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R

V

Shelley TASKER

And

Lance MURDOCH

SKELETON ARGUMENT ON BEHALF OF DEFENDANTS FOR TRIAL ON 19.7.21 AT EXETER MAGISTRATES COURT

FACTS

1. Both defendants are charged with holding or being involved in holding a gathering ('the Cornwall Freedom Rally') on Saturday 14 November 2020 in Truro city centre, contrary to s10 of the Health Protection (Coronavirus, Restrictions) (England) Regulations (No4) 2020 - which came into force on 5 November 2020 - without a reasonable excuse.

2. Both defendants accept attending the Cornwall Freedom Rally.

3. Both defendants spoke to a crowd of people whilst at the Rally using a loudhailer.

4. Both defendants deny holding or being involved in holding the Cornwall Freedom Rally.

5. Both defendants accept there were just over 30 people in attendance.

SUBMISSIONS

6. The defence have three submissions to make
    i. The protests were organised by a political body who had taken the required precautions and so the defendants cannot be in breach of r.10;
    ii. Neither defendant was holding the gathering and attendance at a gathering cannot prove involvement with holding a gathering pursuant to r.10(2)
    iii. If the court finds either defendant to have held or been involved in holding the gathering, the defendants are not guilty because they had a reasonable excuse for contravening the restrictions pursuant to r.20.

THE LAW

<u>Submission 1</u>

<u>Does Regulation 10 apply?</u>

7. Both defendants are charged with breaching R.10 Health Protection (Coronavirus, Restrictions) (England) Regulations (No4) 2020 [hereafter "the Regulations"] which states (emphasis added)

> (1) No person may **hold, or be involved in the holding of, a relevant gathering**.
> (2) For the purposes of paragraph (1) a person **who only participates in a gathering by attending it is not to be taken as being involved in the holding of the gathering**.
> (5) A gathering falls within this paragraph if (not falling within paragraph (4)) it—
> (a) consists of more than 30 persons,
> (b) takes place—
> i. in a private dwelling,
> ii. in a vessel (other than a government vessel, a vessel used for public transport or a houseboat), or
> iii. on land which satisfies the condition in paragraph (7),

(c) is not a gathering in relation to which any of the exceptions set out in regulation 11, so far as capable of applying to the gathering, **or the exception in paragraph (6),** applies.

(6) This paragraph applies if, in the case of a gathering described in paragraph (5)(b)(ii) or (iii), the person holding the gathering **or, if they are not the person responsible for organising that gathering, the gathering organiser**—

(a) is a business, a charitable, benevolent or philanthropic institution, a public body or **a political body**, and

(b) has taken the required **precautions (see regulation 14**).

(7) Land satisfies the condition in this paragraph if it is **a public outdoor place** which is not—

(a) operated by a business, a charitable, benevolent or philanthropic institution, or

(b) part of premises used for the operation of a business, a charitable, benevolent or philanthropic institution, or a public body.

8. It is accepted that the Cornwall Freedom Rally was a gathering capable of falling within (5) because it consisted of more than 30 persons and took place in a public outdoor place. However, it is submitted that this is a case where (6) applies because the gathering organiser is a political body and has taken the required precautions set out in Regulation 14.

<u>Is the gathering organiser a political body under (6)?</u>

9. R.10(6) provides for political bodies. R.2 states that a "political body" means—

(a) a political party registered under Part 2 of the Political Parties, Elections and Referendums Act 2000(9), or

(b) **a political campaigning organisation** within the meaning of regulation 2 of the Health and Social Care (Financial Assistance) Regulations 2009(10);

10. Regulation 2 of the Health and Social Care (Financial Assistance) Regulations 2009(10) states:

> "political campaigning organisation" **means any person carrying on**, or proposing to carry on activities—
>
> to promote, **or oppose, changes in any law applicable in the United Kingdom** or elsewhere, or any policy of a governmental or public authority (unless such activities are incidental to other activities carried on by that person)

11. It is clear that the gathering organiser constituted a political body for the purposes of r.10(6).

Were the requirements in Regulation 14 followed?

12. R.14 provides that

> (1) The gathering organiser or (as the case may be) the manