Bank Mellat*, but it is a compressed version of the same exercise, involving (a) the identification of a feature of the employee's conduct to which the employer could legitimately object (broadly corresponding to step (1)), and (b) an assessment of whether the employer's response to that feature was proportionate (broadly corresponding to steps (2)-(4)). It is no doubt best practice to consider each of the *Bank*

[6] This is a case involving discrimination on the ground of taking part in trade union activities. It is among the authorities reviewed by Simler LJ in *Kong*.

Mellat steps separately, but it is well recognised that there is a considerable degree of overlap between them.

76. Second, the equation of the applicable test with that under article 9.2 of the Convention appears to bring in not only the test of objective justification but also the requirement that the act in question be "prescribed by law". The School sought to object to this element in its Respondent's Notice (see para. 117 below), but since permission was refused the issue was not live before us. However, even if, absent *Page*, it would be unnecessary to import this element, I cannot see that it causes any conceptual problem in this context: the employer's rights under the employment contract provide the necessary framework of "law", in the sense in which that term is used paragraph 2 of articles 9 and 10.

77. Third, the burden of proof of objective justification is on the employer. I make this point in particular because in her reasons for giving permission to appeal Elisabeth Laing LJ expressed a concern that a consequence of the reasoning in *Page* might be that employees had to demonstrate that the treatment of which they complained was not in accordance with the law or proportionate to a legitimate aim. I do not believe that to be the case: as a matter of general principle a justification for interfering with a qualified Convention right must be proved by the party relying on it.

78. Fourth, although *Page* imports a test of objective justification into the separability approach, it does so only because of the protection conferred on the right to manifest a religious belief conferred by the Convention. It has no impact on the application of the separability approach in other cases.

79. Fifth, as regards a claim of harassment, section 26 of the 2010 Act requires the treatment to be "related to" the protected characteristic, rather than "because of" it as in section 13 (1). It was not suggested in argument before us that that difference renders the ratio of *Page* inapplicable in harassment cases, and I do not believe that it does.[7]

The Jurisprudential Basis of that Ratio

80. I accept that my judgment in *Page* does not clearly explain the jurisprudential basis of the decision that an objective element could be introduced into section 13 (1) of the 2010 Act. That may to some extent reflect the nature of the arguments before us in that case, and I hope that it may to that extent be venial. But in this appeal we have received extensive and helpful submissions, both from the parties and from the interveners, exploring the basis on which *Page* was, or must be taken to have been, decided. I believe that we should take advantage of the assistance which we have received in order to try to explain the reasoning more fully. Anything I say will be obiter, for one or both

[7] I should, however, note that at paras. 38-42 of her written submissions on behalf of Sex Matters Ms Reindorf suggests that the different language of section 26 was potentially problematic in this context. I do not agree. The definition of "harassment" in the domestic legislation initially used the phrase "on the grounds of", but it was subsequently replaced by "related to". I explained the origin of that change at paras. 54-58 of my judgment in *Unite the Union v Nailard* [2018] EWCA Civ 1203, [2019] ICR 28, and at para. 93 (1) I expressed doubt whether it made any difference. But even if for some purposes the different terms have different effects, the question for our purposes is simply whether it is possible to import a test of objective justification; and if it is possible to do so in the case of "because of" I cannot see why it is not equally possible in the case of "related to".

of two reasons. First, whatever the underlying reasoning, we are bound by the ratio in *Page* as identified above (a point which not all of the interveners appeared to appreciate). Second, even if it were otherwise open to us to reformulate that ratio, the EAT, as appears below, clearly decided the appeal by applying it and neither party has permission to challenge that aspect of its decision. But I think the exercise is worthwhile, not least because the interveners attach importance to having the most thorough understanding possible of how the law works in this area.

81. A conceptual underpinning for the ratio in *Page* might be thought to be most readily provided by section 3 of the 1998 Act – that is, that the incorporation of the test of objective justification in article 9.2 is necessary in order to render section 13 (read with section 4) compatible with Convention rights. That was the view of Judge Eady in *Wasteney*: see para. 48 of her judgment. Mrs Fraser Butlin advocated this analysis, relying by way of analogy on para. 57 of the judgment of Mummery LJ in *X v Y*, [2004] EWCA Civ 662, [2004] ICR 1634, where he referred to section 3 as enabling the "blending" of the requirements of the unfair dismissal legislation with the protection of employees' rights under article 8 of the Convention.

82. However section 3 was not expressly relied on in *Page* itself, and the point is not as straightforward as it may appear at first sight. The section only operates so far as necessary to render the statutory provision in question "compatible with the Convention rights" – that is, with the rights of the persons who enjoy those rights (in our case persons wishing to manifest a religious belief). On the face of it, the protection conferred by section 13 is perfectly compatible with employees' Convention rights: it may, because it is unqualified, go further than the Convention requires, and so place additional obligations on the employer, but that is not the same thing.

83. I initially thought that it followed that section 3 has no application in this case. On further consideration, however, I believe that a more sophisticated argument may be available, as follows:

(1) The starting-point is that section 4 (read with section 13) does not explicitly protect the manifestation of a belief. Like the underlying Directive, all that it expressly confers is a right not to be discriminated against "[on the grounds of] religion or belief". Whether that phrase implicitly extends to the protection of the manifestation of a belief is a matter of construction.

(2) As we have seen, the CJEU in *Bougnaoui* has held that article 1 of the Directive must indeed be construed as protecting the manifestation of a belief. But it is to be noted that the basis for that conclusion is said in terms to be that it achieves consistency with the Convention: see para. 54 above.

(3) The domestic courts are of course obliged as a matter of EU law to construe the provisions of the 2010 Act so as to achieve the result stated by the CJEU. The appropriate domestic tool for achieving consistency with the Convention is section 3 of the 1998 Act, and that is not the less so because it might otherwise be obliged to reach the same result on a *Marleasing* basis.

(4) There is nothing against the grain of the Act in reading down sections 4 and 13 accordingly; but since that can only be done to the extent necessary to achieve

compatibility with the rights conferred by article 9, the right to manifest a belief receives only the qualified protection identified in paragraph 2.

(5) It is not necessary to identify a precise means of re-drafting the Act to achieve that result (see para. 37 (f) of the judgment of Sir Andrew Morritt C in *Vodafone 2 v Her Majesty's Commissioners of Revenue and Customs* [2009] EWCA Civ 446, [2010] Ch 77, and the authorities there cited). The option most consistent with the reasoning in *Page* would be to read words into section 13 (1) providing that (in short) treatment which was a proportionate response to the objectionable way in which an employee manifested a protected belief should not be treated as having been done because of that belief. But that is not the only possibility. It might be more consistent with the route taken in this paragraph to include a new subsection in section 13 containing separate provision for manifestation cases (as the existing subsections (2)-(6) do for issues peculiar to other protected characteristics). Another alternative (advanced by Mr Cooper and Mr Keen in their written submissions on behalf of the FSU) would be to qualify the definition of "religion or belief" in section 4 so as to exclude (for short) objectionable manifestations of belief (though this might be less satisfactory because it would on the face of it deny protection against disproportionate responses to such manifestations).

84. On balance I think that that argument is correct and accordingly that section 3 does indeed provide a satisfactory basis for the ratio in *Page*. However, I acknowledge that it is not straightforward, and I should accordingly say that I believe that it can also be justified on ordinary principles of domestic construction, as summarised at paras. 85-88 below.

85. The starting-point is that the Court in *Page* believed that the legislature cannot have intended that an employer should be obliged to tolerate any conduct at all by an employee which constituted a manifestation of a belief, whatever form it took and whatever the circumstances; and that is reinforced by the fact that the drafters of the Convention thought it necessary to qualify the right to manifest a belief. It is not necessary to multiply examples of cases where an inability to prohibit particular kinds of manifestation would produce an obviously unacceptable result. One familiar case is the wearing of clothes or jewellery which would create a serious risk to health or safety at work. Another is that of religious proselytisation at work, as illustrated by the cases noted at para. 70 above: in that connection, I note that A-G Sharpston observed at para. 73 of her Opinion in *Bougnaoui* that proselytisation "has … simply no place in the work context". It follows that it is in accordance with the legislative purpose to construe the Act, so far as possible, so as to incorporate some such limitation.

86. The next question is what the parameters of such a limitation should be. The Court's view in *Page* was that the qualification which best achieved the legislative purpose was to permit a defence of objective justification substantially corresponding to the terms of article 9.2 of the Convention. There are a number of reasons why that should be so, even without resort to section 3 of the 1998 Act. We have seen that the CJEU in *Bougnaoui* referred to the Convention as an aid to the construction of the Directive. More specifically, article 2.5 of the Directive legitimises in principle a qualification reflecting the terms of article 9.2: that is significant, even though no such qualification was expressly included in the 2010 Act. It is in fact hard to see how the presumed legislative purpose of limiting the right to manifest a religious belief to the extent

necessary to protect the rights and freedoms of others could be achieved more appropriately than by the balancing exercise required under the Convention. There is nothing to be gained by searching for some different formulation, and there are obvious practical advantages in employing a test with which practitioners and tribunals are familiar. It would also be anomalous if, in proceedings brought by an employee of a public authority in the ordinary courts under section 7 of the 1998 Act for breach of their right under article 9 to manifest a belief, the applicable test were different from that which would apply if they brought proceedings in the ET under the 2010 Act.

87. It remains to identify how such a limitation could operate within the structure of the provisions of the 2010 Act. The Court in *Page* believed, drawing on the separability case-law, that that was best done by treating it as going to the requirement of causation in section 13 (1). That is, where the act complained of was objectively justified it should not be treated as being done "because of" the manifestation in question.

88. A highly purposive construction of this kind is not objectionable in principle where the Court is satisfied that it is truly necessary. But the objections to implying a qualification which the legislature has failed to express may be less cogent in this case since the protection of the manifestation of belief is itself not express but is, as appears from *Bougnaoui*, the product of a "purposive" choice to prefer a wider interpretation of the words chosen by the legislature.

89. Very broadly, though not in detail, those explanations of the ratio in *Page* correspond to the submissions of Mr O'Dair for the Claimant and Mrs Fraser Butlin for the Archbishops' Council. But Mr Jones and Mr Milsom for the School and counsel for the other interveners identified respects in which that ratio is said to be problematic or suggested ways in which it could be supported by better reasoning. Since, for the reasons already given, it is not open to us to decide this appeal on any different basis I do not propose to consider these submissions in detail, but I will briefly review them.

90. The fundamental objection advanced to the approach in *Page* is that it is said to undermine an essential feature of the law of direct discrimination. It is well established, at least in EU and UK law, that direct discrimination cannot generally be justified. That feature cannot, it is said, be circumvented by incorporating an element of objective justification into the requirement that the discrimination be "on the grounds of" the protected characteristic: it is well established that if the subjective mental processes of the putative discriminator had nothing to do with the protected characteristic they cannot be liable, however unreasonable or unfair the treatment in question may have been (see, classically, the judgment of Elias J in *Law Society v Bahl* [2003] UKEAT 1056/01/3107, [2003] IRLR 640, at paras. 93-101). Likewise, in separability cases the fact that an employer's response to some objectionable feature of the protected conduct is disproportionate is relevant only if and to the extent that it supports a finding that that was not the real reason for the impugned act: see the observations of Simler LJ in *Kong* referred to at para. 59 above.

91. In support of this objection we were referred to paras. 58-67 of the Opinion of A-G Sharpston in *Bougnaoui*. In those paragraphs, which are headed "The differences between a restrictions-based approach and one based on discrimination", she rejects as "simplistic" the suggestion that the requirements of the Strasbourg and EU jurisprudence as regards direct discrimination should be "blended" so as to allow the

adoption of what she acknowledges to be the more flexible approach under article 9 of the Convention. She concludes, in para. 67:

> "The distinction between [direct and indirect discrimination] is a fundamental element of this area of EU legislation. There is in my view no reason to depart from it, with the inevitable loss of legal certainty that would result."

It is fair to say that that passage occurs in a part of her Opinion not directly concerned with the issue in the particular case and is not expressly, or so far as I can see implicitly, adopted in the judgment of the Court; but it remains of obvious persuasive authority.

92. I see the force of that objection, but if the incorporation of an objective test is required by section 3 of the 1998 Act it cannot prevail. And even if section 3 is not engaged, I do not in fact think that it is unanswerable. In the first place, there is nothing axiomatically objectionable in the proposition that direct discrimination may be capable of justification: that is the case under article 14 of the Convention, and the justification of direct discrimination is also permitted by the Framework Directive in the case of age discrimination and under article 2.5. Direct discrimination in manifestation cases is (uniquely) different from discrimination on the ground of other protected characteristics (and indeed from simple belief discrimination) because it is based, as the Court in *Eweida* identifies, not on the possession of the characteristic as such but on overt conduct, which thus has the potential to impact on the interests of society and the rights and freedoms of others. That distinction may be said to put it in a special category which requires a more flexible approach. As I have said, I find it hard to accept that the legislature intended employees to enjoy an absolute right not to suffer any adverse treatment on the basis of conduct manifesting their religious or other beliefs, whatever the nature of that conduct and whatever the circumstances.[8]

93. The submissions on behalf of the School, and of those of the interveners who addressed the point, acknowledged that it was important that employers should be entitled to prohibit or punish objectionable or inappropriate manifestations of religious or other belief; but it was contended that this could be achieved in alternative ways which did not do violence to the important principles of discrimination law identified above. These alternatives were essentially threefold. I take them in turn.

94. The first was to contend that in most if not all instances where an employee suffers a detriment as the result of manifesting a religious belief the case can properly be characterised as one of indirect discrimination, in which case the employer can defeat the claim by showing that the impugned PCP was objectively justified. There are of course many manifestation cases where what the employee is complaining of is the effect of an apparently neutral PCP; indeed such cases may reflect the majority of claims brought, as Judge Eady suggests in *Wasteney* (see para. 54 of her judgment). But that point goes nowhere unless all cases of manifestation discrimination can be

[8] I note that Sharpston A-G does in fact acknowledge in her Opinion in *Bougnaoui* that there are circumstances in which such conduct should be prohibited: see para. 73, to which I have already referred, accepting that proselytisation may properly be forbidden in the workplace. She apparently relies for that purpose on article 2.5 (see n. 14), but it is arguable that the same route could be followed in respect of all objectionable manifestations of religious belief.

properly so analysed. I understood Mr Jones and Ms Clement to go so far as to contend that that was the case. I find that hard to accept. Take a case where an employee is disciplined for Christian proselytisation in the workplace. Even if it could be shown that the employer applied a PCP prohibiting such proselytisation (which might not be easy in the absence of an express rule) I do not see how the impact of such a PCP could be described as apparently neutral: it would be direct discrimination against anyone wishing to manifest their Christian faith. *Chondol*, *Grace* and *Wasteney* were all advanced as cases of direct discrimination, as indeed was the present case; and in my view that reflects a correct understanding. In this connection it is important to appreciate that whether a claim can be pleaded as one of direct or indirect discrimination is not a matter for the claimant's choice: as Lady Hale made clear in the *JFS* case (see para. 57 of her judgment), direct and indirect discrimination are mutually exclusive.

95. The second suggested way of achieving consistency with recognised principle was to rely on the conventional separability approach. It was acknowledged that this approach would not afford protection in cases where the treatment complained of was genuinely because of the way the employee had manifested their belief but was disproportionate. But it was suggested that such cases would be rare, and that the difference in practice between the protection afforded by the two tests is accordingly slight. It is impossible to know whether that is the case.

96. The third alternative was to import the requirement of objective justification into the definition of the protected characteristic: that is, an objectionable manifestation of a belief should not be treated as falling within the phrase "religion or belief" in section 4 (cf. para. 83 (5) above). This approach has the attraction that it does not compromise the traditional subjective approach to the question of causation. But, like the second alternative, it does not on the face of it provide protection against disproportionate responses.

97. I have briefly reviewed these alternative approaches out of deference to the thought that went into the submissions before us. As I have said, the short answer to all of them is that they are inconsistent with the ratio of *Page*. But I should say that in my view none of them is obviously preferable to that ratio. I also believe that it is an advantage of the *Page* test that it uses legal concepts to which tribunals are well used, not least because they are familiar with applying them in cases of indirect discrimination.

THE DECISION OF THE ET

98. The ET's Reasons for dismissing the claim are presented carefully and systematically. I can summarise them sufficiently for our purposes as follows.

99. Paras. 1-7 deal with various interlocutory matters. Paras. 8-25 identify the witnesses from whom the Tribunal heard and contain its findings of fact. I need not add to what I have already summarised above, though I should note (because it is relevant to one of the grounds of appeal to the EAT) that Mr Conlan gave evidence but the other members of the panel did not. Paras. 26-32 summarise the relevant provisions of the 2010 Act and identify the nature of the Claimant's claim (including her identification of the beliefs on which she relied as set out at para. 27 above).

100. At paras. 34-45 the Tribunal considers a submission by the School that the Claimant's views about gender fluidity did not qualify for protection under section 10 of the 2010 Act because they did not satisfy the fifth of the requirements identified in the well-known judgment of Burton P in *Nicholson v Grainger Plc* [2009] UKEAT 0219/09/0311, [2010] ICR 360 – that is, that in order to qualify for protection a belief "must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others". The Tribunal rejected that submission and held that the beliefs expressed in the Claimant's posts constituted a protected characteristic. Its decision in that regard was subsequently vindicated by the decisions of the EAT in *Forstater v GCD Europe* UKEAT/0105/20, [2022] ICR 1, and *Mackereth v Department for Work and Pensions* [2022] EAT 99, [2022] ICR 1609, and it is not challenged by the School.

101. At para. 46 the Tribunal explains that it will address the claim of discrimination before considering the harassment claim. At paras. 48-52 it considers and rejects a preliminary submission by the Claimant that the School was not entitled to take any action against her because her Facebook posts were private.

102. Paras. 53-67 contain the ET's reasoning on the direct discrimination claim. The gist appears at paras. 57-64. Paras. 58-60 focus on the language of the posts, which the Tribunal describes as "florid and provocative", and not on the substance of the views expressed. At para. 60 it finds that the School believed that a reader of the posts

> "might conclude that someone who associated herself with such a post (as [the Claimant] had done) not only felt strongly that gender fluidity should not be taught in schools but was *also* [my emphasis] hostile towards the LGBT community and trans people in particular".

It thus found, at para. 61, that the act of which the Claimant was accused and found guilty was "posting items on Facebook that might reasonably lead people who read her posts to conclude that she was homophobic and transphobic", which the School felt "had the potential for a negative impact in relation to... pupils, parents, staff and the wider community". At para. 62 it quotes, and accepts, Mr Conlan's oral evidence to the effect that "… had [the Claimant's] beliefs been simply stated on her Facebook page in the form which they appear in paragraph 30 above [para. 27 of this judgment] no further action could or would have been taken against her". Paras. 63-64 read:

> "63. We concluded that not only the dismissal but the entire proceedings taken against Mrs Higgs were motivated by a concern on the part of the School that, by reason of her posts, she would be perceived as holding unacceptable views in relation to gay and trans people – views which in fact she vehemently denied that she did hold.
>
> 64. In short, that action was not on the ground of the beliefs but rather for a completely different reason, namely that as a result of her actions she might reasonably be perceived as holding beliefs that would not qualify for protection within the Equality Act (and, as we say, beliefs that she denied having)."

103. It is worth quoting also what the Tribunal went on to say at paras. 65-66:

> "65. It is important to bear in mind that this was not a claim of unfair dismissal. We were not concerned to decide whether the School's actions were reasonable or not. It might be contended that there was a different course of action the school could have taken, in the light of the position made clear by Mrs Higgs in the disciplinary process. Since she denied being homophobic or transphobic, a reasonable employer might have taken the view that justice would be served by her (or the School) making it clear that if anyone thought she held those views they had got 'the wrong end of the stick' – that pupils and parents should not be concerned that she would demonstrate any sort of hostility to gay or trans pupils (or indeed gay or trans parents).
>
> 66. That was not a subject canvassed before us, for the simple reason that it was irrelevant to our considerations. Our only task was to decide if there was a causal connection between the beliefs in paragraph 30 and the treatment meted out to Mrs Higgs."

It is reasonably clear from that passage that the Tribunal thought it strongly arguable, to put it no higher, that the School's treatment of the Claimant had been disproportionate.

104. At paras. 69-75 the Tribunal rejected the harassment claim for essentially the same reasons. Paras. 70-72 read:

> "70. It was possible to see some sort of connection between her beliefs and [the treatment complained of]. The posts in question clearly expressed those beliefs both in relation to same sex marriage and gender fluidity. However, as we have said, her treatment was not a consequence of her expressing those beliefs in a temperate and rational way. Rather, *it was because the School felt that the language used in those posts might reasonably lead someone who read them to conclude that she held views (homophobic and transphobic) that she expressly rejected* [emphasis supplied].
>
> 71. The essence of the protection from harassment is that a claimant should be entitled to hold and express protected views without being mistreated as a consequence. It was not the protected views of Mrs Higgs that resulted in the disciplinary action but rather the School's conclusion that her action in posting the items in question might reasonably (and in fact did) lead others to conclude that she held wholly unacceptable views.
>
> 72. It follows that we also conclude that the causal nexus between the protected characteristic and the actions of the school was not made out. The School's behaviour was not related to the relevant beliefs and it followed that the claim of harassment was not made out."

105. In short, the Tribunal's reasoning was as follows:

(1) The Claimant's protected beliefs could not themselves be equated with hostility to gay or trans people – for short, with holding "homophobic and transphobic" views[9]. The Claimant denied holding any such views, and the Tribunal made no finding that she did: indeed it seems clear that it accepted that she did not. It follows that it did not find that there was a risk that she would treat gay or trans pupils differently in the course of her work.

(2) However, although the Claimant did not in fact hold homophobic and transphobic views, the School had concluded that the language of her posts might reasonably lead readers of them to think that she did; and that was the reason why it had dismissed her.

(3) Accordingly, her dismissal was not because of her protected beliefs about gender fluidity and same-sex marriage but because the School feared that the way in which she had expressed those beliefs would be perceived as showing that she had homophobic and transphobic views, whose expression would be unprotected and unacceptable.

THE DECISION OF THE EAT

106. The Claimant's eventual grounds of appeal from the ET to the EAT were as follows:

> "(1) The ET erred in law in failing to consider proportionality of the Respondent's interference with the Appellant's manifestation of her religious/philosophical beliefs.
>
> (2) The ET erred in law in failing to consider whether the interference with the Claimant's Convention rights was 'prescribed by law'.
>
> (3) The ET erred in law in holding that the employer could lawfully restrict the Appellants right to freedom of speech to the language of an ET pleading: see (ET 30 and 62).
>
> (4) The ET reached an impermissible conclusion and/or failed to properly explain its reasons for attributing Mr Conlan's reasons to all other decision-makers; alternatively, misdirected itself in identification of the relevant decision-makers.
>
> (5) The ET erred in law in finding that the Respondent did not discriminate against the Claimant when it investigated and/or dismissed her by reason of the complainant's objection to the Claimant's beliefs.
>
> (6) The ET erred in law in finding that it was reasonable for third parties reading the Claimant's posts to conclude that she was homophobic or transphobic. Alternatively, that finding is perverse.
>
> (7) The ET's finding that the reason for dismissal was (or was solely) because of the views of third parties about the posts rather than the

[9] I use this shorthand because the Tribunal did, and it is convenient; but, as Eady J rightly cautions, labels of this kind can be dangerous when accurate analysis is required.

School's own views about those posts (ET 60, 61) results from the following errors of law:

(a) an employer cannot escape liability by pointing to pressure from a third party whose own motivation was discriminatory (*Din v Carrington Viyella*);

(b) stereotyping a protected characteristic is a discriminatory reason (*Aylott* [2010] ICR 1278);

(c) alternatively, this finding is perverse."

107. The reasons why the EAT allowed the Claimant's appeal appear from paras. 81-84 of Eady J's judgment. These read (the emphases in paras. 82 and 83 are mine):

> "81. Returning then to the ET's finding as to the reason for the respondent's actions in this case, it stated that it considered that this was not because of, or related to, the claimant's actual beliefs but because of the concern that her posts might be seen as evidence that she held *other* beliefs, which might be described as 'homophobic' or 'transphobic'. Putting to one side the dangers that can arise from the use of labels that might mean different things to different people (see the discussion at paragraph 250 *R (oao Miller) v College of Policing and anor* [2020] EWHC 225 (Admin), and the observations of Underhill LJ at paragraph 18 *Page v NHS Trust Development Authority* [2021] EWCA Civ 255), the difficulty with the ET's analysis is that it did not engage with the question whether this was, nonetheless, because of, or related to, the claimant's *manifestation* of her beliefs. In answering *that* question, the views or concerns of the respondent were not relevant (*Page*, paragraph 49); applying the test laid down at paragraph 82 *Eweida v UK* (2013) 57 EHRR 8, the ET needed to consider whether there was a sufficiently close or direct nexus between the claimant's protected beliefs and her posts (relied on by her as amounting to a manifestation of those beliefs).
>
> 82. To the extent that the ET addressed the question identified in *Eweida*, it is apparent that it did so through the prism of the respondent's view of the claimant's posts. The respondent's views were relevant when determining whether there had in fact been any interference with the claimant's right to manifest her beliefs and to freedom of expression - whether its treatment of her was because of, or related to, her exercise of those rights - but could not be determinative of the prior question, whether there was a sufficiently close or direct link between the claimant's posts and her beliefs such as to mean that those posts were to be viewed as a manifestation of her beliefs. *If they were, then the ET needed to determine the 'reason why' question by asking itself whether this was because of, or related to, that manifestation of belief (prohibited under the EqA), or whether it was in fact because the claimant had manifested her belief in a way to which objection could justifiably be taken. As was made clear in Page (see paragraph 68), in the latter case, it is the objectionable manifestation*

> *of the belief that is treated as the reason for the act complained of. In order to determine whether or not the manifestation can properly be said to be 'objectionable', however, it is necessary to carry out a proportionality assessment*: keeping in mind the need to interpret the EqA consistently with the ECHR, there can be nothing objectionable about a manifestation of a belief, or free expression of that belief, that would not justify its limitation or restriction under articles 9(2) or 10(2) ECHR (and see *Page* at paragraph 74; *Wasteney v East London NHS Foundation Trust* [2016] ICR 643 at paragraph 55).
>
> 83. As the respondent acknowledged in its oral submissions, the ET's reasoning demonstrates that, had it properly engaged with the *Eweida* question, it would have concluded that there was a close or direct nexus between the claimant's Facebook posts and the beliefs that she had relied on in her claims: as it stated, 'The posts in question clearly expressed those beliefs' (ET, paragraph 70). That did not mean that it was bound to find that the respondent's actions necessarily amounted to direct discrimination or harassment, *but, in determining the reason for the treatment complained of, the ET needed to assess whether those actions were prescribed by law, and were necessary for the protection of the rights and freedoms of others*. And, in carrying out that assessment, the ET needed to first recognise the essential nature of the claimant's right to freedom of belief and to the freedom to express that belief (a recognition that must carry with it an understanding of the foundational nature of those rights for any democracy; see *Sahin v Turkey* (2007) 44 EHRR 5 and *Handyside v UK* 1 EHRR 737), before undertaking the proportionality assessment laid down in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 (see paragraph 54 above).
>
> 84. The problem with the ET's approach is that it by-passed any engagement with the nature of the claimant's rights, and failed to carry out the requisite balancing exercise, when seeking to determine whether the mental processes which caused the respondent to act did not involve the claimant's beliefs but only their objectionable manifestation. As the claimant objects (ground 1 of the appeal), the ET's approach meant that it impermissibly narrowed the task it had to undertake. It was not enough to find that the respondent had been motivated by a concern that the claimant could be perceived to hold 'wholly unacceptable views' (ET, paragraph 70); the ET needed to consider whether that motivation or concern had arisen out of the claimant's manifestation of her beliefs (accepted to be protected under the EqA) or by a justified objection to that manifestation."

108. Eady J thus proceeded on the basis that *Page* had established that, in a case where, as here, the treatment complained of was in response to the manifestation of a protected belief, the question whether that manifestation was the reason for the treatment involved the application of a test of objective justification corresponding to that in article 9 (and article 10) of the Convention: see in particular the passages which I have italicised. The decision of the ET was overturned because it had not applied any such test. Because

permission to cross-appeal was refused (see paras. 118-119 below) that self-direction is not challenged before us, but it will appear from my analysis of *Page* above that I believe that it was right.

109. Those reasons essentially correspond, as Eady J observes, to ground 1 of the Claimant's grounds of appeal to the EAT. At para. 85 she rejects ground 3, but she says that she sees force in the point made in grounds 5-7.

110. Paras. 86-88 of Eady J's judgment are essentially ancillary, and I need not set them out. However, I should refer to paras. 89-90. In those paragraphs she acknowledges that para. 65 of the ET's Reasons suggests that it believed that the Claimant's dismissal was disproportionate, but she says that there is no clear finding to that effect. She continued, at para. 91:

> "While, therefore, the appeal should be allowed, this is not a case where it can properly be said that only one outcome is possible, and the appropriate disposal must be for this matter to be remitted for determination (*Jafri v Lincoln College* [2014] EWCA Civ 449). That remission should be on the basis that it has already been found that the Facebook posts in issue had a sufficiently close or direct nexus with the beliefs relied on by the claimant in these proceedings such as to amount to a manifestation of those beliefs (per *Eweida*). It will, however, be for the ET on the remitted hearing to determine, recognising the essential nature of the claimant's rights to freedom of belief and freedom of expression: (1) whether the measures adopted by the respondent were prescribed by law; and, if so, (2) whether those measures were necessary in pursuit of the protection of the rights, freedoms or reputation of others. Undertaking that analysis will enable the ET to determine whether the respondent's actions were because of, or related to, the manifestation of the claimant's protected beliefs, or were in fact due to a justified objection to the manner of that manifestation, in respect of which there was a clear legal basis for the claimant's rights to freedom of belief and expression to be limited to the extent necessary for the legitimate protection of the rights of others."

111. Para. 1 of the EAT's order reflects the contents of para. 91 of the judgment, though the material parts are not identically worded. It reads:

> "The appeal be allowed and this matter remitted (in accordance with the reasons provided in the Judgment handed down this day) for the determination of the question whether the respondent's actions were because of, or related to, the manifestation of the claimant's protected beliefs, or were due to a justified objection to the manner of that manifestation, in respect of which there was a clear legal basis for the claimant's rights to freedom of belief and expression to be limited to the extent necessary for the legitimate protection of the rights of others."

112. Finally, at paras. 92-94 of the judgment Eady J considered what guidance she could properly give to the ET as regards its decision on the remitted questions. Paras. 93-94 read:

> "93. For my part, I consider that a danger can arise from any attempt to lay down general guidelines in cases such as this. Experience suggests that issues arising from the exercise of rights to freedom of religion and belief, and to freedom of expression, are invariably fact-specific. Although the public debate around these issues tends to be conducted through the prism of categories and labels, that is not an approach that can properly inform the decisions taken in individual cases. The values that underpin the right to freedom of religion and belief and of freedom of expression – pluralism, tolerance and broadmindedness (per *Sahin v Turkey* (2007) 44 EHRR 5*; Handyside v UK* 1 EHRR 737) – require nuanced decision-making; there is no 'one size fits all' approach.
>
> 94. All that said, I can see that, within the employment context, it may be helpful for there to be at least be some mutual understanding of the basic principles that will underpin the approach adopted when assessing the proportionality of any interference with rights to freedom of religion and belief and of freedom of expression.
>
> (1) First, the foundational nature of the rights must be recognised: the freedom to manifest belief (religious or otherwise) and to express views relating to that belief are essential rights in any democracy, whether or not the belief in question is popular or mainstream and even if its expression may offend.
>
> (2) Second, those rights are, however, qualified. The manifestation of belief, and free expression, will be protected but not where the law permits the limitation or restriction of such manifestation or expression to the extent necessary for the protection of the rights and freedoms of others. Where such limitation or restriction is objectively justified given the manner of the manifestation or expression, that is not, properly understood, action taken because of, or relating to, the exercise of the rights in question but is by reason of the objectionable manner of the manifestation or expression.
>
> (3) Whether a limitation or restriction is objectively justified will always be context-specific. The fact that the issue arises within a relationship of employment will be relevant, but different considerations will inevitably arise, depending on the nature of that employment.
>
> (4) It will always be necessary to ask (per *Bank Mellat*): (i) whether the objective the employer seeks to achieve is sufficiently important to justify the limitation of the right in question; (ii) whether the limitation is rationally connected to that objective; (iii) whether a less intrusive limitation might be imposed without

undermining the achievement of the objective in question; and (iv) whether, balancing the severity of the limitation on the rights of the worker concerned against the importance of the objective, the former outweighs the latter.

(5) In answering those questions, within the context of a relationship of employment, the considerations identified by [the Archbishops' Council] are likely to be relevant, such that regard should be had to: (i) the content of the manifestation; (ii) the tone used; (iii) the extent of the manifestation; (iv) the worker's understanding of the likely audience; (v) the extent and nature of the intrusion on the rights of others, and any consequential impact on the employer's ability to run its business; (vi) whether the worker has made clear that the views expressed are personal, or whether they might be seen as representing the views of the employer, and whether that might present a reputational risk; (vii) whether there is a potential power imbalance given the nature of the worker's position or role and that of those whose rights are intruded upon; (viii) the nature of the employer's business, in particular where there is a potential impact on vulnerable service users or clients; (ix) whether the limitation imposed is the least intrusive measure open to the employer."

113. Mrs Fraser Butlin invited this Court to approve the guidance given in para. 94 (parts of which at least are acknowledged by Eady J to have been based on the submissions of the Archbishops' Council to the EAT). She drew our attention to a number of ET decisions in which it had been acknowledged to be helpful, and to an observation to the same effect in *Harvey on Industrial Relations and Employment Law*. Mr O'Dair and some of the other interveners, on the other hand, while not asserting that it was positively erroneous, proposed various amplifications or refinements. Eady J herself, at para. 93, sounds a strong note of caution about the value of guidelines in this field. I agree, and I would echo in particular her statement that the relevant principles require nuanced decision-making and that there can be no one-size-fits-all approach. But, provided para. 94 is read as being limited to, as she says, a summary of the underlying principles, I would respectfully endorse it. I would only say, consistently with the caution already expressed, that it will not be necessary – or always even useful – for a tribunal to structure its reasoning by reference to the nine "considerations" enumerated in head (v). All of them are potentially relevant; but in practice, as the EHRC observed, the focus of the issues in any given case will only be on some of them, and there may be some cases where other considerations – or considerations which do not neatly fit into her formulation – may be relevant.

THE ISSUES

114. The Claimant's grounds of appeal begin with a summary which acknowledges that the appeal was allowed but says that it is her case that the claim should not have been remitted to the ET because "the EAT was bound in law to reach its own conclusion and allow the Claimant's claim for direct discrimination". As to that, there is no issue about the principles applying to the EAT's decision whether to remit a case in respect of

which it has found that the ET made an error of law. As I put it at para. 45 of my judgment in *Jafri v Lincoln College* [2014] EWCA Civ 449, [2015] QB 781:

> "If, once the ET's error of law is corrected, more than one outcome is possible, the authorities are clear that it must be left to the ET to decide what that outcome should be, however well-placed the EAT may be to take the decision itself."

(As I said in the following paragraph, I think it is regrettable that the test is so inflexible, but the law is settled short of the Supreme Court.)

115. The Claimant then pleads four specific grounds of appeal, as follows:

> "GROUND 1: On the factual findings of the ET, supplemented by undisputed and indisputable facts of this case, the EAT was bound to conclude that the Respondent's interference with the Appellant's rights cannot be justified under Article 9(2) or 10(2), because:
>
> (a) The interference was not 'prescribed by law';
>
> (b) The interference was not justified by protecting the Respondent's reputation;
>
> (c) The interference was not justified by the protection of rights and freedoms of others. There is no right not to be offended, and the offence taken by the audience ('heckler's veto') can never justify interference with Convention rights.
>
> (d) The interference was not proportionate; and/or
>
> (e) The interference could not be justified as necessary in a democratic society in the light of the essential principle of pluralism which underpins the Convention.
>
> GROUND 2: The EAT has failed to direct itself, or to provide guidance to the ET on remission, on the principle that the Convention protects not only the substance of a manifestation/expression, but likewise the language and manner.
>
> GROUND 3: The EAT has failed to address Grounds 5-7 of the Grounds of Appeal before it. Had it done so, it was bound to conclude, on the unchallenged factual findings of the ET supplemented by undisputed and indisputable facts of this case:
>
> (a) that the complainant was guilty of unlawful stereotyping and therefore of discrimination
>
> (b) Respondent adopted the discriminatory views of that third party and was thus had been [*sic*] guilty of direct discrimination.
>
> GROUND 4: EAT has erred in failing to uphold Ground 4 of the Appellant's appeal: The ET reached an impermissible conclusion

> and/or failed to properly explain its reasons for attributing Mr Conlan's reasons to all other decision-makers; alternatively, misdirected itself in the identification of the relevant decision-makers."

116. In her reasons for giving permission to appeal Elisabeth Laing LJ found each of those grounds to have a real prospect of success, but she added that, even if they did not, the appeal raised "at least three important questions about the dismissal of an employee for the expression of her beliefs". I have addressed these in the course of my consideration of the issues.

117. As already noted, the School sought in its Respondent's Notice dated 5 February 2024 to challenge the terms of the EAT's order. Section 6 of the Notice reads:

> "The Respondent accepts that the EAT was entitled to uphold the appeal and remit to the same employment tribunal to reconsider the effect (if any) of the Facebook posts as constituting a manifestation of a protected belief. It challenges, however, the importation of a Convention-based proportionality assessment - including a gateway criterion that the impugned conduct must be 'prescribed by law' - into s13 EqA 2010.
>
> The Respondent's Grounds are set out in the Answer to Claimants Appeal and Notice of Cross-Appeal."

I need not set out the full grounds referred to in the final sentence. The School's essential point was that there was no warrant for introducing the requirements of article 9.2 into the exercise required by the 2010 Act. Its position is sufficiently summarised by para. 9 of the Notice of Cross-Appeal, which reads:

> "An ET should apply heightened scrutiny where the decision-maker asserts that the reason for detrimental treatment is not the protected characteristic but a feature separable from it. A similar approach is taken to separability in victimisation or whistleblowing complaints. R accepts that the ET's enquiry at first instance is not sufficiently reasoned and consents to remission accordingly. That heightened enquiry, however, is confined to those matters known to and operative upon the mind of the decision-maker. It is subject to neither a 'prescribed by law' test nor a proportionality exercise. Both the EAT's terms of remission and Ground One are thus founded on errors of law."

118. Elisabeth Laing LJ refused the School permission to cross-appeal on that basis for two reasons – (a) that the School had conceded the point below "by accepting in both tribunals that A's Convention rights were relevant and by arguing that R's interferences with those rights were justified", and (b) that its proposed argument was contrary to the ratio of *Page*, by which the Court was bound. Although the School sought permission to re-open that refusal, Elisabeth Laing LJ found that the stringent requirements for granting permission to re-open had not been met; and she in any event maintained her view that this Court had in *Page* "treated the discrimination claims and the Convention rights arguments as co-extensive, or as virtually co-extensive".

119. The result is that it is not open to the School on this appeal to argue that Eady J was wrong to proceed on the basis that its treatment of the Claimant had to be justified by reference to the criteria in article 9.2.

GROUNDS 1 AND 2

120. Although ground 1 ostensibly comprises a number of distinct points, most of them are simply different formulations of the submission that the EAT was bound to hold that the treatment complained of by the Claimant was not an objectively justifiable response to her having made the posts. Ground 2 makes a further particular point which feeds into that submission, and it is convenient to take it together with ground 1, as indeed Mr O'Dair did in his oral submissions.

THE SCHOOL'S CASE ON JUSTIFICATION

121. The School did not in its original Grounds of Resistance plead any case on objective justification and, because of the view that it took on the law, the ET did not consider any such case. Even in the School's skeleton argument before us no case is clearly articulated about the features of the posts which are said to justify the action taken against the Claimant. I accordingly focus on the justification advanced by Mr Jones in his oral submissions. That justification broadly reflected the reasons given by the School in the dismissal letter, but it does not correspond to them entirely. In so far as it differs, that is not fatal to the School's case: the test is objective, and an employer can in principle justify an act complained of on a basis that it did not articulate at the time.

122. Mr Jones began by referring to two decisions of the ECtHR as identifying the relevant principles – *Giniewski v France*, 64016/00, [2006] ECHR 82, and *Lilliendahl v Iceland*, 29297/18, [2020] ECHR 931. Neither is concerned with the limits of free speech in an employment context, but Mr Jones submitted that they remained useful as statements of principle.

123. *Giniewski* concerned a newspaper article criticising a papal encyclical. It included a statement that certain Catholic teachings had led to antisemitism and "prepared the ground in which the idea and implementation of Auschwitz took seed". The publisher had been found liable in civil proceedings for "public defamation against a group of persons on account of their membership of a religion". He claimed (and the Court found) that that decision infringed his article 10 rights. Mr Jones relied on the decision only for the following statement of principle (at para. 43 of the judgment), which he said applied equally to the expression of religious beliefs protected by article 9:

> "As the Court has stated on many occasions, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to para. 2 of Art. 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. As para. 2 of Art. 10 recognises, however, the exercise of that freedom carries with it duties and responsibilities. Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights,

> and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs."

124. Importantly, that passage recognises the distinction between, on the one hand, expressing views that may "offend, shock or disturb" and, on the other, the way in which the views are expressed. Mr Jones relied in particular on the Court's reference to expressions of the belief that are "gratuitously offensive to others" and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs. I do not think that the Court intended that those phrases should be treated as stating the definitive criterion of the limits of acceptable speech, but I accept that they give a useful general indication. To the extent that the Court's language is relied on, the word "gratuitously" should not be overlooked: the Court was evidently referring to language which was offensive for the sake of offence.

125. In *Lilliendahl* the applicant had posted a comment underneath an online newspaper article about the promotion of education about LGBT issues, in which he described homosexual activity in crude and highly offensive language and referred to it as disgusting. He was convicted of a criminal offence and fined. In its judgment the Court reviewed its previous case-law on the subject of "hate speech". This distinguishes between (a) speech which "seeks to stir up hatred or violence", such that it can be treated as being "aimed at the destruction of the rights and freedoms [sc. of others] laid down in [the Convention]" and thus to fall within the scope of article 17 (see paras. 24-25 of the judgment), and (b) "less grave forms of 'hate speech' which the Court has not considered to fall entirely outside the protection of Article 10, but which it has considered permissible for the Contracting States to restrict" (see para. 35). Para. 36 reads:

> "Into this second category, the Court has not only put speech which explicitly calls for violence or other criminal acts, but has held that attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for allowing the authorities to favour combating prejudicial speech within the context of permitted restrictions on freedom of expression (see *Beizaras and Levickas v. Lithuania*, … §125; *Vejdeland and Others v. Sweden*, … §55, and *Féret v. Belgium*, … §73). In cases concerning speech which does not call for violence or other criminal acts, but which the Court has nevertheless considered to constitute 'hate speech', that conclusion has been based on an assessment of the content of the expression and the manner of its delivery."

The Court's conclusion was that the applicant's conduct fell into the second category and that his former conviction and fine were objectively justifiable.

126. Mr Jones asked us to note in particular that the Court in *Lilliendahl* found that the language used by the applicant, coupled with the clear expression of disgust, was such as "to promote intolerance and detestation of homosexual persons". He relied on the case as authority for the proposition that article 10 rights, and thus also rights under article 9, did not extend unqualified protection to "insulting, holding up to ridicule or slandering specific groups of the population": whether speech of that kind was protected would depend on "the content of the expression and the manner of its

delivery". I have no difficulty with that proposition, which is consistent with the approach endorsed in *Page*.

127. Having said that, I do not think that the Strasbourg concept of "hate speech" (or the equivalent domestic jurisprudence) can be straightforwardly applied in the present context, and Mr Jones did not invite us to do so. *Lilliendahl* (like the other cases referred to in it) is concerned with restrictions imposed by the state, indeed with criminal sanctions; and the context of the employment relationship is different.

128. In his skeleton argument Mr O'Dair relied on observations in the decision of the ECtHR in *De Haes v. Belgium* 19983/92, [1997] ECHR 7, to the effect that "journalistic freedom … covers possible recourse to a degree of exaggeration, or even provocation" (para. 46) and that "article 10 … protects not only the substance of the ideas and information expressed but also the form in which they are conveyed" (para. 48). He cited by way of illustration a number of Strasbourg and domestic cases in which the exercise of free speech has been held to be protected notwithstanding the use of offensive language. I have no difficulty accepting that in particular cases even very offensively expressed statements may be protected by article 10. But that is not inconsistent with the proposition clearly recognised in *Giniewski* and *Lilliendahl* that in some cases the offensive language of a statement of fact or opinion will nevertheless justify an interference with the speaker's article 10 rights. I also observe that the authorities in question are, again, concerned with interference by the state and not in the context of the employment relationship.

129. Against that background, Mr Jones submitted that an ET could properly conclude that the language of the posts was indeed gratuitously offensive and insulting to homosexual and trans people and did nothing to contribute to constructive public debate; that it was potentially damaging to the reputation of the School that one of its employees should post or re-post messages that used such language; and that dismissal was a proportionate response. The essential points that he made in support of each of those submissions were as follows.

130. As regards the language of the posts, Mr Jones referred in particular to the reference in the re-posts to "the LGBT crowd" perpetrating a form of "child abuse" by subjecting schoolchildren to what is described as the "mental illness" of believing in gender fluidity. That was grossly insulting to gay and trans people as a group. He acknowledged that it was the language of the original posts, rather than the Claimant's own, but he pointed out that she had chosen to re-post them and that, despite her concession that it would have been better to use her own language, she had not taken them down.

131. As regards potential damage to the reputation of the School, Mr Jones emphasised that this was not a case where the Claimant was using the kind of language that she did about some issue which had no bearing on her employer's business. On the contrary, the posts made serious allegations about what was said to be going on in schools, including secondary schools. In those circumstances, a reader of the posts who knew that she worked at the School might well be concerned that she was expressing those views, and using the same offensive language about LGBT people, in the school environment, including to pupils. At least one reader of the posts, the complainant, had identified her and knew that she worked at the School, and there was no reason to suppose that there might not be many others: indeed the passage from the dismissal

letter quoted at para. 22 above records the Claimant's acknowledgment that that was so.

132. As for whether dismissal was a proportionate response, Mr Jones relied on the fact that the Claimant had told the panel that, despite her concessions about the language of the posts, she would not have acted differently: there was thus no reason to believe that she would not post similar material in the future. He said that a tribunal would be entitled to accept the panel's conclusion, recorded in the dismissal letter, that she had demonstrated no understanding of the implications of her actions or of how they might reflect on her professional reputation and that of the School within the community.

133. Accordingly, he submitted, following the *Bank Mellat* approach, it would be open to the ET to find that the School's aim was to protect itself from the reputational harm which it was liable to suffer from a member of its staff using the gratuitously offensive and insulting language that she had; that her dismissal was a rational way of achieving that aim; that any measure short of dismissal would have unacceptably compromised the achievement of that objective; and that its achievement outweighed the interference with the Claimant's article 9 (and article 10) rights.

134. I need to emphasise two things about the School's case on justification as so advanced.

135. First, it is no part of its case that it was entitled to object to the Claimant publicly expressing her protected beliefs. That is so even if parents or others who knew where she worked might have found those beliefs offensive and thought the worse of the School for employing her. Mr Conlan accepted that in his evidence in the ET (see para. 102 above), and he was right to do so. This is not therefore a case about whether an employee can be dismissed simply for expressing those views on Facebook: it is about the terms in which she did so. This point is worth making because, on at least one reading of the complainant's emails[10], what they found offensive was indeed the substance of the Claimant's protected beliefs: if so, that is not the basis of the School's justification.

136. Second, it is not part of the School's case that there was in fact a risk that the Claimant would express those views, or exhibit any prejudice against gay or trans people, in the work environment. She had said in terms that she would not do so, and that was not controverted by the School in its dismissal letter and appears to have been accepted by the ET. The justification is focused squarely on reputational damage – that is, on the risk that readers of the posts might think the worse of the School for employing, in the Claimant's position, someone who expressed themselves about "the LGBT crowd" in the way that she did.

THE CLAIMANT'S SUBMISSIONS

137. I do not propose to summarise Mr O'Dair's submissions in full, partly because some were not material to the School's case on justification as it eventually emerged, and

[10] It is not in fact clear exactly what the complainant was referring to when they said "I find *these views* offensive". On another view, it may have been not the protected beliefs as such but, rather, what they inferred from those beliefs about the Claimant's attitude to gay and/or trans people: if so, that raises a separate issue, which I address at paras. 146-152 below. In truth, it seems likely that the complainant was not really alive to the relevant distinctions.

partly because some of his points will be incorporated into my own reasoning. But there are three points which it is useful to address at this stage.

(1) "Reputational Damage"

138. Mr O'Dair submitted that the effect of the reasoning of the ET summarised at para. 105 (2) above was that the School had been justified in dismissing the Claimant simply on the basis that the complainant had been, and other readers of the posts might be, offended by her expression of her protected beliefs and think the worse of it for employing her. He submitted that reliance on reputational damage of that kind was unacceptable in principle.[11] It is part of the price of a pluralist society that employers may sometimes have to take a hit for employing someone who expresses unpopular beliefs. He pointed out that it is well established that an employer cannot avoid liability for race or sex discrimination by showing that the act complained of was done in order to avoid adverse reactions from racist or sexist customers or clients (see, e.g., *Din v Carrington Viyella Ltd* [1982] ICR 256[12]); he submitted that that principle applies equally in the present case. The FSU likewise in its written submissions expressed concern about the indiscriminate use of reputational harm as a justification for interference with employees' freedom to manifest their beliefs.

139. The ET was not of course addressing the issue of justification as such, and I am not sure that the effect of its reasoning is indeed as Mr O'Dair characterised it; but I agree with him that, if it is, it is wrong in principle. An employer does not have *carte blanche* to interfere with an employee's right to express their beliefs simply because third parties find those beliefs offensive and think the worse of it for employing them. Nor, however, does the employee have *carte blanche* about what they can say in public or how, or in what circumstances, they say it. The characteristics of the employment relationship may entitle the employer to impose limitations on the employee's rights to manifest their beliefs and of free expression in accordance with articles 9.2 and 10.2 of the Convention. The particular characteristic with which we are concerned here is the employer's legitimate interest in protecting its reputation – not only with customers or consumers or users of its services, but also with other third parties, including other employees, whose perception of it may affect its work or business. The extent to which it will be justified in interfering with the employee's article 9 or article 10 rights will depend on the circumstances, and it is not possible to give any kind of general exposition. For present purposes I need only note three considerations which will be relevant to the proportionality of any such interference.

140. The first consideration is the subject-matter of the expression of opinion or belief. A statement of the employee's views about matters which have nothing to do with the employer's business is self-evidently less likely to damage its reputation than a statement about matters which are central to it. In the present case there is, as Mr Jones pointed out, a connection between the posts and the School because they related to sex education in schools.

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[11] This is apparently what is referred to in ground 1 (c) as "the heckler's veto", though the use of that phrase in this context does not seem to me very apt.

[12] The EHRC in its submissions referred to another decision to similar effect – *R v Commission for Racial Equality, ex p Westminster City Council* [1985] ICR 827.

141. The second consideration is the way in which the employee expresses their beliefs. This of course is the same kind of distinction as discussed above in connection with the separability cases, and also acknowledged in *Giniewski* and *Lilliendahl*. Even where the belief itself is protected, an employer may suffer reputational harm from being associated with an employee who expresses it publicly in an inappropriate way. The paradigm of such a case will be where the views are expressed in egregiously offensive or insulting language, as illustrated in cases like *Lilliendahl* (though there might in principle be cases where the reputational harm is done by some other feature). I would emphasise that the threshold of offensiveness should be high: protection should not be lost merely because the employee has expressed themselves intemperately. As we have seen, Mr Jones submits that the threshold is crossed in this case.

142. The third consideration is whether it is clear that the views expressed are personal to the employee. It is one thing to be entitled to express your own views on sensitive topics, but another to risk them being imputed to your employer, to whom it may be important to maintain institutional neutrality on the issue in question. This consideration may be particularly (though not only) important in the case of senior employees. As I said at para. 59 of my judgment in *Page*,

> "[t]he extent to which it is legitimate to expect a person holding a senior role in a public body to refrain from expressing views which may upset a section of the public is a delicate question which can only be decided by reference to the facts of each particular case."

A principal reason why this Court upheld the tribunal's decision in that case was that it had found that the trust legitimately feared that the expression by one of its directors of a view that homosexual acts were wrong might discourage some gay patients from taking up its services: see para. 61 of my judgment, where I distinguished a concern of that kind from "generalised perceived reputational damage". I mention this consideration because it is quite clear that it was <u>not</u> present in this case. As we have seen, the panel expressly accepted that it was unlikely that readers of the posts would believe that the Claimant was speaking for the School (see the final paragraph of the passage in the dismissal letter quoted at para. 22 above).

143. I should emphasise that those are no more than relevant considerations. They should not be treated as criteria all of which an employer must satisfy in order to justify an interference with an employee's article 9 or article 10 rights on the basis of reputational harm. I should also emphasise that even where reputational harm, or a risk of it, is shown the interference in question must be proportionate.

144. It follows from that discussion that the School's reliance on reputational damage in this case is open to it in principle. Mr Jones does not rely on any damage that might be caused simply by the Claimant's expression of her gender-critical views, or her beliefs about same-sex marriage, but on the damage done by what he says was her gratuitously offensive and insulting language about gay and trans people in relation to an issue of relevance to the work of the School.

145. Before leaving this topic, I should refer to the decision of Briggs J in *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch), on which Mr O'Dair placed some reliance. In that case a manager in a housing trust had expressed views on his personal Facebook page disapproving of churches conducting same-sex marriages. He was disciplined for,

among other things, bringing the trust into disrepute. He brought proceedings in the County Court for breach of contract: the proceedings were subsequently transferred to the High Court. In paras. 55-64 of his judgment Briggs J held that the claimant's conduct was incapable of bringing the trust into disrepute, for essentially two reasons. First, he found that, although his Facebook page did identify his work, there was no risk that any reader would understand his views to be those of the trust. Second, even if the views that he expressed had the propensity to upset fellow-employees or customers of the trust who read them that did not constitute the bringing of it into disrepute. As he put it at para. 62:

> "On the assumption that Mr Smith was not (as I have found) reasonably to be taken as seeking to express the Trust's own views, I cannot envisage how his moderate expression of his particular views about gay marriage in church, on his personal Facebook wall at a weekend out of working hours, could sensibly lead any reasonable reader to think the worst of the Trust for having employed him as a manager."

I respectfully agree with Briggs J's conclusions in those paragraphs, but I do not believe that they advance the argument in this case, since Mr Jones's case is that the Claimant's expression of her opinions was far from "moderate", and the opinions expressed were relevant to the work of the School.

(2) Assumptions and stereotyping

146. It will have been noted that a central element in the Claimant's ground 3 is that the complainant had been guilty of discrimination against her in the form of "unlawful stereotyping": see para. 116 above. As will appear, I do not believe that it is necessary for us to determine ground 3, but this aspect of it is potentially relevant in the context of the School's justification in the present case.

147. The foundation for the Claimant's case on this point is the complainant's accusation that she had expressed "homophobic" views. Mr O'Dair proceeded on the basis that the effect of the accusation was that she had an "animus" against gay people. That, like "homophobic" itself, is a rather imprecise term, the meaning of which may be affected by the context, but fortunately all that matters for our purposes is that the complainant meant to describe an attitude on the part of the Claimant towards gay people that might lead her to treat them differently. The complainant did not in terms also describe the Claimant as being "transphobic", but it seems from paras. 15-16 above that Ms Dorey and/or the Claimant herself understood that to be part of the case against her.

148. Mr O'Dair's submission is that the accusation that the Claimant had homophobic and (apparently) transphobic attitudes was not based on any actual expression of such attitudes in the posts. Rather, it was an assumption that anyone who expressed the protected beliefs must be homophobic or transphobic. He submitted that there was no basis for such an assumption. Holding gender-critical beliefs, or believing that same-sex marriage is not equivalent to traditional marriage, cannot be equated with an animus against gay or trans people. The Claimant herself put the point pithily to Ms Dorey, when she said (see para. 16 above):

> "I know that there are transgenders and gays who do have the same beliefs as me. … I am not against gay people, it doesn't say that."

As noted at para. 105 (1) above, the ET accepted her evidence on that point and appears to have accepted the distinction in question.

149. In this connection Mr O'Dair referred us to para. 250 of the judgment of Julian Knowles J at first instance in the *Miller* case ([2020] EWHC 225 (Admin)), where he accepts evidence that "some involved in the [transgender] debate are readily willing to label those with different viewpoints as 'transphobic' or as displaying 'hatred' when they are not". There is also a parallel with the observation of this Court (Irwin and Haddon-Cave LJJ and Sir Jack Beatson) at para. 5 (10) of its judgment in *R (Ngole) v University of Sheffield* [2019] EWCA Civ 1127. The claimant in that case had been removed by the defendant university from his MA course in social work because he had expressed on Facebook the opinion that homosexual acts were sinful. The Court said:

> "The mere expression of views on theological grounds (*e.g.* that 'homosexuality is a sin') does not necessarily connote that the person expressing such views will discriminate on such grounds. In the present case, there was positive evidence to suggest that the Appellant had never discriminated on such grounds in the past and was not likely to do so in the future (because, as he explained, the Bible prohibited him from discriminating against anybody)."

150. The next steps in the argument advanced in ground 3 are that the assumption that a person holding the protected beliefs must be homophobic and/or transphobic constitutes an unlawful stereotype applied to people holding those beliefs; and that the School "adopted" that discrimination by acting on the complaint.

151. Those steps are irrelevant under grounds 1 and 2 because we are concerned only with whether the School's response to the posts was objectively justified. But it is just as necessary in that context to judge an employee's statement by what they actually say (albeit including any necessary implications) rather than by what some readers might choose illegitimately to read into them. That is particularly important in the current social media climate, where messages are often read hastily and sometimes by people who are partisan or even ill-intentioned or (more likely) simply succumb to the common human tendency to find in a communication what they expect to find rather than what is actually there.

152. I have addressed this question because the point made in the previous paragraph may be of some general importance. It was indeed one of the three questions identified by Elisabeth Laing LJ when granting permission. She said:

> "Where the objection is based on the words used by the employee, it is arguable that the defence should only be available if objectively, the employer can legitimately complain about the meaning of those words, and that it should not be available because of the reaction to those words of a person which derives, not from the objective meaning of the words, but from subjective inferences some people might draw, or which the complainant has drawn, from those words."

As will be seen, I agree with that argument; and thus also with Falk LJ's judgment below. However, in the light of the School's case on justification as developed by Mr Jones, the point no longer directly arises: that justification does not depend on any

stereotypical assumption that the Claimant was homophobic or transphobic, whatever the complainant may have thought, but on the actual language of the posts.

(3) Use of personal Facebook account

153. Mr O'Dair emphasised in his submissions, as the Clamant had in the investigation and at the disciplinary hearing, that the posts were on her personal account, to which only her Facebook friends had access and which did not identify that she worked for the School. Likewise, in her grant of permission to appeal Elisabeth Laing LJ identified an important issue as being "the extent to which an employer may lawfully dismiss an employee for expressing views which are based on her religious beliefs in a forum which is not in the workplace, is not controlled by the employer, and which has a limited number of members".

154. As to that, I accept that the facts that the posts were published in a forum which had nothing to do with the School, and would be likely to be seen by only a small number of people not all of whom would know of the Claimant's connection with it, are highly relevant to the extent and gravity of any reputational damage that the School might suffer. But I did not understand Mr O'Dair to be submitting that they afforded a complete answer to the School's case, and I do not believe that they do. As both the panel and the ET pointed out, there is no guarantee that Facebook posts will only be seen by those to whom the owner of the account grants access; and in any event publication even to her Facebook friends might in principle damage the School's reputation among the local community who had close connections to it as parents or otherwise.

155. That conclusion is not inconsistent with Briggs J's conclusion in *Smith* quoted at para. 145 above. The fact that in that case the claimant's views were posted only on his personal account was not treated as decisive of the question of reputational damage: Briggs J takes into account equally that they were "moderately expressed". They also of course had no relevance to his work.

DISCUSSION AND CONCLUSION

156. It follows from my observations on Mr O'Dair's submissions that there is no threshold objection to the School's case on justification. The question is whether it would be open to the ET, if the case were remitted, to accept that case on the facts.

157. It is simpler to state my conclusion first and then give my reasons. In my opinion the ET would be bound to find that the Claimant's dismissal was not objectively justified and accordingly that it constituted unlawful discrimination. That is of course her principal complaint, and no separate finding is required about the rejection of her internal appeal. As regards her secondary complaint about the disciplinary process leading to her dismissal, I do not believe that we are in a position ourselves to decide whether that also was unjustified, but I hope and expect that it will not be necessary for the case to be remitted for the determination of that question. I take the two complaints in turn.

The dismissal claim

158. As regards the dismissal, I am prepared to assume, but without deciding, that the School was entitled to take objection to the posts for the reasons relied on by Mr Jones – that is, that their language was gratuitously offensive to gay and/or trans people because of the way that it described the conduct of "the LGBT crowd" and that it was used in the context of sex education in schools and was accordingly relevant to the Claimant's work. Even on that assumption, however, I believe that dismissal was unquestionably a disproportionate response. My reasons are as follows.

159. First, even if the language of the re-posts passes the threshold of objectionability, it is not grossly offensive. In context, the description of the promoters of gender fluidity as "the LGBT crowd" does not appear to be primarily intended to incite hatred or disgust for homosexuals or trans people. Rather, it is one of a series of derogatory sneers, alongside "liberal school systems" and "far-left zealots". The accusations of "child abuse" and the promotion of mental illness may be stupidly rhetorical exaggeration but they are not likely to be taken literally. I do not mean to downplay the offensiveness of the language of the re-posts, but we are a long way from the kinds of direct attack on homosexuality found, for example, in *Lilliendahl*.

160. Second, the language is not the Claimant's own (except for her repetition of the word "brainwashing"). It appears only in messages from others which (as would be evident to the reader) she had re-posted. She made clear to the School that she did not agree with the language used: that does not of course absolve her of responsibility for re-posting it, but it is relevant to the question of the degree of any culpability.

161. Third, the panel accepted that there was no evidence that the reputation of the School had thus far been damaged: its concern was about potential damage in the future (see, again, the final paragraph of the passage in the dismissal letter quoted at para. 22 above). As it also accepted, there was no possibility that, even if readers of the posts associated the Claimant with the School, they would believe that they represented its own views. Any reputational damage would only take the form of the fear expressed by the complainant, namely that the Claimant might express at work the homophobic and transphobic attitudes arguably implicit in the language used. I accept that if that belief became widespread it could harm the School's reputation in the community, as the panel clearly thought. But the risk of widespread circulation was speculative at best. The posts were made on her personal Facebook account, in her maiden name and with no reference to the School. By the time of the hearing, several weeks after the posts were made, only one person was known to have recognised who she was.

162. Fourth, even if readers of the posts might fear that the Claimant would let her views influence her work, neither the panel nor the ET believed that she would do so. There was no reason to doubt her assertion that her concern was specifically about the content of sex education in primary schools; that she "wouldn't bring this into school"; and that she would never treat gay or trans pupils differently (see para. 16 above). There had indeed been no complaints about any aspect of her work for over six years. It would have been open to the School, if it really thought it necessary, to issue a statement making it clear that it was confident that there was no risk that the Claimant's views would affect her attitude towards gay or trans pupils or parents: it will be recalled that the ET itself floated this possibility at para. 65 of its Reasons.

163. Taking those reasons together, I do not believe that dismissal was even arguably a proportionate sanction for the Claimant's conduct. It was no doubt unwise of her to re-post material expressed in (to use the ET's words) florid and provocative language with which she did not agree, and in circumstances where people were liable to realise her connection with the School. But I cannot accept that that can justify her dismissal, and still less so where she was a long-serving employee against whose actual work there was no complaint of any kind.

164. My decision on this point is reinforced by the strong indication in the ET's Reasons that it would be likely to have found that the Claimant's dismissal was unfair if that issue had been before it: see para. 103 above.

165. In reaching that conclusion, I have not lost sight of the point, emphasised by Mr Jones, that the panel believed that the Claimant had no "insight" into the consequences of her actions, as illustrated not only in what she said to it but in her failure to take down the posts: see the second paragraph of the passage from the dismissal letter quoted at para. 24 above. This view was obviously central to its decision to dismiss. I accept that in an appropriate case lack of insight may justify an employer in choosing dismissal rather than a less severe sanction; but there can be no universal rule. There are understandable reasons why in some cases an employee may not be willing to admit that the conduct in question was wrong, or seriously wrong, particularly if it was the manifestation of a deeply-held belief. If the case is not one that would otherwise justify dismissal, it is hard that it should be marked up in seriousness because of a failure to make an acknowledgement of fault which the employee would genuinely find difficult. The position may be different where the employer needs to be confident that the employee understands what they have done wrong in order to prevent a more serious or damaging occurrence of the same conduct in the future; but for the reasons already given this was not that kind of case.

166. I would add that the judgment of this Court in *Ngole* contains useful observations on the dangers of placing inappropriate weight on "lack of insight". The university appears to have acknowledged that the claimant's expression of his view that homosexual acts were sinful was not inherently inconsistent with working as a social worker. But it believed that it was necessary for him to change the way in which he expressed himself and make clear that his views would not affect his work; and that that would not be possible because he had adopted an intransigent position in defence of his posts which showed no insight into why they were problematic. At paras. 109-112, headed "Lack of 'insight' and entrenched positions", the Court held that the claimant's termination was not justified, both because the university was itself partly responsible for his intransigence but also, "crucially", because it never made it clear

> "that it was the *manner and language* [emphasis in original] in which [he] had expressed his views which was the problem or discuss or offer him guidance as to how he might more appropriately and moderately express his views on homosexuality in a public forum and in a way in which it would be clear that he would never discriminate on such grounds or allow his views to interfere with his work as a professional social worker."

(see para. 111). I do not suggest that the facts in *Ngole* are directly comparable to those of the present case; but the Court's approach to the issue is nevertheless instructive.

The disciplinary process claim

167. I can give my reasons on this point shortly. I have no doubt that the School was entitled to carry out an investigation of some kind in response to the complaint. The posts unquestionably used offensive language, even if it was evidently not the Claimant's own, and they had been seen by, and caused concern to, at least one parent who knew that she worked at the School. It would frankly have been irresponsible not to try to ascertain whether there was a risk of serious reputational damage or of the Claimant "bringing into school" the issues that she raised in the posts or holding attitudes that might affect how she treated gay or trans children. It is debatable whether that investigation needed to be disciplinary in character or, if it did, whether Ms Dorey was justified in finding a case to answer at the end of it. It is still more debatable whether it was necessary to suspend the Claimant: as to this, see the observations of Elias LJ in *Crawford v Suffolk Mental Health Partnership NHS Trust* [2012] EWCA Civ 138, [2012] IRLR 402, at para. 71. However, these are not questions to which I believe that this Court can provide a confident answer in circumstances where they were not explored by the ET or in the submissions to us.

168. Formally, therefore, the Claimant's case on these elements of her claim will have to be remitted to the ET. But I would strongly discourage that course. The real complaint in this case has been about her dismissal, and any points of principle which it raises have been decided in the context of that claim. Even if, as to which I express no view, the quantum of her compensation might be (slightly) greater if she succeeded on these elements, the additional sums would be wholly disproportionate to the costs. Mr O'Dair sensibly said in his oral submissions that he expected that the parties would take a "pragmatic" view about the need to remit these issues if the Claimant succeeded on the dismissal claim; and I am confident that they will do so.

CONCLUSION ON GROUNDS 1 AND 2

169. For the reasons given above I believe that the EAT was wrong to order remittal on the dismissal claim and we should ourselves hold that the Claimant's dismissal constituted unlawful discrimination on the ground of religion or belief. Remittal of that claim will only be necessary in order to determine the question of remedy. I hope and expect that remittal of the disciplinary process claim will not be necessary.

GROUNDS 3 AND 4

170. My conclusions on grounds 1 and 2 make it unnecessary to decide grounds 3 and 4, which are incapable of affecting the outcome of the appeal; and, like Eady J, I prefer not to do so. I can explain my reasons very summarily.

171. As to ground 3, the significance of the Claimant's case based on unlawful stereotyping is that if it were established it would, at least as Mr O'Dair submitted, bypass any defence of objective justification because the complainant, and through them the School, would have been shown to be motivated, at least to a significant extent, not by the language of the posts, or any other separable feature, but directly by the beliefs expressed in them. This submission was not addressed in the oral submissions, but I am inclined to think that it is analytically correct. But I am not satisfied that it would be right for this Court to make findings on the complainant's motivation, or on the issue of whether it was adopted by the School, particularly since this analysis was not

considered by the ET and not fully addressed in the oral submissions before us. There is no advantage in our wrestling with an issue which is far from straightforward and cannot lead to a different finding than we have already made on grounds 1 and 2.

172. It is right to record that we had helpful written submissions from EHRC on the law concerning direct discrimination by stereotyping in the context of religion or belief. So that their work is available in a case where it may be directly useful, I quote the following passage:

> "50. … One particular species of [direct discrimination] in which an employee's holding or manifesting their belief might have a significant influence on their treatment is through the putative discriminator's adoption of a stereotype. In such a case, although the reason for the treatment given by the employer is not the protected characteristic, it is nonetheless positively relied on by the claimant. The claimant argues that the decision-maker has, consciously or unconsciously, adopted a stereotype and was significantly influenced by it in deciding on the treatment complained of i.e. on the basis that the claimant would share the perceived attributes of the group, rather than relying on evidence about the particular individual. If that is so then the treatment will be 'because of' the protected characteristic. It does not matter if the stereotype is very likely to be true: see e.g. *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* … [2005] 2 AC 1 per Lady Hale at §82; *Commerzbank AG v Rajput* UKEAT/154/18 [2019] ICR 1613 … at §77 per Soole J.
>
> 51. …
>
> 52. In relation to religion or belief, a decision-maker will accordingly discriminate where the reason given for the treatment is significantly influenced, consciously or unconsciously, by a stereotype that persons who hold or manifest the relevant belief will share attributes of a group which they might not in fact possess. Examples of stereotypes in relation to religion or belief explicitly recognised in the case law are that: persons who hold/manifest certain gender-critical beliefs have animus towards trans persons (see e.g. *R (Miller) v College of Policing* [2020] EWHC 225 (Admin) [2020] 4 All ER 31 at §§250, 281); or that persons holding/manifesting the belief that same-sex sexual activity is sinful have animus towards gay persons (see e.g. *Ngole* at §115). It may be that some persons who hold/manifest such beliefs have such animus, but it is stereotyping to assume that all do. Given the above cases, the EHRC considers that a Tribunal is likely to be able to proceed on the basis that the stereotypes which they identify exist (*Commerzbank*, §§79-80), although it may need to give prior notice to the parties of a proposed use of the principle: ibid., §84.
>
> 53. The stereotype must significantly influence the decision-maker's decision. That is irrespective of whether, as in a case such as the present, the employer is acting following a third-party objection/complaint about the claimant."

I am prepared to say, albeit entirely obiter, that my provisional view is that that is a correct summary of the law.

173. As to ground 4, this was the subject only of the briefest oral submissions from Mr O'Dair, and of none from Mr Jones or the interveners, and since it cannot affect the outcome I see no advantage in my prolonging this judgment by addressing it.

CONCLUSION AND SUMMARY

174. For the reasons given above I would allow the Claimant's appeal against the EAT's decision to remit to the ET the issue of whether her dismissal was unlawfully discriminatory and I would substitute a finding that she succeeds on that claim. I would dismiss her appeal against the decision to remit the remaining elements of her claim, but, as I have said, I hope and expect that a decision on those issues will not be necessary.

175. This has been a regrettably long, and long-delayed, judgment. It may assist non-lawyers or skim-readers if I summarise my essential conclusions in broad terms:

(1) The dismissal of an employee merely because they have expressed a religious or other protected belief to which the employer, or a third party with whom it wishes to protect its reputation, objects will constitute unlawful direct discrimination within the meaning of the Equality Act.

(2) However, if the dismissal is motivated not simply by the expression of the belief itself (or third parties' reaction to it) but by something objectionable in the way in which it was expressed, determined objectively, then the effect of the decision in *Page v NHS Trust Development Authority* is that the dismissal will be lawful if, but only if, the employer shows that it was a proportionate response to the objectionable feature – in short, that it was objectively justified: see para. 74 above.

(3) Although point (2) modifies the usual approach under the Equality Act so as to conform with that required by the European Convention of Human Rights, that "blending" is jurisprudentially legitimate: see paras. 81-97.

(4) In the present case the Claimant, who was employed in a secondary school, had posted messages, mostly quoted from other sources, objecting to Government policy on sex education in primary schools because of its promotion of "gender fluidity" and its equation of same-sex marriage with marriage between a man and a woman. It was not in dispute, following the earlier decision of the EAT in *Forstater v GCD Europe*, that the Claimant's beliefs that gender is binary and that same-sex marriage cannot be equated with marriage between a man and a woman are protected by the Equality Act.

(5) The school sought to justify her dismissal on the basis that the posts in question were intemperately expressed and included insulting references to the promoters of gender fluidity and "the LGBT crowd" which were liable to damage the school's reputation in the community: the posts had been reported by one parent and might be seen by others. However, neither the language of the posts nor the risk of reputational damage were capable of justifying the Claimant's dismissal

in circumstances where she had not said anything of the kind at work or displayed any discriminatory attitudes in her treatment of pupils: see paras. 159-163 above.

I emphasise that that is intended as no more than a broad summary. For anyone needing an accurate understanding of the details of our decision and the reasons for it, there is no substitute for a careful reading of the judgment in full.

Bean LJ:

176. I agree with both judgments.

Falk LJ:

177. I am grateful to Underhill LJ for his detailed exposition of the issues, and agree with his judgment in its entirety. I add this concurring judgment only to emphasise one aspect.

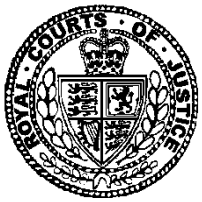
178. As Underhill LJ explains at paragraphs 151 and 152 of his judgment, it is necessary in this context to judge a statement by what it actually says, and not by reference to a concern about what some readers might wrongly read into or infer from it. While this will, as he notes, include necessary implications, it must be emphasised that the test is an objective one. In other words, what meaning do the words used actually have? What message would they convey to a reasonable reader? In the event of a dispute, this will be a matter that the tribunal must decide for itself.

179. The ET did not undertake that exercise in this case. Rather, it accepted that the School felt that the posts could reasonably lead someone to conclude that the Claimant held certain views. This is understandable because the ET was focusing only on the School's motivation. But it highlights a real concern that arises from such an approach. Namely, that if unchecked it would risk a judicially-endorsed silencing of the legitimate expression of views due to a concern about the conclusions that some might choose to draw from what is said, even if an impartial tribunal would not agree that the conclusions could reasonably be drawn and would also recognise the force of the point that freedom of speech entails the freedom to express opinions that may offend.

180. This point is closely linked to the ratio of *Page*, and in particular the use of the words "to which objection could justifiably be taken" in paragraph 68. It is only when a tribunal has determined what the words mean that it can then proceed to determine whether what was (actually) said was, despite being a manifestation of a belief, expressed inappropriately and whether, if it was, the response was objectively justifiable.

181. As Underhill LJ has explained (at paragraph 74 above) the words "to which objection could justifiably be taken", and its shorthand version "objectionable", should be taken to have the same effect as the word "inappropriate". Speaking for myself, I find "inappropriate" the more helpful term, for two reasons. First, it reduces the risk of the words "to which objection could justifiably be taken" being incorrectly read as permitting regard to be paid to the risk that some readers might wrongly read what is said in a way that a reasonable reader would not. Secondly, it more obviously conveys that the forum and context for what is said is relevant, as well as the content and manner.

For example, something that might be unproblematic on a private Facebook page could justify different treatment if communicated in a work setting.



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Case No: KB-2025-000497

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 27th February 2025

Before:
FORDHAM J

- -

Between:

THE CHANCELLOR, MASTERS AND SCHOLARS OF THE UNIVERSITY OF CAMBRIDGE	**Claimant**
- and -	
PERSONS UNKNOWN	**Defendants**
- and -	
EUROPEAN LEGAL SUPPORT CENTRE	**Intervener**

- -
- -

Yaaser Vanderman (instructed by Mills & Reeve) for the **Claimant**
Grant Kynaston (instructed by ELSC) for the **Intervener**
The Defendants did not appear and were not represented

- -

Hearing date: 27.2.25

Judgment as delivered in open court at the hearing

- -

Approved Judgment

- -

FORDHAM J

Note: This judgment was produced and approved by the Judge,
after authorising the use by the Court of voice-recognition software during an ex tempore judgment.

FORDHAM J :

Introduction

1. I am going to give my reasons now, for a decision on the Claimant's ("the University") application for an injunction. In other circumstances the Court would have wanted, and preferred, to have the opportunity to reserve judgment and hand down the judgment at a future date. But I am satisfied that I must grasp the nettle now, to explain what I am going to do in this case and why, in particular in the light of points that have been made about the significance of the coming weekend. I am authorising the use by the Court of voice recognition software, in the hope that it will enable me to produce a prompt and approved written judgment. But I should make clear that I expect the University's lawyers to be taking a note of this judgment with a view to it being uploaded to their injunction webpage.

The Injunction Webpage

2. The injunction webpage can be located by Googling "Cambridge University notices injunction". The actual address is www.cam.ac.uk/notices. The webpage is, in my judgment, important. By locating it, any member of the public or press and any person with an interest in this case is able to access all of the court materials in their entirety. I will be expecting, and may need to direct, that the University continue to upload to that webpage all court materials. Anyone accessing those materials will have full information about the background to this case and the evidence and written submissions that were put forward to the Court. Because the materials are publicly accessible, I will give some bundle references.

Two Cases

3. Since the University's bundle of authorities for today's hearing is itself available on the injunction webpage, there is ready access for everyone to the voluminous caselaw that was put before the Court. I think it is sufficient, for now, if I identify two of the cases. The first is a working illustration case which lists and addresses "substantive requirements" (see §23) and "procedural requirements" (§40): see University of London v Harvie-Clark and Others [2024] EWHC 2895 (Ch). That is a judgment in which an interim injunction was granted by the High Court. It is right to record that the defendants were unrepresented in that case. I am told that there is a contested substantive hearing in those proceedings, waiting to be dealt with. My principal purpose in referencing that case at the outset is because it gathers together relevant "requirements". The second is Wolverhampton City Council v London Gypsies and Travellers [2023] UKSC 47 [2024] AC 983. Unlike the University of London case, and unlike the present case, Wolverhampton was not a protest case. But reliance has been placed on it in the submissions today. And, while bearing in mind the distinction with protest cases, it contains what is self-evidently important substantive and procedural guidance.

The University's Application

4. The Court has before it the University's claim for an injunction, brought by claim form supported by particulars of claim. Specifically for today, and filed to accompany the claim form, is the University's Form N244 application notice dated 12 February 2025.

By that application notice, the University is asking the Court to make an order, in the terms of a draft order, for an injunction. The basis – given in the Form N244 – is that:

> ***the Defendants have previously trespassed on part or all of the Land (as defined) and there is a substantial, real and imminent risk that those Defendants will trespass upon parts or all of the Land.***

Mr Vanderman for the University has clarified, through his written and oral submissions, that today's application is not, however, solely based on trespass. It is also based on private nuisance.

The ELSC's Application

5. The other application which is before the Court – and which I have already in part granted – is a Form N244 application by the European Legal Support Centre ("ELSC"). ELSC seeks two things. The first is an order pursuant to CPR 19.2 that it be added to these proceedings as an intervener party. Reliance has been placed by Mr Kynaston, in support of that part of the application, on passages in Wolverhampton (especially at §§176 and 226) recognising the appropriateness of hearing from persons who represent the interests of defendants. Reliance is also placed on the fact that there was such an intervener in the Wolverhampton case itself. That first part of the ELSC's application has not been opposed by the University and I granted it earlier during today's hearing. I was quite satisfied that it was appropriate and necessary in the interests of justice that ELSC be joined to these proceedings. I will need to return to the substance of the second part of ELSC's application, which asked the Court to adjourn the University's claim for an injunction, in its entirety.

University Rules, Codes and Guidance

6. I want next to draw attention to the fact that – as in the University of London case (see §§9, 15, 23) – so too in the present case there are terms of admission, rules of behaviour, codes of practice and guidance which expressly address the position of a University student so far as concerns matters relating to events on University property, and freedom of expression and protest. These are themselves in the public domain. But they are also within the bundle of materials, available on the injunction webpage. By way of an overview, a student at the University is required to comply with the rules of behaviour and in turn with relevant codes of practice. Under the rules, a student must not interfere with – or attempt to interfere with – the activities of the University or occupy any University property without appropriate permission. Permission is required for meetings and events on University property, whether indoors or outdoors. Students are not to occupy buildings; nor to disrupt University events. They are not to seek to disrupt events taking place on University premises or do anything designed to prevent an event successfully taking place. Within the interim injunction order that was made in the University of London case (see §15) was express recognition that UOL students were able to protest if they had the relevant authorisation pursuant to the conduct rules codes and guidance.

A Final Injunction

7. The University's primary position at today's hearing is that this Court should today grant a "final" injunction, subject only to there being liberty to apply to vary or discharge it.

Four Locations

8. The injunction sought by the University would relate to four locations. The Court has been shown the land ownership materials which support the University's position that it is the landowner. First, there is the Senate House. This is a formal building in the centre of Cambridge, at the heart of the University, where degree ceremonies and Senate meetings are held. Secondly, there is the Senate House Yard. This is a lawn in front of the Senate House. Thirdly, there is a building called the Old Schools. It is on the same enclosed site as the Senate House and Yard. But is described as "physically distinct". It contains University administrative departments. Finally, there is a building called Greenwich House. It is an administrative building two miles away from the others.

The Description of Persons Unknown

9. The injunction that is sought is directed against what are described as persons unknown, as follows:

> ***PERSONS UNKNOWN WHO, IN CONNECTION WITH CAMBRIDGE FOR PALESTINE OR OTHERWISE FOR A PURPOSE CONNECTED WITH THE PALESTINE-ISRAEL CONFLICT, WITHOUT THE CLAIMANT'S CONSENT (I) ENTER OCCUPY OR REMAIN UPON (II) BLOCK, PREVENT, SLOW DOWN, OBSTRUCT OR OTHERWISE INTERFERE WITH ACCESS TO (III) ERECT ANY STRUCTURE (INCLUDING TENTS) ON, THE FOLLOWING SITES (AS SHOWN FOR IDENTIFICATION EDGED RED ON THE ATTACHED PLANS 1 AND 2): (A) GREENWICH HOUSE, MADINGLEY RISE, CAMBRIDGE, CB3 0TX; (B) SENATE HOUSE AND SENATE HOUSE YARD, TRINITY STREET, CAMBRIDGE, CB2 1TA; (C) THE OLD SCHOOLS, TRINITY LANE, CAMBRIDGE, CB2 1TN.***

For the purposes of the Court dealing with the application today, the University through Mr Vanderman has accepted the appropriateness of narrowing down "block, prevent, slow down, obstruct or otherwise interfere with access", so that it would simply say "prevent access".

The Three Prohibitions

10. The substance of the order being sought against that identified group of Persons Unknown involves three things. They are reflected in the description of the group, quoted above. The first is a prohibition on entering, occupying or remaining upon the land without the University's "consent". The second is a prohibition on (what I just explained is for today) preventing access on the part of any other individual to the relevant land, again without the University's "consent". Pausing there, one of the significant points about that second prohibition is that it would bite on actions taken by an individual who was not on the specified University land itself, but was on the land outside it. The third is a prohibition on erecting or placing any structure on the land including tents or sleeping equipment, again without the University's "consent".

Protesting and Other Locations

11. The University's particulars of claim specifically include this as part of the University's pleaded case:

> ***The Defendants are able to protest at other locations without causing significant disruption to the University, its staff and students.***

That is a clear, pleaded reference to "protest". However, as Mr Kynaston for ELSC points out "protest" does not appear within the drafting of the University's draft injunction order.

Five Years

12. Completing my description of the order that I am being asked by the University to make today, the injunction sought – in relation to these four locations and with these three categories of prohibition – would be for a period of 5 years (to 12 February 2030), but subject to an annual review and a liberty to apply provision.

Three Incidents of Occupation

13. So far as the factual basis for the University's application is concerned, it really comes to this. The University has put forward evidence of three incidents each described in the materials as an "occupation". The University explains that its understanding is that these have been occupations, predominantly by its own students. Two of them (at Senate House Yard) relate to the location for a planned graduation ceremony (Senate House) and, on the evidence, the occupation led to those graduation ceremonies being relocated. I emphasise I am not making any finding of fact for the purposes of today's application. But I do need to consider and assess the evidential picture as it stands before the Court.

14. On 15 May 2024 – it is said – 40 to 50 people entered Senate House Yard by climbing over the fence. They made an "encampment" of 13 tents on the lawn. I understand 15 May 2024 to have been a Thursday. Graduation ceremonies were due to take place at Senate House during the course of the weekend (17 and 18 May 2024). There are social media postings which refer to the encampment, with photos. There is a reference to this as action "disrupting graduation" (University's bundle p.600). The occupiers left at 10:20pm on the Friday evening (16 May 2024), by which time the location of the graduations had been moved from Senate House, to take place instead within individual colleges. There were 1,158 students graduating and 2,773 guests.

15. The other occupation relating to a graduation started on 27 November 2024 when – it is said – a group entered Senate House Yard again by climbing over the fence and 6 tents were put on the lawn. Again there are social media communications which are before the Court with the description of a returning occupation ("Cambridge encampment is back"; "we are back") (pp.133, 401). I understand 27 November 2024 to have been a Wednesday. A graduation was due to take place at the Senate House that weekend, on Saturday 30 November 2024. That graduation was moved from Senate House across the road to Great St Mary's Church. There were some 500 students affected and their guests. Communications – linked to those in occupation – refer to having "forced" the move of the graduation ceremony (p.153). The occupants again left, this time on the evening of Saturday 30 November 2024. At 11am on that same day (30 November) there was a rally outside Great St Mary's Church (p.566). Great St Mary's Church – as I have already indicated – is across the road from Senate House and Senate House Yard. Mr Vanderman emphasises that, on the day that the occupants left (30 November 2024), there was a contemporaneous posted message that says: "We will be back" (p.153).

16. The third occupation is an incident of a very different nature, on the face of it. At Greenwich House (the administrative office building) on 22 November 2024 – it is said – a group entered the building; the fire alarms were activated and all the staff exited the

building; at which point the group then blocked re-entry. The University's evidence is that members of that group then accessed private offices and opened locked cabinets. That occupation continued until 6 December 2024. There were legal proceedings relating to that incident, specifically relating to what was said by the University to be confidential materials which the University was concerned had been accessed. Court orders were made relating to that.

17. That completes my summary of the background and context in which I have to decide what, if any, order it is appropriate for the Court to make today. I need next to record that I was particularly concerned during the hearing about two features of this case

A Concern About Timing

18. The first concern is that the University publicised these proceedings through its injunction webpage only on Wednesday 19 February 2025. Emails were sent on that morning to three identified email addresses. Notices were fixed by process servers at the four locations. The court documents were all published on the injunction webpage. That timing, is in my judgment, a matter of significant concern in the following context and for the following reasons:

    i) I have already identified the dates of the incidents which really underpin the application for an injunction. As I have already described, the latest of them (Greenwich House) had ended on 6 December 2024. It was well known and understood that the graduation ceremonies were scheduled to take place at Senate House on 1 March 2025, 29 March 2025 and 5 April 2025.

    ii) A published statement by the University on 3 February 2025 (p.261) referred to graduation ceremonies. It said the University was:

        > ***currently exploring legal options that would protect certain limited areas of the University, including Senate House and Senate House Yard, from future occupations so that we can hold the [graduation ceremonies] that our students and their families expect.***

        Two days later (5 February 2025) there was a meeting with representatives of Cambridge for Palestine. A final decision was then taken on the 7 February 2025 to issue these proceedings. But that was not announced publicly.

    iii) These proceedings were commenced on 12 February 2025 and an oral hearing was sought (in Form N244) at that stage, for the "week commencing 24 February 2025". The principal witness statement relied on (Rampton 1) is dated Friday 14 February 2025. It refers (§161) to proposed notification, by the means that were subsequently adopted. It was on that Friday 14 February 2025 (at 1736) that the Court confirmed to the University the listing of this hearing for today (27 February 2025).

19. In my judgment, it is regrettable that publication of the fact of these proceedings and the Court documents, including uploading to the webpage and sending of the three emails, did not take place until the morning of Wednesday 19 February 2025. That left just 5 working days before the hearing. It is no answer, in my judgment, that CPR 23.7(1)(b) refers to serving an application "at least 3 days" before the court is going to deal with it. That is because CPR 23.7(1)(a) has a freestanding requirement "as soon as practicable" after an application has been filed. The University was not waiting for an order from the

Court to direct or authorise any particular notification step. It had already waited a considerable period of time since the latest of the events most directly relied on.

20. All of this really matters, for reasons identified by the Supreme Court in the Wolverhampton case. At §226 the Supreme Court emphasised the importance of notification in sufficient time before an application is heard to allow affected persons – or those representing their interests – to make focused submissions as to whether it is appropriate for an injunction to be granted and if so as to terms and conditions (ie. including drafting). The Supreme Court also identified (at §226) why that was important, namely that it was "in the interests of procedural fairness". I am unable to accept that the University's delay is justifiable on the basis that (until it had a hearing date) it was "avoiding confusion"; or that it needed to "ready itself for press attention"; or that it needed to await the actions of a process server. In my judgment there ought to have been earlier and more prompt action, and therefore greater notice.

Reaction

21. In the event, ELSC became aware of the University's application only on Friday 21 February 2025. Others have also, belatedly, become aware of these proceedings. The Court has – and I will require to be uploaded to the injunction webpage – a communication written to the University by the United Nations Special Rapporteur on Freedom of Association and Peaceful Assembly (Gina Romero), dated today 27 February 2025. There is also a letter to the Court from the non-governmental organisation Liberty, dated 26 February 2025. In addition, among the materials filed by ELSC and by the University there are other responses to the University's application for the injunction. A series of concerns are raised in these materials.

The Other Graduation Events

22. The second point which caused me specific concern in dealing with the hearing today relates to the facts, so far as graduation ceremonies are concerned. The Court was told in the materials about the 17/18 May 2024 graduation weekend; and then about the 30 November 2024 graduation weekend. The Court was also told about the upcoming graduation events, beginning this Saturday 1 March 2025, then 29 March 2025 and then 5 April 2025. What the Court was not told in the materials was about these further ten graduation ceremonies which had taken place, unimpeded, at the Senate House and Senate House Yard. They were on 19 June 2024, 26 to 29 June 2024, 18 to 20 July 2024, and 25 and 26 October 2024. In my judgment, it was important that the Court was given a full factual picture, and not simply told about those graduation events that had been displaced. It was fortunate that, by specifically enquiring, I was able – through Mr Vanderman – to discover the fuller facts (also evidently unknown to him). This does mean that the picture before the Court is that it is three out of the last thirteen graduation events which have involved a need to relocate in the light of occupation action.

What I am Not Going to Do

23. I am not prepared today to make any "final" order for an injunction. I am not going to make any order with a duration of "five years". Nor am I prepared today to make an order relating to all four of the locations that have been identified in the Claimant application. So far as the Old Schools are concerned, this building does not feature in any of the evidenced prior incidents. It is true that they are at the same enclosed site as

the Senate House and Senate House Yard. But I am very clearly told that they are "physically distinct". So far as Greenwich House is concerned that, as I have said, is two miles away from graduation events. It has been the subject of one enduring incident which ended on 6 December last year. I am not satisfied that it could be appropriate, procedurally or substantively – still less necessary and justified – for this Court to be making any order today in relation to any of these features or locations.

24. Nor am I prepared today to make any order that would apply to the conduct of any individual who is outside of University land. In my judgment, that is a distinct feature. It relates to the second of the three prohibitions. It introduces distinct and important considerations. When I enquired about that, I was taken to footnoted references (authorities bundle p.543 fn.9) to a line of authorities that are not before the Court today. And I have not been satisfied, either from a procedural or a substantive point of view, that any injunction – even an interim injunction – should be made extending to what any individual does or does not do outside University land.

Saturday's Graduation Ceremony

25. In my judgment, the clear focus for the purposes of today – in the light of everything that I have so far said – has to be on this Saturday's graduation ceremony, scheduled as it is to take place at Senate House and Senate House Yard. Mr Kynaston for ELSC very fairly accepted that all of his points about timing and procedural unfairness were subject to the caveat that the Court would need to consider – as I do - the question of urgency. It is because the graduation ceremony is due to take place on Saturday – the day after tomorrow – that I am giving this judgment immediately at the end of the hearing. The supporting witness statement (Rampton 1 §74) describes as the "main issue" caused by the previous occupations, the disruption of degree graduation ceremonies at Senate House. The University's solicitors letter of response (26 February 2025) to ELSC's request for an adjournment today emphasises "urgency" by reference to Saturday's ceremony. I agree with Mr Kynaston that it is striking, in all the circumstances, that the University did not narrow down and tailor today's application and an injunction to Saturday's degree ceremony. I am quite satisfied that it is the appropriate focus for my consideration. It is, moreover, an event which – on the face of it – squarely engages the University rules, codes and guidance to which I have referred, especially about students not interfering with University events, as well as about not having protest events without having applied for authorisation.

What I Am Going to Do

26. I am going to make a very limited court order in this case. I do not accept Mr Kynaston's submission that there are "insurmountable drafting problems" in the University's draft order, which it is simply too late to resolve or which the Court ought not to be concerned to address. I will be seeking with Mr Vanderman's assistance and (if he is able to give it) Mr Kynaston's assistance, to achieve maximum focus and clarity. Far from being a "final" order, for "five years", my order will be a strictly time-limited order, covering the coming weekend only, and by way of "interim" injunction. It will relate only to conduct on the University land at Senate House Yard and within the Senate House building. It will relate only to persons being at those locations without the University's consent (the first prohibition) and the erecting or leaving at those locations of equipment (the third prohibition). It follows – there being no second prohibition – that the rally which is scheduled to take place on Saturday opposite Senate House and Senate House Yard will

not be and cannot be affected by this Court's order today. I am satisfied that my order is a very limited, but a necessary, intrusion into any legitimate interests. One of the key points raised on behalf of ELSC – in Ms Ost's witness statement (at §28) – is that there is no evidence that anyone threatens or intends to take any action to interfere with Saturday's ceremony. I will return to that point. But I say now that, if that were correct, the order which I am making is benign. I will require from the University the usual cross-undertaking in damages that has been put forward.

Description of Persons Unknown

27. I am minded, in line with the approach of Nicklin J in MBR Acres Ltd v Curtin [2025] EWHC 331 (KB) especially at §§356 and 390, to adopt a simplified description of the Defendant. I have well in mind the clear guidance in Wolverhampton at §221 about defining actual or intended respondents to injunction applications "as precisely as possible", "when it is possible to do so". That guidance describes the appropriateness of exploring that identification, if necessary by reference to intention, and adopting it "if possible". I am conscious that the order that I am making today is only, in any event, very limited and targeted, including for a very short period of what would be a couple of days. I will return with the parties' assistance to the drafting and finalisation of the order in this respect. One of the points that concerns me is as to the messaging that a court order may give, in the way in which it is expressed and targeted. In fact, in this case, even on the University's own drafting the order would not be limited to individuals or groups with any particular position or point of view in relation to "the Palestine-Israel conflict". That is because the University's suggested drafting includes any "purpose connected with" the conflict. That is notwithstanding, as Mr Vanderman rightly points out, the University has needed to justify its application by reference to evidence; and the evidence in question has related to the occupation incidents which I have summarised.

Observations from UOL

28. I record here the following observations made in the University of London case by Thompsell J at §50:

> ***whilst the rights and wrongs of the matters over which the protestors are protesting is a much bigger topic than the one before the court, and it would not be right for the court to express any opinion on them, I think I can observe that the motivations of the protestors spring from a deeply-held sense of injustice and it is a good thing that young people do take notice and seek to call out what they see as injustice. As noted in City of London Corp v Samede [2012] PTSR 1624 at §41 the court can take into account the general character of the view that Convention is being invoked to protect.***

Human Rights

29. The "Convention" referred to by Thompsell J is the European Convention on Human Rights. I would not have been prepared in this case to proceed for today on the basis that those human rights were irrelevant to an application of this kind. There is authority in the possession case of University of Birmingham v Persons Unknown [2024] EWHC 1770 (KB) at §§62 to 64, where this Court (Johnson J) was not prepared to proceed by treating them as irrelevant, going on to explain that in that case possession on behalf of the University was plainly not a violation of Convention rights (see §§72-75). Wisely, Mr Vanderman – for the purposes of today – was prepared to accept that the Court should assume that the Convention rights could apply. I am not reaching a finding as to the law.

I am simply avoiding making an adverse assumption (whether about the Convention rights directly, or about substantively equivalent standards). Apart from anything else, as it presently seems to me, the Convention rights would be engaged in relation to any injunction which took effect under the second prohibition, on conduct outside the University's premises; even if they arose only from the perspective of this Court itself acting as a public authority.

Contempt and Permission

30. I will want to include in my order, in the particular circumstances of the present case, the special provision that the court's permission is required before any contempt application can be instituted: see MBR §390. I am told by Mr Vanderman that that is an unusual provision to include, but I am undeterred by that observation. Given, in particular, the procedural concerns that I identified earlier – but in any event in the particular circumstances – I am satisfied that additional protection is appropriate in this case.

Justification

31. It is obvious from what I have said already that I have been satisfied, by reference to the evidential burden which is on the University, that there is the requisite justification for a court order but only the very narrow and limited order which I have identified. A helpful encapsulation of the key substantive test was identified for me by Mr Vanderman – and embraced by him for the purposes of my consideration today – from the local authority gypsy and traveller context in Wolverhampton at §218:

> ***any [claimant] applying for an injunction against persons unknown, including newcomers … must satisfy the court by full and detailed evidence that there is a compelling justification for the order sought… There must be a strong probability that a tort … is to be committed and that this will cause real harm. Further, the threat must be real and imminent.***

Doubtless there is much that can be said about the word "imminent". I have, for the purposes of today, noted the observations of Julian Knowles J in London City Airport Ltd v Persons Unknown [2024] EWHC 2557 (KB) at §29, about "imminence" being the absence of prematurity. I interpose that no concept of "imminence" justifies the University's delay to which I earlier referred when expressing my first of two concerns.

32. On the evidence before the Court, there have on two occasions been incidents in which individuals have deliberately entered Senate House Yard in the days before a known scheduled graduation ceremony. They have erected tents on the lawn. They have remained until the University has been "forced" to transfer the graduation ceremony from Senate House to another location. At which point they have then left the site. There is no evidence of damage caused by them. They are expressly described as having occupied and left peaceably; and having left the site on each of the two occasions in "a tidy state". Nevertheless, on the contemporaneous social media communications, the identifiable purpose of the actions was "disrupting" graduation, so its move of location was "forced". I have anxiously considered the newly-disclosed fact that there are no fewer than 10 graduation events after May 2024 and before November 2024 when no such occupation took place. Nevertheless, the latest graduation event in time was the November 2024 graduation weekend, where the University was "forced" to move the event from its historic graduation venue to an alternative venue. Moreover, as I have mentioned, there is evidence of a communication from an individual involved in the November occupation – the most recent event – which said: "we will be back". All of this is the evidential

picture which, in my judgment, does satisfy the relevant legal tests of justification, for the purposes of today's interim injunction relating to the coming weekend, so far as occupation of the lawn at Senate House Yard is concerned.

33. Alongside that evidential picture, Mr Vanderman is in my judgment right to draw attention to the fact that there has been an opportunity – not taken by them – for those who were involved in communicating about the previous occupations to have disavowed any intention, so far as this Saturday is concerned. On that point, my attention was invited to the observations of Linden J in Esso Petroleum Co Ltd v Persons Unknown [2023] EWHC 1837 (KB) at §67. A principal point made in the helpful witness statement of Ms Ost of ELSC involved bringing to the Court's attention that Cambridge for Palestine has announced its intention to have a rally this Saturday at Great St Mary's, opposite Senate House. What she has taken from that information – which I respect and understand – is that this rally would be action "instead of" any protest or occupation at Senate House or Senate House Yard. On the evidence, however, there was a rally at 1pm on 30 November 2024 outside Great St Mary's, on the same day that the occupation at Senate House Yard was still taking place. I am not able, for the purposes of today, to take reassurance from the fact of the rally having been announced. Nor is there any reassurance in my judgment to be gained by the absence of prior communications of an intention to occupy ahead of this weekend. There is similarly no evidence that the previous occupations were preceded by visible communications which would have alerted anyone. Therefore the fact that there are no visible communications as at today is not something on which I am able to rely. As I have already mentioned – although it is really only a footnote – if and insofar as there is in fact no intention to occupy on this occasion, well then my Order is benign.

34. Alongside these points about the evidence of the risk there is the powerful evidence filed by the University, describing the impact for those for whom this is their graduation ceremony, and for their guests. That is the impact of a relocation to an alternative venue which, on the face of the evidence, would mean an event and location of a very different character. There is, in my judgment, powerful evidence – within the supporting witness evidence which can be viewed in the public domain on the injunction webpage – about these impacts and the impacts on the University itself and its staff. Against those impacts, I cannot see that there is any countervailing justification – still less compelling justification – which would extend to disrupting that graduation event by forcing it to again to be moved.

35. I have found a useful reference-point within the Statement from the UN Special Rapporteur on the Rights of Freedom of Peaceful Assembly and of Association, in her statement (2 October 2024) with recommendations for universities worldwide:

> ***In universities located on private property, gatherings and peaceful protests are still protected under the right to freedom of peaceful assembly. While certain restrictions may be applied to safeguard the rights and interests of others property stakeholders, these must be assessed on a case-by-case basis. This evaluation should consider "whether the space is routinely publicly accessible, the nature and extent of the potential interference caused, whether those holding rights in the property approve of such use, whether the ownership of the space is contested through the gathering and whether participants have other reasonable means to achieve the purpose of the assembly, in accordance with the sight and sound principle". This underscores the importance of refraining from imposing blanket restrictions. The use of "trespassing" offences for peaceful assemblies carried out on the private property of academic institutions should be assessed strictly against the necessity and proportionality principles…***

I am quite satisfied, that viewed through the lens of those considerations, there is no countervailing feature within them which militates against the grant of this order. On the contrary, that case-specific evaluation in the light of those considerations in my judgment supports the court making the narrow order which I am now going to make.

36. I have not in these reasons gone through the "substantive requirements" and "procedural requirements" described in the two authorities which I mentioned at the start of this judgment. I record that I am satisfied that there is a cause of action in trespass, which matches the particulars of claim; that – subject to the second concern which I raised which was cured at this hearing – there has been full and frank disclosure; that the evidence is sufficient to prove the claim for the purposes of an interim injunction; and that the balance of convenience and justice weighs in my judgment strongly in favour of the grant, as opposed to the refusal, of my narrow order for interim relief in all the circumstances. Damages would not be an adequate remedy for the harm on the part of the University and those affected . Nor is there an adequate alternative remedy for the University which would, with sufficient urgency, be able to address an occupation and ensure that this weekend's event did not again need to be relocated. I am satisfied that clarity can be achieved as to the "who", the "what", the "where" and the "when" of my order. I am satisfied that there has been sufficient notification, for the purposes of justly determining this application today, to the limited extent that I have. I am satisfied that my Order involves no procedural unfairness. I will make directions so that this case can return to this Court, at which point there can be full representation on the part of the Intervener and the court will be able to revisit the question of an injunction, including any question of another temporally-limited injunction relating to the next graduation ceremony scheduled for 29 March 2025. But I am not prepared, in the circumstances that I have described, to make any wider or further injunction order: I do not consider there to be a compelling justification or imminent risk justifying any further or other order; nor am I satisfied that it would be procedurally fair for this Court today to be making any wider or further order.

37. There is a final point which I should address explicitly. I was at one point minded to restrict today's Order so that it applied only to Senate House Yard. The reason being that that is the location where there has previously been occupation. I have seen no evidence of any previous entry into Senate House itself. However I was satisfied on reflection that it was appropriate to include Senate House within the Order. It is the location of the ceremony. It would be an odd thing for the Court to restrict the injunction to the Yard. It might also be misunderstood, if the Court were to communicate that it is only the Yard. Moreover, I have been influenced by the other events at Greenwich House. I can see the prospect that those intent on securing a relocation of Saturday's event, if feeling unable to locate themselves on the lawn at the Senate House Yard, could then see as open to them from the Court the alternative of securing entry – perhaps while preparations are underway for the ceremony – into the venue itself; and then being able to disrupt through occupation from within Senate House itself. And so it is, in my judgment, necessary, justified and appropriate in all the circumstances that Senate House should itself be included within the court order.

The Order

38. The Order itself will be promptly uploaded to the injunction webpage, where it can be viewed. There are directions in the Order for uploading of materials. The Defendants in the Order are simply "Persons Unknown". The two prohibitions are that until 23:00 on

Saturday 1 March 2025, the Defendants must not, without the consent of the Claimant: (1) enter, occupy or remain upon the Land; or (2) erect or place any structure (including, for example, tents or other sleeping equipment) on the Land. The Land is Senate House and Senate House Yard. The return date for further consideration of the case will be the first available date after 17 March 2025. The parties will now need to liaise and provide a prompt time estimate. As I mentioned at the hearing, consideration should be given to a possible hybrid hearing which may serve to allow remote observation by those interested or affected unable readily to attend in person in London.

Neutral Citation Number: [2025] EWCA Crim 199

Case No: 202402963 A5; 202402960 A5; 202402964 A5; 202402965 A5; 202402969 A5; 202403124 B5; 202403120 B5; 202403122 B5; 202403125 B5; 202403126 B5; 202403583 A2; 202403585 A2; 202403587 A2; 202403589 A2; 202403834 A3; 202403837 A3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT SOUTHWARK
His Honour Judge Hehir
T20227305 & T20220798

ON APPEAL FROM THE CROWN COURT AT BASILDON
His Honour Judge Collery KC
T20230007, T20230014 & T20240019

ON APPEAL FROM THE CROWN COURT AT BASILDON
His Honour Judge Graham
T20227191, T20220422 & T20230086

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2025

Before :

THE LADY CARR OF WALTON-ON-THE-HILL
THE LADY CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE LAVENDER
and
MR JUSTICE GRIFFITHS

- -

Between :

JULIAN ROGER HALLAM
LUCIA WHITTAKER DE ABREU
DANIEL SHAW
LOUISE CHARLOTTE LANCASTER
CRESSIDA GETHIN

PAUL SOUSEK
GAIE DELAP
THERESA HIGGINSON
PAUL BELL
GEORGE SIMONSON

CHRIS BENNETT
JOE HOWLETT

SAMUEL JOHNSON
LARCH MAXEY

PHOEBE PLUMMER
ANNA ELLEN HOLLAND **Appellants**

- and -

REX **Respondent**

- and -

FRIENDS OF THE EARTH LTD
GREENPEACE LTD **Interveners**

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Danny Friedman KC and Owen Greenhall (instructed by **Hodge Jones & Allen Solicitors**) for **Hallam, Whittaker de Abreu, Shaw** and **Gethin**
Danny Friedman KC and Robbie Stern (instructed by **Hodge Jones & Allen Solicitors**) for **Lancaster**
Raj Chada, Solicitor Advocate (instructed by **Hodge Jones & Allen Solicitors**) for **Bennett** and **Maxey**
Jacob Bindman (instructed by **Hodge Jones & Allen Solicitors**) for **Bell, Delap, Sousek** and **Higginson**
John Briant (instructed by **Amosu Robinshaw Ltd**) for **Simonson**
Francesca Cociani, Solicitor Advocate, (instructed by **Hodge Jones & Allen Solicitors**) for **Howlett**
Laura O'Brien, Solicitor Advocate, (instructed by **Hodge Jones & Allen Solicitors**) for **Johnson**
Rosalind Comyn (instructed by **Hodge Jones & Allen Solicitors**) for **Plummer**
Brenda Campbell KC (instructed by **Hodge Jones & Allen Solicitors**) for **Holland**

Jocelyn Ledward KC and Fiona Robertson (instructed by the **Crown Prosecution Service**) for the **Respondent** in respect of **Hallam, Whittaker de Abreu, Shaw, Gethin and Lancaster**
Paul Sharkey and Edward Gordon-Saker (instructed by the **Crown Prosecution Service**) for the **Respondent** in respect of **Sousek, Delap, Bell, Simonson and Higginson**
James Curtis KC and Charlotte Oliver (instructed by the **Crown Prosecution Service**) for the **Respondent** in respect of **Bennett, Howlett, Johnson and Maxey**
Ben Lloyd (instructed by the **Crown Prosecution Service**) for the **Respondent** in respect of **Plummer and Holland**

Alex Goodman KC and Jessica Jones (instructed by **Lloyds PR Solicitors**) for the **Interveners**

Hearing dates: 29 and 30 January 2025

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Approved Judgment

This judgment was handed down in Court 4 at 10.00am on Friday 7 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Lady Carr of Walton-on-the-Hill, CJ :

The structure of this judgment is as follows:

(1) Introduction

1. 16 applications for leave to appeal against sentence have been referred to the full court by the Registrar. We grant leave to appeal on all applications and proceed to consider the substantive appeals.

2. The appellants were among the defendants sentenced in four cases for offences committed in connection with protests in the period from August to November 2022. The protests were committed in the name of Just Stop Oil about climate change issues. In this introductory section, we summarise the four cases in chronological order of the offences committed.

3. ***The Thurrock Tunnels Case***: In August 2022 protesters occupied tunnels under the roads providing access to the industrial estate which includes the Navigator oil terminal in Thurrock, Essex. Their activities caused the roads to be closed. Four appellants, each convicted on 20 March 2024 of conspiracy to cause a public nuisance contrary to s. 1(1) of the Criminal Law Act 1977, appeal against the immediate custodial sentences imposed on them on 6 September 2024 in the Crown Court at Basildon by HHJ Graham, namely:

    i) Chris Bennett: 18 months' imprisonment.

    ii) Dr Larch Maxey: 36 months' imprisonment.

    iii) Samuel Johnson: 18 months' imprisonment.

    iv) Joe Howlett: 15 months' imprisonment.

4. ***The Sunflowers Case***: On 14 October 2022 two protesters threw soup onto Vincent van Gogh's painting known as "Sunflowers" in the National Gallery. They were each convicted on 25 July 2024 of criminal damage contrary to s. 1(1) of the Criminal Damage Act 1971 and appeal against the immediate custodial sentences imposed on them on 27 September 2024 in the Crown Court at Southwark by HHJ Hehir, namely:

    i) Phoebe Plummer: 24 months' imprisonment.

    ii) Anna Holland: 20 months' imprisonment.

5. ***The M25 Conspiracy Case:*** Between 7 and 10 November 2022 45 protesters were arrested after climbing, or attempting to climb, onto various gantries across the M25 motorway. Five appellants, each of whom was convicted on 11 July 2024 of conspiracy to cause a public nuisance contrary to s. 1(1) of the Criminal Law Act 1977, appeal against the custodial sentences imposed on them on 18 July 2024 in the Crown Court at Southwark by HHJ Hehir, namely:

    i) Roger Hallam: 5 years' imprisonment.

    ii) Daniel Shaw: 4 years' imprisonment.

    iii) Lucia Whittaker de Abreu: 4 years' imprisonment.

    iv) Louise Lancaster: 4 years' imprisonment.

v) Cressida Gethin: 4 years' imprisonment.

6. ***The M25 Gantry Climbers Case:*** Five appellants were among those who climbed gantries over the M25 on 9 November 2022 as part of the protest organised by the defendants in the M25 Conspiracy case. On the second day of trial, 5 March 2024, they pleaded guilty to causing a public nuisance contrary to s. 78(1) of the Police, Crime, Sentencing and Courts Act 2022 (s.78(1)) (the 2022 Act). They appeal against the custodial sentences imposed on them on 1 August 2024 in the Crown Court at Basildon by HHJ Collery KC, namely:

i) Gaie Delap: 20 months' imprisonment.

ii) Paul Sousek: 20 months' imprisonment.

iii) Theresa Higginson: 24 months' imprisonment.

iv) Paul Bell: 22 months' imprisonment.

v) George Simonson: 24 months' imprisonment.

7. These appeals raise certain general issues concerning the approach to sentencing in cases of this nature which are common to some or all of the individual cases. We were provided with lengthy written submissions and authorities by all parties, including the interveners, supplemented by two days of oral submissions. Nevertheless, the central points of principle can be made shortly:

i) The exercise of sentencing in cases of non-violent protests is to be carried out in accordance with normal sentencing principles, including those contained in ss. 57, 63 and 231(2) of the Sentencing Act 2020.

ii) The correct approach to issues that may arise when sentencing in cases of non-violent protests, such as conscientious motivation and deterrence, was considered authoritatively in *R v Trowland* [2023] EWCA Crim 919; [2024] 1 WLR 1164 (*Trowland*), to which there was no challenge before us.

iii) The sentencing exercise in cases of non-violent protest should not be over-complicated because of the engagement of the European Convention of Human Rights (ECHR). Whether or not Articles 10 and/or 11 of the ECHR (Article 10; Article 11) are engaged should be simple; if engaged, the court then has to carry out what should be a straightforward proportionality exercise. There should be no need to make extensive reference to domestic or international authorities. The parties agreed that the common law and the ECHR are in step. As was also common ground, if the common law principles in *Trowland* (identified below) are applied properly, the defendant's ECHR rights should be observed.

iv) References to the sentencing outcomes in different cases are unlikely to be helpful, since each case will turn on its own facts. It can also be dangerous. The parties spent much time pointing to the custodial sentence (of three years) imposed on Morgan Trowland. However, the term of three years was not a tariff of any sort. Indeed, whilst upheld on appeal, it was held to be severe (and arguably manifestly excessive). An approach that treats a three year term for

offending similar to that in *Trowland* as a benchmark risks undesirable and unwarranted sentence inflation.

8. We address the general issues first before turning to the facts of the individual cases.

(2) The Common Issues

(2)(a) R v Trowland

9. *Trowland* concerned the sentences imposed on two Just Stop Oil protesters who disrupted the M25 motorway by climbing onto the Queen Elizabeth II bridge above the motorway on 17 October 2022. They were each convicted on 4 April 2023 of causing a public nuisance contrary to s. 78(1). They appealed against the sentences imposed on them on 21 April 2023 in the Crown Court at Basildon, namely 3 years' imprisonment in the case of Morgan Trowland, and 2 years and 7 months' imprisonment in the case of Marcus Decker.

10. The judgment of the court (at [42] to [51]) addressed the relevant legal background and principles authoritatively.

11. It dealt first with the introduction of the new offence in s. 78 of the 2022 Act (s. 78) as follows:

> "42. …Section 78, which came into force on 28 June 2022, enacted a new offence of intentionally or recklessly causing public nuisance and (by section 78(6)) abolished the common law offence of public nuisance. It was introduced in the context of increasing non-violent protest offending by organisations such as Extinction Rebellion and Insulate Britain.

12. The court went on:

> "46. By section 78 Parliament thus introduced a new offence which covers (intentional or reckless) non-violent protest (for which there is no reasonable excuse). Three points deserve emphasis. First, s. 78(1)(c) introduces a fault element (of intention or recklessness), which the common law offence did not require. The LCR commented that: "[i]t is unjust that defendants should be exposed to such a serious sanction unless there is equally serious fault on their part" (see [3.53]). Secondly, s. 78(1)(b)(ii) makes it a criminal offence if a person "obstructs the public or a section of the public in the exercise or enjoyment or a right that may be exercised or enjoyed by the public at large". There is no qualification that the act of obstruction must be serious or significant before it becomes a criminal offence. Thirdly, custodial sentences of up to 10 years can be warranted."

13. The court also commented later:

> "83… In implementing section 78 Parliament expressed its clear intention that stringent custodial sentences may be required for (intentional or reckless) non-violent protest offending for which there is no reasonable excuse. The 10-year maximum term provides sentencing context that

was previously absent; it represented Parliament's assessment of the seriousness of the offending."

14. The court addressed the correct approach to sentencing for s. 78(1) offences as follows:

> "47. There is no definitive Sentencing Council Guideline specific to the offence (nor for any obvious analogous offence). The court thus takes into account the statutory maximum and any relevant sentencing judgments of this court. We have not been shown any appellate judgments addressing the sentencing regime for the statutory offence of public nuisance, although there are appellate judgments arising out of sentences for the old common law offence. They are considered below, in particular *Roberts* and *Brown*, where the relevant Strasbourg jurisprudence was also examined.
>
> 48. The seriousness of the offence is to be assessed by considering the culpability of the offender and the harm caused by the offending (see s. 63 of the Sentencing Act 2020). The court must also consider which of the five purposes of sentencing identified in s. 57 of the Sentencing Act 2020, namely punishment, reduction of crime (including its reduction by deterrence), reform and rehabilitation, public protection and the making of reparation, it is seeking to achieve through the sentence that is to be imposed. Once a provisional sentence is arrived at, the court takes into account relevant aggravating and mitigating features. Other considerations, such as totality, may be engaged under the stepped approach set out in the Sentencing Council's General Guideline: Overarching Principles. Custodial sentences must be what is, in the opinion of the court, the shortest term commensurate with the seriousness of the offence (see s. 231(2) of the Sentencing Act 2020).
>
> 49. The (qualified) rights to freedom of expression and assembly under Articles 10 and 11 are relevant to sentence. Article 11 is generally seen as a more specific, or lex specialis, form of the right to freedom of expression in Article 10, and the two can be considered together. Particular caution is to be exercised in imposing a custodial sentence in non-violent protest cases. (See *Taranenko v Russia* (App No 19554/05) (2014) ECHR 485 ; 37 BHRC 285 at [87]; *Kudrevicius v Lithuania* (App No 37553/05) (2016) 62 EHRR 34; 40 BHRC 114 ("Kudrevicius") at [146]; *Roberts* at [43].) It may also be relevant if the views being expressed relate to important and substantive issues (see *DPP v Ziegler and others* [2021] UKSC 23; [2022] AC 408 ("*Ziegler*") at [72]), although we emphasise immediately below the limits of such consideration. Determination of the proportionality of an interference with ECHR rights is a fact-specific enquiry which requires the evaluation of the circumstances in the individual case. It is a flexible notion, which depends on fair and objective judicial assessment; there are no rigid rules to be applied. The inquiry requires consideration of the questions identified by the Divisional Court at [63] to [65] of its judgment in *DPP v Ziegler* [2019] EWHC 71 (Admin); [2020] QB 253 (cited by the Supreme Court at [16]).
>
> 50. It is no part of the judicial function to evaluate (or comment on) the validity or merit of the cause(s) in support of which a protest is made

(see Roberts at [32]). However, a conscientious motive on the part of protesters may be a relevant consideration, in particular where the offender is a law-abiding citizen apart from their protest activities. In such cases, a lesser sanction may be appropriate: a sense of proportion on the part of the offender in avoiding excessive damage or inconvenience may be matched by a relatively benign approach to sentencing. The court may temper the sanction imposed because there is a realistic prospect that it will deter further law-breaking and encourage the offender to appreciate why in a democratic society it is the duty of responsible citizens to obey the law and respect the rights of others, even where the law is contrary to the protesters' own moral convictions. However, the more disproportionate or extreme the action taken by the protester, the less obvious is the justification for reduced culpability and more lenient sentencing. (See *R v Jones (Margaret)* [2006] UKHL 16; [2007] 1 AC 136 ("*Jones*") at [89]; *Roberts* at [33] and [34]; *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9; [2020] 4 WLR 29 ("*Cuadrilla*") at [98] and [99]; *National Highways Ltd v Heyatawin and others* [2021] EWHC 3078 (QB); [2022] Env LR 17 at [50] to [53]; *Brown* at [66].)

51. Ultimately, whether or not a sentence of immediate custody for this type of offending is warranted, and if so what length of sentence is appropriate, will be highly fact-sensitive, set in the context of the relevant legislative and sentencing regime identified above."

15. The court also indicated that conscientious motivation was a factor most logically relevant to the assessment of culpability, as opposed to general mitigation (see [55]).

16. These general principles are applicable in the present cases, while recognising that the M25 Gantry Climbers case was the only case in which the defendants were convicted of the substantive offence of causing a public nuisance, contrary to s. 78(1). (As set out above, in the Thurrock Tunnels and M25 Conspiracy cases the defendants were convicted of conspiracy to cause a public nuisance; and in the Sunflowers case the defendants were convicted of criminal damage, for which there is a Sentencing Council Guideline.)

17. In terms of the application of the principles to the facts in Trowland and conscientious motivation, the court stated:

> "56. The judge does appear to have treated the protesters' conscientious motives primarily as a matter of mitigation (for which he applied 25% credit). This reflected the manner in which the issue was presented to him on behalf of the protesters at the time of sentencing (i.e. that this was a matter of mitigation). As set out above, we consider that, strictly speaking, these were matters more relevant to culpability. However, the judge elsewhere referred to the fact that the protesters' motives led him to reduce his assessment of their culpability; and, ultimately, we do not consider that any error in approach was material. What matters is whether the protesters' conscientious motives which caused them to exercise their rights of freedom of expression and assembly were reflected properly in the ultimate sentences. As set out further below, we consider that they were."

18. As for culpability, the court stated:

> "72. The judge was entitled to find the protesters' culpability to be high, despite their conscientious motivation, not least given the extensive planning involved. There was an event planner working with the protesters; the bridge had been chosen as a spectacular protest site in order to attract media attention; another individual had dropped them off on the bridge and then called the police; Mr Trowland had sketched the bridge to work out how the plan could be executed; the date had been chosen by reference to the government's autumn agreement to increase gas and oil licences; Mr Trowland undertook media communications training in order that his message could be better communicated; both protesters practised climbing and throwing ropes between them to facilitate the erection of the banner and the hammocks; specific equipment had been purchased and they carried out a risk assessment; they took food and drink with them.
>
> 73. The reasons given by the judge for his finding of culpability were entirely sound: the choosing of a high profile target for maximum disruption; the extensive organisation and planning; the protesters' awareness that the road would be closed and disruption would be caused; that they stayed on the bridge for far longer than was proportionate; their choice to ignore the disruption and anger that would be caused to others; the fact that requests to come down were ignored, as were the risks to those who had to remove them from the bridge in the cherry picker. The protesters' motive was their concern about climate change but the action taken was totally disproportionate."

19. The court proceeded on the basis that the defendants' rights under Articles 10 and 11, whilst engaged, were significantly weakened on the facts:

> "74. The Article 10 and Article 11 protections, whilst not removed, were significantly weakened on the facts. As set out above, the s. 78(3) defence of "reasonable excuse", which incorporates Article 10 and Article 11 protections, was not available to the protesters. The protest was taking place on land from which the public were excluded. The further away from the core Article 10 and 11 rights a protester is, the less those rights merit an assessment of lower culpability or, putting it another way, a significant reduction in sentence (see *Kudrevicius* at [97]). In fact, by ascending the bridge, the protesters were committing a criminal offence under the Dartford-Thurrock Crossing Act 1988 (as set out above). This is relevant to an evaluation of whether the sentences were manifestly excessive and/or proportionate.
>
> 75. Further, the Article 10 and Article 11 protections were weakened by the fact that the disruption here was the central aim of the protesters' conduct, as opposed to a side-effect of the protest. Persuasion is very different from attempting (through physical obstruction or similar conduct) to compel others to act in a way a defendant desires. The distinction between protests which cause disruption as an inevitable side effect and protests which are deliberately intended to cause disruption is an important one. (See *Cuadrilla* at [43] and [94].)

> 76. The judge was also entitled to conclude that the obstruction was significant: indeed, in this case it was of the utmost seriousness. It affected the Strategic Road Network, a network that was essential to the growth, wellbeing and balance of the nation's economy. We have referred to the protest's striking effects in statistical terms above, together with the evidence from affected individuals and businesses. Hundreds of thousands of members of the public were affected, some very significantly. In short, the protest resulted in enormous practical and personal disruption, alongside damage to businesses and the economy and a need for the deployment of significant police and Highways Agency resource and assistance."

20. The court addressed the judge's approach to the protesters' previous convictions and rehabilitation prospects as follows:

> "58. … The judge did not ignore the prospect of rehabilitation; as recorded above, he referred expressly to it as "an important factor". But he concluded that there were no signs that the protesters were any less committed to the causes that they espoused, and referred to Mr Trowland's evidence in which he set out at length the beliefs that motivated him. The strength of the protesters' beliefs was on any view material to the question of rehabilitation. As was stated in *Roberts* at [47], when making a judgment about the risks of future offending, underlying motivations can be of great significance.
>
> 59. The judge was entitled to reject that the protesters' apologies were genuine and to take the view that they were inadequate and self-serving. The judge was concerned that they would continue to engage in their illegal activities despite their indications to the contrary. As he put it, "history indicate[d] that they were unreliable in that regard". They had been repeatedly released on bail and continued to offend. The fact that, in other domestic cases, undertakings by defendants not to offend have been accepted (see for example Roberts at [46] to [51] and McKechnie at [38]) is nothing to the point. This was pre-eminently a matter for the judge to assess...
>
> 77. As for mitigation, as already identified above, the judge was entitled to take the view that the protesters' apologies rang hollow and to harbour real concern that they would continue to engage in such protest activities as they though fit, despite their evidence to the contrary. The judge was aware of the protesters' personal histories. We do not consider that any significant weight falls to be attached to character references in the context of this type of offending, which is typically committed by those of otherwise good character. As set out above, albeit that it was a matter more properly addressed in the context of culpability, the judge also took account of their conscientious motives, affording 25% credit in this regard. This was not only fair, but arguably generous to the protesters in circumstances where there was no sense of proportion in their activities. They did nothing to avoid excessive damage or inconvenience: on the contrary, their conduct was designed to (and did) cause extreme damage and inconvenience."

21. Finally, it is relevant to note what was said in relation to deterrence as an aim of sentencing in these types of cases. The protesters relied on the observations made by Leggatt LJ in *Cuadrilla Bowland Ltd v Persons Unknown* [2020] EWCA Civ 9; [2020] 4 WLR 29 *(Cuadrilla*) (in [98] and [99]), to the effect that, in general, there is reason to expect that less severe punishment is required to deter protesters from further law-breaking in comparison to other offenders. The court in *Trowland* commented:

> "66. These comments do not appear to us materially to advance the protesters' challenge. First, they are general in nature and always subordinate to the fact-sensitive exercise to be carried out in each case. Secondly, the direct aim of the protesters here was to cause maximum disruption (in order to deliver their message); a stand-out feature in this case is the lack of moderation on the part of the protesters. Thirdly, conscientious motivation/moral difference is already factored into the question of culpability, as identified above. Fourthly, as for deterrence, that is an area pre-eminently to be assessed on the facts, and in any event Leggatt LJ was addressing only deterrence to the offenders themselves, not the wider public, which may be a highly relevant consideration. Fifthly, whilst the social bargain or "dialogue" continued beyond the offending itself, the disproportionate nature of the protesters' actions remains highly relevant; and again the specific facts of each case, such as previous convictions and bail status, take precedence."

22. Secondly, in addressing the protesters' reliance on *R v Roberts* [2018] EWCA Crim 2739; [2019] 1 Cr App R (S) 48 (*Roberts*) and *R v Brown* [2022] EWCA Crim 6; [2022] 1 Cr App R 18 (*Brown*) the court stated:

> "86. As set out above, the offending in *Roberts* and *Brown* occurred in 2017 and 2019 respectively. A court's perception of the strength of the need for deterrence can change over time. Specifically, as is common knowledge, supporters of organisations such as Just Stop Oil have staged increasingly well-orchestrated, disruptive and damaging protests. It can be said that the principle of deterrence is of both particular relevance and importance in the context of a pressing social need to protect the public and to prevent social unrest arising from escalating illegal activity."

23. It is against the background of the principles stated and applied in *Trowland* that we address the issues which arise in these cases. Indeed, counsel for the appellants submitted that the principal basis for the proposed appeals is the appellants' contention that the sentencing judges did not properly apply the principles stated in *Trowland*, not that those principles were wrong. Considering that submission will primarily be a matter for reviewing the facts of, and the sentencing exercise conducted in, each case.

24. Nevertheless, it is helpful to address at this stage the parties' submissions on principle in relation to i) conscientious motivation; ii) Articles 10 and 11; iii) sentences in other public nuisance cases; and iv) the Aarhus Convention.

(2)(b) Conscientious Motivation

25. It is not disputed that each of the appellants was motivated to act as they did by a conscientious desire to communicate their views about the appropriate response to climate change issues. The appellants contend that the sentencing judge in each case erred because he declined to make any reduction in the sentences imposed on them by reason of their conscientious motivation. The interveners, Friends of the Earth Limited and Greenpeace Limited, support this contention. The Crown submits that in each case the sentencing judge referred to *Trowland* and correctly acknowledged that conscientious motivation may result in greater leniency in sentencing, but explained why he considered that that factor should be afforded no particular weight on the facts.

26. We will consider in due course the sentencing remarks in each case, but it can be said in general terms at this stage:

    i) The appellants' conscientious motivation was a factor relevant to sentencing in each case. It would have been an error for the sentencing judge to conclude on the facts that it had no part whatsoever to play in the sentencing exercise;

    ii) As stated in *Trowland* (at [55]), conscientious motivation fell most logically to be factored into the assessment of culpability. However, conscientious motivation did not preclude a finding that any appellant's culpability was still high (see *Trowland* at [50] and [72]);

    iii) Contrary to Mr Friedman's submission for the protesters, a sentencing judge is not obliged to specify an amount by which they have reduced a custodial term to reflect a defendant's conscientious motivation. As a general proposition, a sentencing judge is not obliged to attribute specific percentage values or figures to individual factors which have been taken into account in the sentencing exercise: see for example *R v Ratcliffe* [2024] EWCA Crim 1498 at [81]. That includes not only aggravating and mitigating factors, but also factors, such as conscientious motivation, going to the assessment of culpability. There is no parallel to be drawn with the approach to discounts for guilty pleas, for which a quantified reduction in sentence is made at a discrete stage in the sentencing process.

(2)(c) Articles 10 and 11

27. Article 10 provides as follows:

> "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."

28. We note that the appellants' message in these cases constituted "political speech", to which particular respect is afforded: it involved a call for a change in the law. There were ways in which the appellants could have communicated that message without trespassing and without committing a criminal offence. But the fact that they committed a trespass and a criminal offence in communicating that message did not mean that their activity ceased to be an expression of their views.

29. Article 11 provides as follows:

> "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."

30. As with other ECHR rights, the analysis of alleged violations of these rights generally follows five stages:

i) Does the right apply to the facts of the case? (This is often expressed by asking whether the right is "engaged" by the facts of the case.)

ii) Has there been an interference with the right?

iii) Was the interference "prescribed by law"?

iv) Did the interference pursue a legitimate aim?

v) Was the interference "necessary in a democratic society"? (This is usually expressed by asking whether the interference with the right was proportionate. In cases such as the present, the assessment of proportionality applies at each stage, i.e. prosecution, conviction and sentence.)

31. The appellants submitted that the sentences imposed constituted a disproportionate interference with their rights under Articles 10 and 11. The interveners supported this submission; the Crown opposed it. We address the proportionality of the sentences when we consider the individual cases, while noting the guidance in *Trowland* at [49], [74] and [75]. We deal here, however, with two preliminary issues which arise in connection with this ground of appeal and which concern the question whether Articles 10 and 11 apply at all on the facts of these cases.

32. Miss Ledward for the Crown submitted that Articles 10 and 11 are not engaged in a protest case if the protesters are trespassing (a contention not positively advanced in *Trowland*). It was not disputed that the protesters who climbed gantries on the M25

were trespassing, since the public are not allowed access to the gantries. It was submitted that the legal position is less straightforward in the Thurrock Tunnels case, since the tunnels were underneath a public highway, but that the occupants of one of the tunnels had trespassed on railway property in order to access the tunnel. As for the Sunflowers case, it was said that the judge was right to conclude, as he did, that Articles 10 and 11 did not apply because the protest was violent or non-peaceful.

(2)(c)(i) Articles 10 and 11 and Trespass

33. There can be circumstances in which speech falls outside the protection afforded by Articles 10 and 11, such as those identified in Article 17 of the ECHR. However, Article 17 was not relied on in the present cases.

34. Articles 10 and 11 did not confer on the appellants a right of entry to private property: see *Appleby v United Kingdom* (2003) Application No. 44306/98. Moreover, disrupting traffic has been held not to be at the core of Articles 10 and 11: see *Kudrevičius v Lithuania* (2015) 62 E.H.R.R. 34, at 91. However, we were not referred to any case in which the European Court of Human Rights (the ECtHR) has decided that a protester who commits an act of trespass thereby automatically loses their rights under Article 10 or 11 altogether. On the contrary, *Steel v United Kingdom* (1998) 23 September was a case involving "a protest against the extension of a motorway involving a forcible entry into the construction site and climbing into the trees to be felled and onto machinery in order to impede the construction works" (see the description in *Taranenko v Russia* (2014) Application No. 19554/05 (*Taranenko*), at §70). The expression of opinion was found to be protected by Article 10.

35. We do not consider that *DPP v Cuciurean* [2022] EWHC 736 (Admin); [2022] QB 888 (*Cuciurean*) at [39] to [50] assists us on this point. *Cuciurean*, which involved a challenge to prosecution and conviction (not sentence) for aggravated trespass, contrary to s. 68 of the Criminal Justice and Public Order Act 1994, did not determine the question of whether Articles 10 and 11 were engaged.

36. Although the appellants' activities were not at the core of Articles 10 and 11, we do not consider that their acts of trespass removed them completely from the scope of Articles 10 and 11. Rather, as in *Trowland* (at [74] and [75]), the fact that the appellants' expressions of opinion involved criminal trespass significantly weakened the protections afforded by Articles 10 and 11 (and so the weight to be attached to those protections when considering proportionality of sentence).

(2)(c)(ii) The Applicability of Articles 10 and 11 in the Sunflowers Case

37. In the Sunflowers case, the judge gave a careful ruling during the course of trial in which he held that neither the conviction nor the sentencing of the appellants engaged any issue of proportionality. In his judgment, Articles 10 and 11 did not apply at all because i) the actions of Ms Plummer and Mx Holland were violent and not peaceful; and ii) they caused significant damage. He referred in particular to *Attorney General's Reference (No 1 of 2022)* [2022] EWCA Crim 1259; [2023] KB *37 (Colston)* at [120] and [121].

38. The judge was correct to state that Articles 10 and 11 were not engaged if Ms Plummer and Mx Holland's actions were violent/non-peaceful (see for example *Colston* at [115]

and [120]); but he was wrong to hold that they were also not engaged if the damage was significant. *Colston* at [120] and [121] provides no support for such a conclusion: all that was being said in *Colston* was that the extent of damage was relevant to the proportionality of any conviction.

39. If, as we conclude below, this was not violent offending, the judge's error was material.

40. *Colston* confirmed that "[v]iolence is not confined to assaults on the person but may include damage to property" (see [87]). For example, criminal damage might be appropriately deemed "violent" if it intimidates onlookers. *Colston* concerned the prosecution for criminal damage of protesters who pulled down a statue and threw it into a harbour.

41. For present purposes, the case of *Murat Vural v Turkey* (2014) Application No. 9540/07 provides the most useful comparison. There the applicant poured paint on five public statutes of Kemal Atatűrk. The ECtHR held that Article 10 was engaged by the applicant's actions. In the same way, we consider that Ms Plummer and Mx Holland's actions engaged Articles 10 and 11. While shocking, their actions were not violent.

42. For these reasons, Articles 10 and 11 were engaged on the facts of the Sunflowers case (albeit significantly weakened).

(2)(d) Sentences in Other Public Nuisance Cases

43. The appellants in the M25 Conspiracy, M25 Gantry Climbers and Thurrock Tunnels cases submitted that the sentencing judge in each case failed to have proper regard to relevant caselaw on sentencing for public nuisance. The appellants referred in particular in this context to:

    i) *R v Chee Kew Ong* [2001] 1 CrAppR (S) 117, in which the defendant committed the offence of conspiracy to cause a public nuisance when he extinguished the floodlights at a Premier League football match, causing the match to be abandoned, for the benefit of individuals who had placed bets on the match abroad.

    ii) *R v Cleator* [2016] EWCA Crim 1361, in which the drunken defendant committed the common law offence of causing a public nuisance by climbing onto and remaining on a structure over the M56 motorway near Manchester.

    iii) *Roberts*, in which the defendant protesters committed the common law offence of causing a public nuisance by climbing on top of lorries and blocking the A583 near Blackpool.

    iv) *Brown,* in which the defendant committed the offence of aggravated trespass, contrary to s. 68 of the Criminal Justice and Public Order Act 1994, by climbing on top of and gluing himself to an aeroplane at London City Airport.

    They also referred to the Sentencing Council Guideline for Offences of Violent Disorder.

44. The Crown submitted that the sentencing judges each had proper regard to what was the only case on sentencing for the new offence created by s. 78(1), namely *Trowland*.

45. The submissions made by the appellants and the interveners address the issue of the relationship between the new statutory offence under s. 78(1) and the common law offence abolished by s. 78(6) of the 2022 Act. In this regard, we see no reason to depart from what was said in *Trowland* (at [46], [47], [78], [79] and [83] to [86]). Each case must, of course, be decided on its own facts, but, insofar as comparisons with sentences in other cases are relevant at all (as to which see paragraph 7(iv) above), sentencing judges in cases such as the present are more likely to be assisted by decisions on the new statutory offence than by decisions on other offences.

46. Particular reference is made in this context to the issue of deterrence. Again, we see no reason to expand on what was said on this issue in *Trowland,* including in relation to *Roberts* and *Brown* (see [66], [83] and [86]). (It can of course also be noted that the sentences imposed in cases decided before *Trowland* did not in fact deter these appellants from committing the offences of which they were convicted. As Mr Friedman volunteered, the appellants expected to go to prison for at least a while. The prospect of short immediate custodial sentences was self-evidently not a sufficient deterrent.)

(2)(e) The Aarhus Convention

47. The appellants submitted that the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) is relevant both as an aid to interpreting ECHR rights and as something to be taken into account by a judge in exercising a discretion, as judges do in determining the appropriate sentence in a particular case. On that basis, the appellants submitted that the Aarhus Convention, in particular article 3(8), supplements their other grounds of appeal. In addition, the appellants submitted that the sentencing judges should have had regard to the views of the UN Special Rapporteur on Environmental Defenders (the UN Special Rapporteur), who had criticised the decision in *Trowland*. However, Mr Friedman confirmed that it was not the appellants' case that the Aarhus Convention added anything to the other grounds of appeal, rather than simply supporting them.

48. The Crown submitted that the Aarhus Convention did not apply to the activities of the appellants in the present cases and that it would not have been appropriate for the sentencing judges to take account of or to afford any weight to expressions of opinion by the UN Special Rapporteur.

49. In our judgment, it would not have been appropriate for the sentencing judges to have had regard to the Aarhus Convention or the views of the UN Special Rapporteur. The Aarhus Convention is not incorporated into English law. That is sufficient, in itself, to decide the point. However, we also agree with the Crown's submission that article 3(8) of the Aarhus Convention did not apply to the appellants' activities. Article 3(8) provides as follows:

> "Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement. This provision shall not affect the powers of national courts to award reasonable costs in judicial proceedings."

50. The appellants in these cases were penalised, but they were not penalised for "exercising their rights in conformity with the provisions of" the Aarhus Convention. They were penalised for committing criminal offences. It is, rightly, not suggested that their prosecution or conviction was contrary to the Aarhus Convention. Neither was their sentencing.

51. We turn now to the particulars of the sentencing exercises in each of the four cases in the order in which the arguments were presented to us. For the avoidance of doubt, in each case, we have considered the question of proportionality independently and our conclusions produce a result in each case which we judge to be proportionate (in line with the approach outlined in *Trowland* at [88]).

(3) The M25 Conspiracy Case

(3)(a) The Judge's Ruling and Sentencing Remarks in the M25 Conspiracy Case

52. All the appellants in the M25 Conspiracy case were convicted on 11 July 2024 after a four-week trial before HHJ Hehir and a jury. They were sentenced on 18 July 2024 by the trial judge.

(3)(a)(i) Trial ruling

53. In the course of the trial, on 8 July 2024 HHJ Hehir gave a ruling on whether certain proposed defences were available to the defendants. On 11 July 2024 he gave his written reasons for deciding that they were not. One of the proposed defences was that conviction would be a disproportionate interference with the defendants' rights under Articles 10 and 11. We emphasise that the judge was ruling on this as a potential defence against conviction, rather than as a potential consideration at the sentencing stage. He held that Articles 10 and 11 were not engaged, because:

> "…those who climbed the gantries in furtherance of the conspiracy alleged did so as lawbreakers and trespassers. Article 10 of the ECHR confers no licence to trespass on somebody else's property in order to express one's views: see *Richardson v DPP* [2014] UKSC 8 per Lord Hughes at para 3. It must follow that neither can Article 11 confer such licence."

54. In the alternative, the judge ruled that conviction would not be a disproportionate interference with the defendants' Article 10 and 11 rights, even if those articles were engaged. He said:

> "…the conspiracy alleged against the defendants contemplated the most substantial disruption to traffic on London's orbital motorway. The Zoom call reveals the expression of the hope by Roger Hallam (and not dissented from by any other defendant) that the planned disruption would lead to total gridlock of the motorway system and other major roads. Such gridlock could have had catastrophic effects had it eventuated, by reference for example to food supplies and the maintenance of law and order. Although there was no total gridlock, very substantial disruption did occur.
> What occurred, and what was contemplated, was conduct of the sort identified by the European Court of Human Rights in *Kudrevicius v Lithuania* 62 EHRR

> 34 as falling outside the "core" of ECHR rights. In those circumstances, disproportionality is inherently unlikely."

55. The fact that this proportionality exercise had been conducted in relation to the prosecution of the offences did not, in itself, mean that proportionality did not also fall to be considered at the point where a sentence was to be passed. The proportionality of any interference with ECHR rights may be particularly relevant at the sentencing stage, even though the ECHR rights in question do not provide a defence to the charge: see *Roberts* at [34]; *Cuadrilla* at [87]; the consideration of *Taranenko* in *Colston* at [90]; and *Trowland* at [87-88].

(3)(a)(ii) Sentencing Remarks

56. In his sentencing remarks, the judge described the conspiracy as "a sophisticated plan to disrupt traffic on the M25 motorway by means of protestors climbing up the gantries over the motorway".

57. He noted the impact of the conspiracy as "disruption on the M25 for four successive days, from 7 November to 10 November 2022." Over 45 protestors climbed gantries at various points on the M25. "Every sector of this orbital motorway was affected". There was "massive disruption". Large sections of the M25 had to be closed each day, causing long tailbacks. Six police forces were involved and the estimated cost of the involvement of the Metropolitan Police alone was over £1 million. The total road impact time over the four days was 121 hours and 45 minutes. The total extent of the delay to road users was calculated at 50,856 hours. The number of affected vehicles was calculated at 708,523. The total economic cost of the four days of disruption was put at £769,966.

58. He referred to evidence from some of those affected, including (for example) people who had missed funerals.

59. The judge found that the appellants had intended, although they had failed to achieve, gridlock. He quoted the appellant Roger Hallam telling a meeting on Zoom on 2 November 2022, a few days before the protest (attended by all of his co-defendants):

> "A really, like, super-significant aspect of this project, which takes it away from anything that has happened before. And that's that it has the potential to create gridlock. In other words, if we take a section of motorway, a circular motorway, people block gantries at close equidistant spaces around that circle, at a certain time of the day, the whole motorway will fill up with cars, and then no one will be able to get on to that motorway, and it will back up on all the other motorways and all the other A-roads. In other words, it will cause a hundred times more disruption than simply two or three people doing it, right. And there's a whole mathematics around it."

60. The judge said:

> "The M25 intersects with no fewer than nine other motorways over its circular course, with the M40, the M1, the A1(M), the M11, the M20, the M26, the M23, the M3, and the M4. It also intersects with a number of major A-roads, into and out of London. In addition, four of London's airports, Heathrow, Gatwick,

> Luton, and Stanstead, lie close to the M25 with many of those travelling through or working at those airports using the M25 to get to and from them.
> Had the gridlock for which all five of you devoutly hoped come to pass, the consequences would have been catastrophic. Mass road disruption in London and southern England would have had major implications for food supplies and the maintenance of law and order, among other things.
> (…)
> Section 63 of the Sentencing Code requires me, in assessing the seriousness of your offending, to have regard not only to the harm you actually caused, but also the harm you intended to cause."

61. The judge recognised (see *Trowland* at [49]) that it was not his task to comment on the merits of the Just Stop Oil cause, but he said:

> "I think I can fairly observe that there is a general consensus, in both scientific and societal terms, that man-made climate change exists, and that action is required to mitigate its effects and risks. (…) I acknowledge that at least some of the concerns motivating you are, at least to some extent, shared by many."

62. The judge identified as aggravating factors for all appellants: (i) the very high level of disruption caused to the public; (ii) the even higher level of disruption intended; (iii) the harm risked from traffic accidents, to members of the emergency services bringing climbers down from gantries and to the climbers themselves; (iv) breach of an injunction granted by the High Court of which all the appellants were aware, since the injunction was referred to on the Zoom call; (v) previous convictions of one or more offences in relation to direct-action protest; and (vi) each of the appellants being on bail in respect of at least one other set of proceedings when committing this offence.

63. Turning to the appellants' conscientious motivation, the judge said:

> "I do not regard your status as non-violent, direct-action protestors as affording you any particular mitigation.
> (…)
> While there will be cases where the conscientious motives of protestors may permit a degree of leniency from this court, this is not one of them."

64. He cited *Trowland* at [50] ("the more disproportionate or extreme the action taken by the protestor, the less obvious is the justification for reduced culpability and more lenient sentencing") and said:

> "Yours is not an appropriate case for leniency. This was a conspiracy to cause extreme and disproportionate disruption."

65. He referred to all of the appellants (except Lucia Whittaker de Abreu) using the trial to conduct what he described as "a calculated campaign to disrupt the proceedings", although he said that he would not sentence them for their conduct during the trial. He said in relation to all of the appellants that:

> "…there is a real risk of each of you committing further serious offences in pursuit of your objectives, unless you are deterred from doing so by exemplary

> sentences in this case. Such sentences will hopefully also deter others who share your outlook from doing what you did."

66. He then turned to the sentencing of each appellant individually.

(3)(a)(iii) Roger Hallam

67. The judge described Mr Hallam (aged 58 at the date of offending) as "a highly influential figure within Just Stop Oil" and, in relation to the M25 Conspiracy case, "the theoretician, the ideas man", who used the Zoom call "to inspire the troops and would-be troops", but also as "intimately involved in the practice". He "sat at the very highest level" of the conspiracy. He obtained the mathematical model for motorway disruption and he supervised its implementation.

68. He had relevant previous convictions, including 11 between 2017 and 2024, most recently for conspiracy to cause a public nuisance by disrupting Heathrow Airport operations with drones, for which he had received a suspended prison sentence which was still in force.

69. The judge found that there was no real personal mitigation, positive character references notwithstanding. Mr Hallam's claim to have changed his attitude was rejected, in part because of his conduct at the trial, when he and three other appellants "set about turning the proceedings themselves into a direct action protest".

70. His sentence of five years' imprisonment after a trial reflected the judge's conclusion that he was "at the very top of the tree so far as the conspiracy is concerned."

(3)(a)(iv) Daniel Shaw

71. The judge described Daniel Shaw (aged 36 at the date of offending) as "up to your neck in the organisation of this conspiracy" and, in particular, the recruitment and training of protestors.

72. He had one previous conviction for causing a public nuisance, committed in 2021 and sentenced with a community order in 2023 which was still in force.

73. The judge particularly mentioned the personal mitigation afforded by Mr Shaw's caring responsibilities. However, the judge said "your conduct during the trial deprives you of any mitigation based on the potential for rehabilitation".

(3)(a)(v) Lucia Whittaker de Abreu, Louise Lancaster and Cressida Gethin

74. The judge described each of Lucia Whittaker de Abreu, Louise Lancaster and Cressida Gethin as "a key organiser", because of their roles as speakers at the Zoom meeting chaired by Mr Shaw and principally addressed by Mr Hallam. He described the role of each of these three as to inspire would-be climbers of the gantries by describing their own previous experience of similar direct-action protest. What each of them said showed that they were familiar with the detail of what was planned and their enthusiasm for it.

75. They also did individual acts in furtherance of the conspiracy. Ms Lancaster rented safe-house accommodation in London for gantry climbers. She also bought "a considerable

amount of specialist equipment" for them. Ms Whittaker de Abreu and Ms Gethin were arrested when dressed and equipped to climb gantries themselves.

76. Ms Whittaker de Abreu (who was 33 at the date of offending) had three previous convictions for obstruction offences during direct-action protest. These had resulted in fines. In mitigation, the judge noted her health and caring responsibilities, but decided "that provides little by way of mitigation, given your conscious choice to engage in offending of this seriousness".

77. Ms Lancaster (who was 57 at the date of offending) had six previous convictions for offences committed during direct-action protest. The two most recent were a conviction in June 2023 for which she received a five-week prison sentence and a conviction in November 2023 for which the sentence was a suspended sentence of imprisonment. Her offence in the M25 Conspiracy was committed in breach of a suspended committal order imposed by the High Court for breach of a High Court injunction by climbing an M25 gantry on a previous occasion (July 2022, shortly before the M25 Conspiracy acts in November 2022) which she herself referred to in the Zoom call. There was no personal mitigation.

78. Ms Gethin (who was 20 at the date of offending) had three previous convictions for offences committed during direct-action protest. The most recent (for a substantive offence of public nuisance in relation to protest disruption on the M25) had resulted in a suspended sentence in February 2024. Her conviction also placed her in breach of a conditional discharge imposed in September 2022. In mitigation, the judge considered character references and material in respect of her health. He was satisfied that the health issues could be managed in prison. He referred to her young age (saying that she was "by far, the youngest of the defendants"). However, he did not regard it as providing any mitigation or justifying any treatment different from her co-defendants. He explained:

> "As the character evidence indicates, and as I learned for myself during the trial, you are an intelligent and well-educated young woman. Neither immaturity nor personal disadvantage has driven you to crime; your own conscious choices have."

79. The judge passed a sentence of four years' imprisonment on all four of the M25 Conspiracy appellants except Mr Hallam, stating that there were no grounds for differentiating between the four, notwithstanding various differences in their personal circumstances and antecedents.

(3)(b) General Issues in the M25 Conspiracy Case

80. In the M25 Conspiracy case, as in *Trowland*, disruption was the central aim of the appellants' conduct, as opposed to a mere side-effect of it. Moreover, Mr Hallam said explicitly in the Zoom call that the aim of the conspiracy was not merely to persuade (for example, by obtaining publicity for Just Stop Oil's arguments) but to compel. The aim was to achieve: "such massive economic disruption that the Government cannot ignore the demand"; and "sufficient mass disruption to force this Country to face its responsibilities and force this Government to respond to the illegality and immorality of what it is engaging in". The emphasis was on the word "force", a word which Mr Hallam used twice in these quotations. The protest was peaceful only in the sense that

it was non-violent. It was intended, however, to be on such a scale as to be coercive. As was said in *Trowland* at [75], "Persuasion is very different from attempting (through physical obstruction or similar conduct) to compel others to act in a way a defendant desires".

81. However, we read the judge's sentencing remarks as meaning that he took no account at all of the appellants' conscientious motivation. Whilst he was right that conscientious motivation is not a matter of mitigation, it is a factor which may reduce culpability (see *Trowland* at [55]). As was said in *Trowland* at [50], "the more disproportionate or extreme the action taken by the protester, the less obvious is the justification for reduced culpability and more lenient sentencing". However, this is, save in a most exceptional and extreme case, a matter of degree, rather than excluding consideration of conscientious motivation altogether. Even in the very serious case of *Trowland*, culpability was reduced materially by the presence of conscientious motivation. The weight to be given to this factor is for the judge to assess on the facts of every case.

82. The judge did not consider, at the sentencing stage, the effect of Articles 10 and 11. As previously explained, we consider that these articles were engaged in the M25 Conspiracy case. When ECHR rights are engaged, the proportionality question must always be asked. However, as we have already said (at paragraph 7(iii) above), if the common law principles set out in *Trowland* are applied properly, the defendant's ECHR rights should be observed.

83. The appellants in the M25 Conspiracy and M25 Gantry Climbers cases argued that there was a disparity between their sentences and those imposed on others involved in the same protest. We were presented with a table of all of those sentenced in relation to offences of public nuisance arising from the M25 Conspiracy, including seven individuals who are not parties to this appeal. The table stated their names, dates of birth, offence dates, sentence dates, whether the offence was charged as a conspiracy or the substantive offence, credit for plea (when relevant), sentence and the approximate sentence before credit for plea. It included no other details. The sentences ranged from a community order imposed on one of those not appealing to this court to the five years' imprisonment imposed on Mr Hallam.

84. Arguments based on disparity are always difficult, as was acknowledged by counsel. In cases which are so highly fact sensitive as these, both as to the nature of the offending and as to the personal involvement and personal circumstances of the offenders (see *Trowland* at [51]), there is little to be gained from the limited information provided.

(3)(c) The M25 Conspiracy Case: Roger Hallam

85. The sentencing judge was entirely justified in taking the serious view of Mr Hallam's offending that he did. We recognise that the judge was particularly well-placed, after a trial, to assess the overall seriousness of the offending. However, we consider a sentence of five years' imprisonment in Mr Hallam's case to be manifestly excessive.

86. The sentences upheld, after a trial, in *Trowland* were three years' imprisonment (Mr Trowland) and two years and seven months' imprisonment (Mr Decker). These were said to be severe, but not manifestly excessive (see *Trowland* at [91]). Mr Hallam's case was worse. The intended effect was worse. The period of disruption was longer, spanning over four days, all in accordance with (although falling short of) the intentions

of this sophisticated conspiracy. However, in this case, as in all cases, it is necessary to pass the shortest possible sentence commensurate with the seriousness of the offence (s. 231(2) of the Sentencing Act 2020). Deterrence was a particularly important factor in Mr Hallam's case, because he had eleven relevant previous convictions at the date of the conspiracy in 2022. By the date of sentence he had also been convicted of a further offence for which he had received a suspended sentence in 2024. Nevertheless, this was his first sentence of immediate custody. It is also necessary to avoid sentence inflation.

87. We take account of all of the matters considered by the judge when passing sentence and we also recognise that some attention must be paid to conscientious motivation and Articles 10 and 11, although much less than would have been the case had the offending been less disproportionate. We consider that the shortest term commensurate with the seriousness of the offence in the case of Mr Hallam was one of four years' imprisonment, not five.

(3)(d) The M25 Conspiracy Case: Daniel Shaw

88. No particular argument was addressed to us in respect of Mr Shaw which did not apply equally to Mr Hallam. Mr Shaw, like Mr Hallam, was entitled to have his culpability considered in the light of his conscientious motivation and to have a final assessment made as to whether the sentence to be passed on him was proportionate to any interference with his ECHR rights. The sentence also had to be the shortest sentence commensurate with the seriousness of the offence.

89. The judge considered that Mr Shaw's sentence should be four years' imprisonment, which was one year shorter than the sentence originally passed on Mr Hallam. It follows, from our reduction of Mr Hallam's sentence from five years' to four years' imprisonment, that Mr Shaw's sentence should not have exceeded three years' imprisonment, which maintains the differential between him and Mr Hallam. We see no reason for any further reduction.

(3)(e) The M25 Conspiracy Case: Lucia Whittaker de Abreu

90. Ms Whittaker de Abreu is entitled to the benefit of the points already discussed above.

91. It was, in addition, submitted that the judge had failed properly to take into account her caring responsibilities. However, he expressly referred to them, saying "I bear in mind what I have seen and heard about your health and your caring responsibilities, but that provides little by way of mitigation, given you[r] conscious choice to engage in offending of this seriousness". We are not persuaded, either by the evidence of these matters put before the judge or by an additional statement from her mother (whose initial statement was before the sentencing judge), that a further reduction in her sentence was required on that account. The seriousness of the offence made an immediate custodial sentence inevitable and Ms Whittaker de Abreu's caring responsibilities were not such as materially to affect the appropriate length of the sentence.

92. It was submitted that the trial judge wrongly evaluated Ms Whittaker de Abreu's risk of reoffending. The judge was of course well-placed after trial to assess Ms Whittaker de Abreu's risk of reoffending. He referred to the fact that she had not disrupted the

trial, as had her co-defendants, but considered that this made no difference to the appropriate sentence. He made no mention of the fact that she had not reoffended or been convicted of any further matters since November 2022, again a point of distinction to be made between Ms Whittaker de Abreu and Ms Lancaster, Mr Hallam and Ms Gethin.

93. We consider that a sentence of four years' imprisonment for Ms Whittaker de Abreu was manifestly excessive and that the appropriate sentence in her case is is 30 months' imprisonment. This reflects the parity found by the judge between her sentence and that of Mr Shaw but makes additional adjustment downwards to reflect the additional mitigation in her favour as referred to above.

(3)(f) The M25 Conspiracy Case: Louise Lancaster

94. No specific personal mitigation was advanced before us in respect of Ms Lancaster. The arguments already considered in relation to other appellants apply also to her. For the same reasons, her sentence will be reduced from four years' imprisonment to three years' imprisonment.

(3)(g) The M25 Conspiracy Case: Cressida Gethin

95. The sentencing judge did not distinguish between Ms Gethin's sentence and the sentences passed on Mr Shaw, Ms Whittaker de Abreu, and Ms Lancaster.

96. A striking difference between her and her co-defendants was her age. She was only 20 years old at the date of the conspiracy offence in late 2022. At the time of the conspiracy offence in 2022, she had only been convicted of one previous matter, an aggravated trespass committed earlier in the same year.

97. The judge acknowledged her age, but said it did not provide any mitigation or entitle her to a shorter sentence than the sentences passed on Mr Shaw, Ms Whittaker de Abreu or Ms Lancaster. He assessed her as "highly intelligent and well-educated" and said that neither immaturity nor personal disadvantage had, as he put it, driven her to crime.

98. The question was whether Ms Gethin's age supported a submission that she lacked maturity, which in turn reduced her culpability. Intelligence and educational attainment are not the same as maturity. Consideration of the possible relevance of immaturity is necessary even in the case of a young adult who has passed the age at which the Guideline on Sentencing Children and Young People applies. As was stated in *Clarke* [2018] 1 Cr. App. R. (S.) 52; [2018] EWCA Crim 185 at [5]:

> "Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear. The discussion in *R. v Peters* [2005] EWCA Crim 605; [2005] 2 Cr. App. R. (S.) 101 (p.627) is an example of its application: see [10]–[12]. Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research (e.g. The Age of Adolescence: thelancet.com/child-adolescent; 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform

> any sentencing decision, even if an offender has passed his or her 18th birthday."

99. We accept the submission that Ms Gethin's immaturity lowered her culpability and that her sentence should be lower than that of her co-defendants accordingly. We reduce her sentence from four years to 30 months' imprisonment.

(4) The M25 Gantry Climbers Case

(4)(a) The Judge's Sentencing Remarks in the M25 Gantry Climbers Case

100. All the appellants in the M25 Gantry Climbers case pleaded guilty as their trial was about to begin. A jury had been empanelled. They were sentenced by HHJ Collery KC on 1 August 2024. Daniel Johnson was sentenced at the same time as the appellants but he has not applied for leave to appeal against his sentence. The judge said that Mr Johnson "led the defendants in their change of pleas and others followed his lead". He gave a 10% reduction in sentence to each defendant as credit for plea and there is no challenge to that.

101. In his sentencing remarks, the judge said that the M25 had been chosen specifically because it is one of the most important parts of the strategic road network and action upon it was likely to cause maximum disruption.

102. The M25 gantry climbers had travelled long distances to take part in the disruption. Between them, they climbed six gantries over the M25 in a broad swathe from St Albans to Sevenoaks. Each had been trained to climb the gantries. Each had been equipped with climbing equipment. Many of them (but not Gaie Delap and Paul Sousek) brought locks and glue to delay their removal. The purpose of climbing the gantries was to delay their removal from the road and thereby prolong the period of road closure and increase the disruption. The purpose of the disruption was so that Just Stop Oil might benefit from media coverage, but the nuisance caused was intended, and not merely a by-product of the disruption.

103. The climbers were acting together and were sentenced on that basis. However, unlike the M25 conspirators led by Mr Hallam, the M25 gantry climbers were "the willing volunteers" rather than "the organisers".

104. The judge noted that there was no guideline for sentencing offences of intentionally causing a public nuisance under s. 78(1). However, he referred to *Trowland,* to the guidelines on overarching principles and on imposition of community and custodial sentences and to the purposes of sentencing in s. 57 of the Sentencing Act 2020.

105. He found both individual and collective culpability to be high. There was sophisticated planning. The actions of the M25 gantry climbers were part of a wider action. The intention was to be part of a co-ordinated effort. Every defendant took steps to make it harder for them to be brought down and so to prolong the disruption.

106. The harm intended and achieved on 9 November 2022 was mass disruption for several hours. 117,000 vehicles were impacted. There were 8,936 hours of vehicle delays, ranging from minutes in some cases to hours in others. Police costs for the Metropolitan Police alone were in excess of £227,000 and involved 44 shifts.

107. The judge considered the appellants' conscientious motivation and said this:

> "The court accepts, of course, that a conscientious motive may be a relevant consideration, particularly where, otherwise, the offender is a law-abiding person. You committed offences simply by being on the motorway. You actions were, in the view of this court, disproportionate to your aims. I do not regard your status as non-violent protesters to afford you any particular mitigation. The very purpose of section 78 was to address the increase in non-violent protest offending. In *Trowland and Decker* [Lady] Justice Carr said, at paragraph 50:
>
> > "However, the more disproportionate or extreme the action taken by the protester, the less obvious is the justification for reduced culpability and the more lenient sentencing."
>
> In my view, because the actions of these protesters was disproportionate – and deliberately intended to be so – consequently the moral difference between your behaviours and that of ordinary law breakers is much reduced."

108. Considering the cases overall, the judge said:

> "I take the view that, in relation to each of you, the custody threshold has been passed, that in none of your cases is the objective of deterrence achieved by the imposition of a community sentence. Such anti-social mass disruption is deserving of punishment. The sentences I pass are the least possible in the circumstances.
> (…)
> I had in mind, when considering these offences, a period of 27 months imprisonment, marginally more for some given the various aggravating factors. That then has to be adjusted to reflect the various mitigating factors in each of your cases."

(4)(a)(i) Gaie Delap

109. Sentencing Ms Delap (aged 75 at the time of offending), the judge said that she had no previous convictions, but one conditional caution in 2020 for wilful obstruction of the highway. He treated as an aggravating factor her being on bail for another protest matter when committing the current offence. He noted that she was the oldest of the defendants, but said, "age, I regret, has not brought wisdom".

110. He accepted her conscientious motivation. He rejected her expressions of regret for the disruption caused as implausible. He accepted her life of service to others before and after retirement as a teacher and some personal health and family caring responsibilities, albeit at a relatively low level.

111. She had been made subject to a qualifying curfew from 10 November 2022 but the tag could not be fitted and that requirement was removed on 8 December. He certified that 14 days were to count towards her sentence, namely half of 28 days.

112. He reduced the sentence to reflect her personal mitigation and general health. With 10% credit for plea, her sentence was 20 months' imprisonment, reduced by 14 days in respect of the time which she had spent on qualifying curfew.

(4)(a)(ii) Paul Sousek

113. Sentencing Mr Sousek (aged 71 at the time of offending), the judge noted his history of protest and his desire to cause public nuisance and large-scale disruption to increase the chance of news coverage. There was no remorse and no intention of changing his behaviour, save to stop short of the point of arrest. He was closer to the centre of the actions than other defendants. The judge said, "you are old enough to know better but do not". He had been the most recalcitrant at court hearings. He also had health issues.

114. He had three previous convictions, two of great age and no obvious relevance. One, however, was in 2022 for protest-related public nuisance, punished by a fine.

115. The judge reduced the sentence for personal mitigation, namely, Mr Sousek's age and state of health. After 10% credit for plea, his sentence was 20 months' imprisonment, with 86 days from the tagged curfew to count towards that.

(4)(a)(iii) Theresa Higginson

116. Sentencing Theresa Higginson (aged 24 at the time of offending), the judge noted one previous conviction for aggravated trespass in 2023 for which she had received a 6 month conditional discharge. The judge understood her to have been on bail for that at the time of the current offence. He said she was, in fact, on bail for two protest-related offences at the time of the current offending, which was an aggravating feature.

117. She was unrepentant and assessed in the pre-sentence report as highly likely to reoffend. She was intellectually able and had choices and opportunities not available to others. There was no significant personal mitigation.

118. Her sentence, after 10% credit for plea, was 24 months' imprisonment. Half of the time spent on qualifying curfew counted towards that.

(4)(a)(iv) Paul Bell

119. Sentencing Paul Bell (aged 22 at the time of offending), the judge noted he had no previous convictions. This was treated as a mitigating feature, reducing the sentence. However, he was on court bail at the time of sentence for two protest-related matters for which he was still awaiting trial, which the judge treated as an aggravating feature.

120. He had an academic career, but had prioritised his Just Stop Oil activity, including the offending, over that.

121. After 10% credit for pleading guilty, he was sentenced to 22 months' imprisonment. The judge gave 78 days' credit for a qualifying curfew.

(4)(a)(v) George Simonson

122. Sentencing George Simonson (aged 22 at the time of offending), the judge noted his conscientious motivation. He rejected the submission that Mr Simonson's attitude to offending had changed and pointed to his two arrests and convictions after the offence in question. He noted a suggestion, although short of a diagnosis, of possible ADHD or autism. Mr Simonson was described as an intelligent, thoughtful and considerate young man.

123. He had three recent and relevant previous convictions for public order and highway obstruction offences, two dealt with by a fine and one resulting in a 12-month conditional discharge. He was on bail for that at the time of offending.

124. After 10% credit for pleading guilty, his sentence was 24 months' imprisonment.

(4)(b) General Issues in the M25 Gantry Climbers Case

125. We apply the principles identified above. It is clear that the judge both recognised and took into account in the case of each defendant their conscientious motivation. He was correct to do so. We are not persuaded that any of the sentences are manifestly excessive in that respect or that the engagement of Article 10 and 11 rights, although not specifically mentioned by the judge, called for more lenient sentencing than was already afforded by the judge's recognition of the appellants' conscientious motivation when passing sentence. The offending was serious and out of all proportion with what was necessary for the exercise of Article 10 or Article 11 rights. Both culpability and harm were, on the judge's findings, significant. The balance of factors in the Imposition Guideline made immediate custody appropriate. There was a history of poor compliance with court orders, a risk of reoffending, a limited impact on others, an absence of strong personal mitigation and, in particular, the necessity of appropriate punishment.

126. It was submitted that the suspended sentence of 21 months' imprisonment imposed on the appellants' co-defendant, Mr Johnson, created a disparity with the appellants' sentences which was not justified. In particular, it was submitted that the judge wrongly emphasised Mr Johnson's disavowal of Just Stop Oil and, thereby, wrongly penalised the appellants for continuing their commitment to the environmental cause of Just Stop Oil and those aspects of its work which are not illegal.

127. The judge's sentencing remarks about Mr Johnson, however, clearly demonstrated why it was legitimate to suspend Mr Johnson's sentence. He was 25 years old and had no previous convictions. He was under investigation, but not on bail for any matters, and the matters under investigation resulted in no action. His involvement with Just Stop Oil was very brief, covering only the period from October to November 2022. He had shown genuine remorse, which was noted in his pre-sentence report and accepted by the judge. He had also disassociated from Just Stop Oil and severed those ties. His engagement with the criminal justice system had already served to deter him from further offending and he intended to pursue post-graduate studies towards a profession (as a psychoanalyst), as to which he had an academic reference in support. In relation to the Imposition Guideline factors, therefore, there was no history of poor compliance with court orders, he presented no risk to the public, there were very strong prospects of rehabilitation and he had personal mitigation in the form of his career prospects, which would be blighted if he went to prison instead of continuing his studies. The offending remained serious, which meant that the custody threshold was crossed, but his position was very different in multiple respects from that of the appellants. This makes the disparity argument unsustainable.

128. We do not think that it is a fair reading of the sentencing remarks to say that the appellants were penalised for continuing their conscientious commitment to Just Stop Oil. Rather, the focus of the judge's remarks was on Mr Johnson's genuine remorse and his decision not to re-offend and, in the case of the appellants, on their lack of genuine

remorse and their risk of re-offending. That was a legitimate judgment to make in respect of the appellants and one which was open to the judge on the materials which he had before him and for the reasons which he gave. He said, in terms, that the continued commitment of the appellants to their cause "is, of course, in itself unobjectionable".

(4)(c) The M25 Gantry Climbers Case: Gaie Delap

129. In relation to Ms Delap, passages in the Pre-Sentence Report were highlighted in which she said that she understood that she must stay within the law in any future involvement with Just Stop Oil. However, the judge was not bound to accept that self-serving assurance and he pointed to reasons, based on the facts of her offending, which made her account of her offending and of her intentions implausible.

130. It was pointed out that the judge was told incorrectly that she was on bail when committing the current offence. In fact, she had been released under investigation for gluing herself to a road. Taking the matters referred to by the judge in reaching his sentence as a whole, and having regard to the final sentence, we do not regard that difference as material. Her sentence of 20 months' imprisonment was lower than the sentence on any of the other appellants, except Mr Sousek, whose sentence was the same. He too was not in breach of bail or of any orders when offending.

131. The judge took Ms Delap's age and other personal mitigation into account, as well as her conscientious motivation. We do not consider the sentence of 20 months' imprisonment to be manifestly excessive or wrong in principle.

132. However, it seems that the judge was not given full or correct information about Ms Delap's curfew. He certified that 14 days counted towards her sentence on account of a short period of time spent on qualifying curfew. However, her qualifying curfew ended because she suffered from a medical condition, which made it necessary to remove the tag for health reasons. Thereafter, although not tagged, she continued to be under a curfew from 7 pm to 7 am for a further 145 days.

133. Our attention was drawn to *R v Whitehouse* [2019] EWCA Crim 970; [2019] CRAppR (S) 48 at [16] to [19] and we drew the parties' attention to *R v Nwankwo* [2024] EWCA Crim 1375 at [19] to [20]. The fact that Ms Delap was subject to onerous bail conditions for so long was something which should have been taken into account when she was sentenced. This issue was not raised in the original grounds of appeal, but, when raised during the hearing, the Crown accepted that account should have been taken of this period of curfew. We accept that, on the facts of her case, it is appropriate to give her some credit for the onerous bail conditions to which she was subject. The position is different in relation to the shorter curfew (from midnight to 7 am) which applied thereafter.

134. We consider that the appropriate adjustment to the sentence is two months. Ms Delap's sentence will be reduced from 20 months' to 18 months' imprisonment accordingly.

(4)(d) The M25 Gantry Climbers Case: Paul Sousek

135. In addition to the points already considered, it was submitted on behalf of Mr Sousek that the judge failed to have sufficient regard to his age and state of health. However,

the judge specifically referred to these factors when reaching his decision on sentence. We are not persuaded that the sentence of 20 months' imprisonment after credit for plea was manifestly excessive or wrong in principle.

(4)(e) The M25 Gantry Climbers Case: Theresa Higginson

136. No grounds additional to those which we have already considered were advanced in respect of Ms Higginson. For the reasons already discussed, we dismiss her appeal against her sentence of 24 months' imprisonment.

(4)(f) The M25 Gantry Climbers Case: Paul Bell

137. In addition to the grounds already considered, it was argued on behalf of Mr Bell that his age (22 at the time of offending), good character and short period in prison on remand (39 days) required a shorter sentence and that the sentence ought in any event to have been suspended.

138. The judge recognised his good character as a mitigating feature which shortened his sentence. He was of full age and there was no suggestion of immaturity in his case. The sentence of 22 months was neither manifestly excessive nor wrong in principle. In addition to the seriousness of the offending, immediate custody was justified by the lack of positive material to suggest a realistic prospect of rehabilitation. Age could not demonstrate that by itself.

(4)(g) The M25 Gantry Climbers Case: George Simonson

139. On behalf of Mr Simonson, it was argued that the judge failed to have sufficient regard to his young age, offending background and personal mitigation. It was submitted that the judge was wrong not to find that he was remorseful, notwithstanding the commission of further offences. It was submitted that Mr Simonson's assessment of the offending in what was described as "granular detail" was a mitigating rather than an aggravating feature.

140. Mr Simonson was 22 at the time of offending. However, he was not only intelligent, but thoughtful. His actions were not impulsive or isolated. There was nothing to suggest reduced culpability by reason of immaturity. The reference to Mr Simonson thinking through "in granular detail", in advance, the organised plan to cause disruption and lengthy delays was a quotation of his own words and such deliberate, premeditated, planned action was clearly not a mitigating feature. The judge was entitled to reject the claim of remorse, not least because there was similar offending both before and after the current offence.

141. It was pointed out that Mr Simonson was not on bail at the time of the offence, contrary to the information given to the judge. He was arrested and bailed for just over three weeks and then released under investigation, which was the position when he committed the current offence. We do not regard that as materially affecting the reasoning of the judge, nor does it persuade us that his sentence was manifestly excessive or wrong in principle. We dismiss the appeal against his sentence of 24 months' imprisonment.

(5) The Thurrock Tunnels Case

(5)(a) The Judge's Sentencing Remarks in the Thurrock Tunnels Case

142. The Navigator oil terminal and the adjacent industrial estate are situated in an area of land which is bounded to the south and east by the river Thames, to the west by the M25 motorway and to the north by a railway line. Only two roads, St Clements Way and Stoneness Road, provide access to the industrial estate and the oil terminal. On 23 August 2022 Just Stop Oil protesters blocked St Clements Way. When they were removed, they disclosed the existence of two tunnels, one under St Clements Way (tunnel 1) and the other under Stoneness Road (tunnel 2).

143. Tunnel 1 was occupied until 4 September 2022 by Samuel Johnson, Joe Howlett and Xavier Gonzalez-Trimmer. (Mr Gonzalez-Trimmer did not stand trial, having, sadly, taken his own life in February 2024.) St Clements Way was fully closed for about 2 hours on 23 August 2022, after which one lane was reopened and a contraflow system operated.

144. Tunnel 2 was occupied by Dr Larch Maxey until 28 August 2022 and by Chris Bennett until 29 August 2022. (Autumn Sunshine Wharrie was also involved with, but did not occupy, tunnel 2. She was tried and convicted but has not sought leave to appeal against her sentence, which was suspended.) Stoneness Road was closed for 6 days, from about 12.30 pm on 23 August 2022 to about 2.10 pm on 29 August 2022, when Mr Bennett left the tunnel.

145. HHJ Graham presided over the five-week trial, at which there was extensive evidence as to the effect of the road closures on businesses at the industrial estate and the oil terminal. The judge said as follows:

> "The effect of this was considerable. It meant that access to the industrial estate was severely limited. It meant that businesses were not able to operate normally. It meant that personal matters also were caused inconvenience to members of the public who were using it there and as a result several hundred thousand pounds worth of loss was occasioned and a large amount of inconvenience to members of the public.
> This, in my judgment, was of a different and more serious level than those who sit in roads or even climb up on bridges because this actually involved damage underneath the road. It involved a considerable degree of planning and execution and the danger was that if these road[s] had actually collapsed, either of them, then there could have been severe damage caused or even injury and death. There was a particularly chilling piece of evidence from, I think, a fire officer who said that after he had visited the tunnel he was satisfied if the tunnel had collapsed he would be dealing with a recovery rather than saving people."

146. There was an issue at trial whether the appellants intended to cause serious harm just to those travelling to and from the oil terminal or to those travelling to and from both the oil terminal and the industrial estate. In his sentencing remarks, the judge said as follows:

i) "… this was a very serious attempt to completely disrupt the industrial area around an oil terminal.";

ii) "That road also gave access to a considerable industrial estate and the clear intention was to make that road unsafe so that it would have to be closed and that access to and from the oil terminal and the industrial estate would be impeded if not stopped.";

iii) "I accept that the main object of this operation was the oil terminal. If the oil terminal had not been there, this operation would not have taken place where it did and I accept therefore that the inconvenience and the nuisance caused to others apart from the oil terminal was by way of collateral damage but the actual damage that was caused, the actual nuisance that was caused, the actual inconvenience and costs that were caused, directly arose from these defendants' actions in digging these two tunnels."

147. After referring to the role played by the individual defendants and their personal mitigation, the judge referred to *Trowland* and said as follows (emphases added):

> "And the Court of Appeal, in my view, set out to say the approach that judges should take to these matters and start by pointing that the Sentencing Council guideline does not exist but that the custodial sentence available is up to 10 years and the Court of Appeal first of all dealt with matters of Article 10 and Article 11 of the European Convention on Human Rights, says that those should be taken into account but points out that the appropriate sentence would be very fact-sensitive according to place.
> I must say, I find Articles 10 and 11 have very little application to this case. There was no restriction on these defendants associating with each other. There is no restriction on these defendants putting their point of view forward. What this case is about is damage to the road structure and placing a - a risk such that roads had to be closed. It is, in that sense, more serious than the case the Court of Appeal considered because that just involved people climbing on bridges and disrupting traffic in that way and this case, the case I am dealing with, there was actual physical damage caused and physical damage which would, in unfortunate circumstances, have led to substantial damage or even injury and death.
> The Court of Appeal specifically rejected a submission that because this was a conscientious demonstration that non-custodial sentences were appropriate. That was rejected and the court said there are no bright lines in protest cases; rather whether or not a custodial sentence was justified turns on the individual facts.
> It talked about the matter of conscientious motive. That again is, the Court of Appeal said, a court could properly take into account but again in this case, in my judgment, that is of very limited influence given the nature of the activity which was undertaken and given that the actual offence here arose from the deliberate causation of damage to an area of the public road."

148. The judge also said as follows in relation to *Trowland*:

> "And the [court] came to the conclusion that the judge was entitled to find the protesters' culpability to be high and that the effect of the obstruction was significant and the court in fact described it as being of the utmost seriousness, affecting a strategic road network.

> Well, in this case, the culpability again must be seen as being high and the effect of the actions here again can only be described of being of the utmost seriousness and so the Court of Appeal concluded that the sentences passed by Collery HHJ KC of three years and just slightly less than three years were described as striking a fair balance and were not disproportionate."

(5)(b) General Issues in the Thurrock Tunnels Case

149. It was submitted that i) the judge's statement that conscientious motivation was of very limited influence meant that he had failed to take it into account at all; and ii) his statement that Articles 10 and 11 had very little application to the case meant that he had failed to take them into account either. However, we consider that these statements, which have to be read in the context of the judge's careful account of the decision in *Trowland*, are to be understood as indicating that the judge did, in accordance with that decision, have regard both to the appellants' conscientious motivation and to their ECHR rights, but decided, in the light of the facts of the case, to accord relatively little weight to these considerations. Notwithstanding their conscientious motivation, the judge concluded, as he was entitled to, that the appellants' culpability was high.

150. The judge also made it clear that he had considered the length of the sentences imposed in *Trowland*. In that respect, we note that the sentences imposed on Mr Bennett, Mr Johnson and Mr Howlett were significantly shorter than the sentences imposed in *Trowland* and that the sentence imposed on Dr Maxey was no longer than the sentence imposed on Mr Trowland.

151. Mr Chada submitted that the judge found that the appellants' intention was limited to causing disruption to the oil terminal and that the disruption caused to the occupants of the industrial estate was merely collateral damage. We do not accept that submission. The judge accepted that the oil terminal was the main object of the operation, but he also said that this was an attempt to disrupt the industrial area around the oil terminal and that the clear intention was to make the road unsafe so that it would have to be closed and that access to and from the oil terminal and the industrial estate would be impeded, if not stopped. One witness's unchallenged evidence was that only one in ten of the vehicles using the roads under which the tunnels were dug was connected with the oil terminal.

152. It was submitted on behalf of each appellant that the judge paid insufficient regard to his personal mitigation, which we will consider separately for each appellant. However, we note that each of the appellants relied on the effect which Mr Gonzalez-Trimmer's death had had on him as a mitigating factor.

(5)(c) The Thurrock Tunnels Case: Chris Bennett

153. Mr Bennett was 31 at the time of the offence. The judge said as follows about Mr Bennett's role in the offending, his previous convictions and his mitigation:

> i) "As far as Mr Bennett is concerned, he had travelled from Bristol and was in tunnel 1 for a total of 12 days and spoke to Dr Maxey during the course of that time. He stayed there even after Ms Wharrie had been arrested and after Mr Maxey had been arrested."

ii) "The defendant Bennett has a conviction for aggravated trespass on land from 2022."

iii) "Mr Bennett says he now has remorse for the damage to the wider community, that he was not the architect of the plan, not an organiser. I have regard to the character evidence which has been uploaded onto the DCS. He is a carer now for those with dementia and has given up activism."

iv) "You played again a significant part in this very serious offending."

154. Mr Bennett's previous conviction involved him tying himself to a tanker at the Navigator oil terminal as part of a Just Stop Oil protest, which resulted in him being fined £400. He had not offended since August 2022. The character references mentioned by the judge included reference to Mr Bennett's intention not to engage with any further disruptive protests.

155. We do not consider that the sentence of 18 months' imprisonment imposed on Mr Bennett was manifestly excessive or wrong in principle. The judge was entitled to assess his culpability as high, notwithstanding his conscientious motivation, and the harm caused was clearly very high. The judge took account of all of the mitigating factors and we do not consider that they required him to impose a shorter sentence. The judge was also entitled to take the view that appropriate punishment could only be achieved by immediate custody. For these reasons, we dismiss Mr Bennett's appeal.

(5)(d) The Thurrock Tunnels Case: Dr Larch Maxey

156. Dr Maxey was 50 at the time of the offence. The judge said as follows in relation to Dr Maxey's role, his previous convictions and his mitigation:

i) "Larch Maxey is the oldest of the male defendants. He is described in the prosecution notes as highly intelligent. He has a background with Just Stop Oil and has a number of previous convictions. He broadcast saying that he was intending to stay in the tunnel and indeed chained himself to the tunnel to stop him being removed."

ii) "As I've already said, Dr Maxey has a number of previous convictions, all of a similar nature. In 2021, he was convicted of aggravated trespass on land and received a suspended sentence. In 2023, he was convicted of a conspiracy to cause a public nuisance under the old common law and received another suspended sentence."

iii) "As far as Larch Maxey is concerned, there are also character references. I am reminded that his involvement in this case through conscientious motivation and Mr [Chada] points me to the European Convention on Human Rights and he says he was not the organiser and as far as his present personal circumstances are concerned, he has caring responsibility for an elderly father, that he has changed his approach to climate change issues and in more personal matters he has been diagnosed as being bipolar and has been severely affected by the death of the co-accused, Mr Trimmer. He's now been out of trouble for two years."

iv) "You were clearly heavily and seriously involved in this very serious offending. You have a lot of convictions for similar offending."

157. As for Dr Maxey's previous offending:

i) In September 2019 Dr Maxey was one of those who used drones to disrupt Heathrow Airport.

ii) On 6 October 2020 Dr Maxey entered an HS2 construction site and climbed a tree. On 6 October 2021 he was given a conditional discharge for 15 months for the offence of aggravated trespass. It follows that he was subject to a conditional discharge when he committed this offence.

iii) For three weeks in January and February 2021 Dr Maxey occupied a tunnel under land related to the HS2 development, for which he was sentenced on 1 August 2023 to 3 months' imprisonment, suspended for 12 months.

iv) On 6 May 2021 Dr Maxey spray-painted a building and smashed its windows, for which he was sentenced on 30 January 2023 to 15 weeks' imprisonment for the offence of criminal damage. He was deemed to have served this sentence by reason of the time which he had spent on a qualifying curfew.

158. Interviewed in a YouTube video, the purpose of which was to recruit volunteers to his cause, Dr Maxey said, amongst other things:

> "… we need to cause an intolerable level of disruption, absolutely intolerable. If it's not intolerable, we'll fail...
> "… what's really needed is economic disruption, so if people take action in a range of ways which helps to contribute towards that pressure for change then we can, we can win, yeah.
> "… this is something I've chosen to give my life to and it's the most rewarding thing I've ever done."

159. Dr Maxey recorded messages which were broadcast on the internet during his occupation of tunnel 2. When St Clements Way was partially reopened, he demanded that it be closed.

160. Several positive character references mentioned that Dr Maxey had moved away from illegal and disruptive action. In a letter to the judge, Dr Maxey expressed his remorse and his intention not to take any disruptive action in future and gave details of his caring responsibilities for his parents and his son and his mental health, having been diagnosed with bipolar disorder in August 2023. A medical report stated that Dr Maxey's condition could have led to poor impulse control, disinhibition and reckless behaviour and also expressed the opinion that imprisonment would interrupt his therapy and give rise to a risk of self-harm.

161. In addition to the submission that the judge paid insufficient regard to the mitigating factors, it was also submitted that there was a disparity between the sentence of 3 years' imprisonment imposed on Dr Maxey and the sentences imposed on the other appellants in the Thurrock Tunnels case.

162. However, we do not consider that the sentence was manifestly excessive or wrong in principle. Dr Maxey's broadcasting activities indicate the leading role which he played, occupying tunnel 2 and thereby causing Stoneness Road to be closed for 5 days. There was no convincing evidence that his bipolar disorder affected his culpability, which was high, as was the harm caused. There were a number of mitigating factors, but these were considerably outweighed by Dr Maxey's history of similar offending in the three years preceding this offence, making it appropriate that his sentence should be significantly longer than those imposed on the other appellants in the Thurrock Tunnels case. We dismiss Dr Maxey's appeal.

(5)(e) The Thurrock Tunnels Case: Samuel Johnson

163. Mr Johnson was 39 at the time of his offence. The judge said as follows in relation to Mr Johnson's role and his mitigation:

i) "As far as Samuel Johnson is concerned, he was also a spokesman for the Just Stop Oil protesters. He had actually attended a tunnelling training session so he was well prepared for this operation. He had been there as early as late July and stayed there until the 4th of September and he complained that when the partial opening of the road over tunnel 1 had happened he demanded that it be closed again."

ii) "As far as Johnson is concerned, I am told that he has moved away from activism, he has cut ties with Just Stop Oil, he is undertaking more positive activities, has a new partner and a close relationship with his sister and his nephew."

iii) "I see no reason to distinguish between you and Chris Bennett."

164. Mr Johnson gave up a career in construction to become involved in climate activism. He used his construction skills in digging the tunnel. Like Dr Maxey, he demanded that St Clements Way be closed when it was partially reopened.

165. He had been convicted of an offence of obstructing the highway committed on 4 October 2021, for which he received a fine on 6 May 2022. He had committed no offences since August 2022. There were a number of character references. It was submitted on his behalf that he had moved away from Just Stop Oil and from direct action protesting, engaging instead with a political party, and he wrote a letter to the judge in which he apologised for the disruption he had caused. However, the pre-sentence report stated that Mr Johnson maintained that his actions were justified and proportionate. The author of the report stated that Mr Johnson's opinions were unlikely to change.

166. We consider that the judge was entitled to conclude that there was no reason to distinguish between Mr Johnson and Mr Bennett. We dismiss Mr Johnson's appeal against his sentence of 18 months' imprisonment for substantially the same reasons as in Mr Bennett's case.

(5)(f) The Thurrock Tunnels Case: Joe Howlett

167. Mr Howlett was 32 at the time of his offence. The judge said as follows in relation to Mr Howlett's role and his mitigation:

    i) "Joe Howlett is 32 years of age now, I believe. He also had been on a tunnelling training camp. He arrived there on the [20th] of August, returned on the 22nd of August, and he occupied tunnel - tunnel 1 until the 4th of September.";

    ii) "As far as Howlett is concerned, he has no previous convictions. He acted out of conscientious motivation. I have seen character references in … relation to him. He is a talented musician and is once again involved in music and is trying to obtain qualification as a teaching assistant with a possibility of going abroad to pursue that.";

    iii) "… I can draw a small distinction in your case because you have no previous convictions."

168. There were several character references. The Pre-Sentence Report recorded that Mr Howlett denied that he had intended to cause any harm at all. It also said that he claimed that he had been lied to about the impact which there would be on local businesses, although it also said that this seemed rather naïve. The Pre-Sentence Report also stated that Mr Howlett had expressed genuine remorse for the public and businesses who had been impacted by his actions and that he had no intention of being involved in further action of this nature, although he still had an interest in the subject matter.

169. The sentence imposed on Mr Howlett was in line with the sentences imposed on Mr Bennett and Mr Johnson, but was 3 months shorter because, unlike them, Mr Howlett had no previous convictions. We consider that this was an appropriate course for the judge to take and we dismiss Mr Howlett's appeal against his sentence of 15 months' imprisonment for substantially the same reasons as in the cases of Mr Bennett and Mr Johnson.

(6) The Sunflowers Case

(6)(a) The Judge's Ruling and Sentencing Remarks in the Sunflowers Case

170. On 13 October 2022 Ms Plummer and Mx Holland entered the National Gallery in preparation for what they were planning to do on the following day. When they returned on 14 October 2022 they each had with them a tin of tomato soup and some glue. They were wearing Just Stop Oil T-shirts under their outer clothing. They entered the gallery where the painting Sunflowers was on display. They removed their outer clothing to reveal the Just Stop Oil logos on their t-shirts. They threw the soup at the painting. They glued themselves to the wall. They were filmed and the film was soon posted on social media. Ms Plummer said "What is worth more, art or life?" She also said that fuel is unaffordable to millions of hungry families who cannot afford to heat a tin of soup.

171. Staff inspected the painting and its antique frame. The painting was protected by glass and fortunately had not been damaged. The frame sustained damage which was estimated at £8,000 to £10,000. The painting was put back on display after about 6 hours.

172. HHJ Hehir presided over the trial, which lasted for 4 days. We have already dealt (in paragraphs 37 to 42 above) with the ruling which he made during the trial. In his sentencing remarks, he said as follows about the potential harm to the painting:

> "However, it is not the value of the damage caused to the frame that is the most serious aspect of your offending. If the protective screen over the canvas had not done its job, the painting itself, Sunflowers, could have been seriously damaged or even destroyed.
> The stance of each of you at trial was a blithe dismissal of the risks involved in what you did. You each asserted that, as far as you as you were concerned, there was never any risk to the canvas because it was covered by a glass screen. But neither of you could be sure that the screen would actually protect the painting from the soup. Tellingly, the gallery staff were not sure either. At trial, the jury heard most vivid evidence of how they immediately checked whether the picture itself had been damaged. For all they knew, soup might have seeped through the glass and got onto the canvas. And you were exactly the same position.
> As Larry Keith, the head of conservation at the National Gallery, said in his evidence, had any liquid got through and made the canvas wet, the consequences could have been very serious. If anything, that is an understatement.
> Each of you claimed in evidence to care about and value Sunflowers. I reject that evidence. My assessments, having heard all the evidence about what happened, including your role, is that you could not have cared less whether the painting itself was damaged or not. I have no doubt that the publicity you each craved would have been even greater if it had."

173. Having noted that Sunflowers was literally priceless and part of humanity's shared cultural treasure, the judge added:

> "You two simply had no right to do what you did to Sunflowers, and your arrogance in thinking otherwise deserves the strongest condemnation. The pair of you came within the thickness of a pane of glass of irreparably damaging or even destroying this priceless treasure. That must be reflected in the sentences I pass.
> Section 63 of the Sentencing Code requires me, in assessing the seriousness of your offending, to consider not only the harm your offence caused, but also the harm it might foreseeably have caused. For the reasons I have explained, that foreseeable harm is incalculable."

174. The judge placed the offence in category A1 in the offence-specific Guideline, saying:

> "My assessment is that your culpability is at level A, as your offending involved a very high degree of premeditation and planning. You did not act alone. Others within Just Stop Oil were involved in the conception and execution of what you two did. You paid a previous reconnaissance visit to the National Gallery, and you were carrying the soup and glue you needed to make your protest. You spoke to a journalist beforehand, as I have already mentioned, and the filming and the dissemination of what was filmed on social media had also clearly been planned in advance.
> So far as harm is concerned, your offending is in category 1 because of the substantial social impact involved. Any attack on priceless art which is on public

> display can have very harmful societal consequences. Stunts like yours lead to more onerous and intrusive security measures in art galleries and other locations where valuable art and artefacts are on display. That may deter some people from visiting art galleries, museums, and the like. There is even the risk that some treasures might have to be withdrawn from public view altogether."

175. The starting point for a category 1A case is 18 months' imprisonment. The judge said that one of the aggravating factors mentioned in the Guideline was present, in that this was a case of damage to a cultural asset. He said that an uplift to the starting point was required to reflect the harm which could foreseeably have been caused to the painting itself. He added that he did not consider that either the appellants' conscientious motivation or the allegedly non-violent nature of their protest provided any mitigation.

176. After considering the appellants' previous convictions and mitigation, the judge explained that he considered that appropriate punishment could only be achieved by immediate custody.

(6)(b) General Issues in the Sunflowers Case

177. We have already dealt with the questions whether i) account should have been taken in sentencing the appellants of their conscientious motivation (see paragraph 26(1) above) and ii) whether Articles 10 and 11 were engaged in this case (see paragraphs 37 to 42 above). The judge was in error in treating these matters as irrelevant to the sentencing of the appellants. As noted in *Trowland*, however, conscientious motivation is relevant to the assessment of culpability and it does not preclude a finding that that an offender's culpability was high, although each case has to be decided on its own facts.

178. It was said for the appellants that the judge should have placed their offending in category B1 in the Sentencing Council Guideline for Criminal Damage, on the basis that their culpability fell into the medium, rather than the high, culpability category. It was submitted that the planning for the offence was not particularly sophisticated and was more appropriately characterised as "Some planning", rather than "High degree of planning or premeditation".

179. The judge was fully entitled to place this offence in the high culpability category. The appellants devised a plan to carry out a particularly high profile stunt, they conducted reconnaissance, they equipped themselves with what was needed, they spoke to a journalist and they arranged for their activity to be filmed to maximise the attendant publicity. This was much more than just "Some planning".

180. Although it was accepted in the grounds of appeal that harm fell into category 1, it was also submitted that the judge was wrong to have regard to the risk of harm to the painting itself, rather than the actual harm caused to the frame. There were two limbs to this submission. First, it was submitted that there was no evidence that the painting was at risk of damage. This was a factual issue which the trial judge was well placed to assess and we see no reason to disagree with his assessment that the reaction of the gallery staff indicated that they considered that there was a risk of damage to the painting.

181. Secondly, it was submitted that the judge misapplied s. 63 of the Sentencing Act 2020, which provides as follows:

> "Where a court is considering the seriousness of any offence, it must consider—
> (a) the offender's culpability in committing the offence, and
> (b) any harm which the offence—
> (i) caused,
> (ii) was intended to cause, or
> (iii) might foreseeably have caused."

182. It was submitted that s. 63(b)(iii) imposes a wholly subjective test. We do not agree. The use of the word "might" indicates that the question is not whether the defendant did foresee damage, but whether the causing of damage might have been foreseen. That is an objective test. The appellants argue that, because they had seen (during their reconnaissance visit the day before) that the painting was held behind glass, there was no foreseeable harm to the painting. However, knowledge that there was glazing did not mean that potential serious harm to the painting was not foreseeable. There was, for example, no reason to believe, or have any confidence in a belief, that the glazing would provide complete protection for the painting. So much is demonstrated by the fact that, in the immediate aftermath of the attack, museum attendants had great concerns for the painting's safety.

(6)(c) The Sunflowers Case: Phoebe Plummer

183. At the same time as sentencing Ms Plummer for this offence, the judge had to sentence her for an offence of interfering with key national infrastructure, contrary to s. 7 of the Public Order Act 2023, committed on 15 November 2023. This is the offence referred to in *R v Sarti* [2025] EWCA Crim 61. The judge imposed a consecutive sentence of 3 months' imprisonment for that offence. Ms Plummer has not applied for leave to appeal against that sentence.

184. The judge said as follows in relation to Ms Plummer:

> "Phoebe Plummer, you turned 23 yesterday. You were 21 when you committed the offence of criminal damage, and 22 when you committed the offence of interfering with key national infrastructure.
> You are a committed Just Stop Oil activist and have previous convictions and many previous arrests to show for it.
> You committed the slow-walking offence, for which I also have to deal with you, while on bail for the criminal damage matter, and other matters too. Furthermore, you did so in breach of the conditional discharge imposed on you only the previous month for a summary-only public order offence of failing to comply with the conditions for a procession, also in the context of a slow-walking protest. I take no action in respect of that breach, but it is a seriously aggravating feature of your offending on the second matter.
> You clearly have deeply held convictions about climate change and other matters, and you are perfectly entitled to them of course. But you have evidently decided that your beliefs entitle you to commit crimes as and when you feel like it. They do not.
> I have read, with care, the pre-sentence report and other mitigation materials provided to me, all now uploaded to the sentencing section of the relevant digital case file.

> You have represented yourself at the sentencing hearing, as you did at both trials. You delivered your own mitigation. I was treated, if that is the word, to a lengthy exposition of your political and ideological views, not only about climate change but also about a variety of other matters. You are entitled to your views and are not being punished for them. You are being punished for committing criminal offences.
> But I do repeat what I said when I, at one point, interrupted your address to the court. The suggestion that you and others like you, convicted by juries of your peers following fair trials in a democratic state under the rule of law are political prisoners is ludicrous, self-indulgent, and offensive. It is offensive to the many people in other parts of the world who are suffering persecution, imprisonment, and sometimes death for their beliefs, in places where neither democracy nor just laws are to be found. Perhaps one day you will come to realise that, although I fear that day is some way off yet.
> You have no remorse for what you did. Instead, you are proud of it. You made no effort to offer me any actual mitigation. In truth, there is none of any substance in your case."

185. The Pre-Sentence Report stated on the one hand that Ms Plummer appeared to be a vulnerable young person who was easily influenced by others and who displayed deficits in understanding the impact her decisions and choices have on others, but on the other hand that she was a clever young person who was open and honest about the fact that she would continue to protest after her sentencing.

186. We do not consider that Ms Plummer's sentence of 24 months' imprisonment was manifestly excessive or wrong in principle. As we have said, the judge was entitled to place her offence in category A1 in the Guideline. "Damage caused to heritage and/or cultural assets" was an aggravating factor. The sentence imposed was well within the range for a category A1 offence, which carries a custodial range up to 4 years' imprisonment. Ms Plummer was 21 when she committed the offence, but the judge had presided over the trial and was able to assess her level of maturity. She had continued to commit protest offences. Overall, the judge was entitled to conclude that the shortest possible sentence that he could impose was 24 months' imprisonment. He was also entitled to conclude that appropriate punishment could only be achieved by immediate imprisonment.

(6)(d) The Sunflowers Case: Anna Holland

187. The judge said as follows in relation to Mx Holland:

> "Anna Holland, you are now 22 years of age and were 20 at the time of your offence. You have one previous conviction, in June 2023, for an offence of wilfully obstructing the highway. Sorry, in October 2022 for an offence of wilfully obstructing the highway. You were conditionally discharged for that matter in June 2023. Your conviction here does not put you in breach of that conditional discharge. I do note, however, that you committed that offence on 6 October 2022, only eight days before you committed the offence for which I must now sentence you. If not on police bail, you had at the very least, been released under investigation by the time of this offence.
> I have read and reflected on the pre-sentence report in your case, and on the many character references supplied on your behalf. You are an intelligent young

> woman who comes from a loving and supportive family. I was particularly struck by the frank and realistic comments in your mother's character reference. There is no doubt that what you did has had a substantial adverse effect on your family. I can see that you acknowledge that. You are currently studying part-time for a Master's degree at Newcastle University. The mitigation material shows how highly regarded you are by those who know you there as well as those who know you in other contexts. You have not reoffended since October 2022 and I am prepared to accept that you do not intend to offend again."

188. The character references before the judge included statements that:

> "She struck me as both confident and mature in relation to her studies.";
> "… I've been deeply impressed by her steadfast purpose, self-awareness and integrity. She does nothing without thinking it through, weighing both tactical considerations and deep moral convictions."

189. On the other hand, as the judge recognised, they also confirmed that Mx Holland had decided not to repeat her offending.

190. Mx Holland's sentence of 20 months' imprisonment was appreciably shorter than that imposed on Ms Plummer, to reflect the fact that, unlike Ms Plummer, she had given up offences of this nature. The judge took account of her youth. It was submitted that she was immature, but, in the respects we have indicated, the character references suggested that she was mature for her age. We dismiss her appeal for substantially the same reasons as we gave in Ms Plummer's case.

(7) Conclusion

191. For the reasons given in this judgment, having granted leave to appeal against sentence in each case:

i) We quash the sentences imposed in the M25 Conspiracy Case and substitute the following sentences:

a) Roger Hallam: 4 years' imprisonment.

b) Daniel Shaw: 3 years' imprisonment.

c) Lucia Whittaker de Abreu: 30 months' imprisonment.

d) Louise Lancaster: 3 years' imprisonment.

e) Cressida Gethin: 30 months' imprisonment.

ii) In the M25 Gantry Climbers Case:

a) We quash the sentence imposed on Gaie Delap and substitute a sentence of 18 months' imprisonment.

b) We dismiss the appeals by Paul Sousek, Theresa Higginson, Paul Bell and George Simonson.

iii) In the Thurrock Tunnels Case, we dismiss the appeals by Chris Bennett, Dr Larch Maxey, Samuel Johnson and Joe Howlett.

iv) In the Sunflowers Case, we dismiss the appeals by Phoebe Plummer and Anna Holland.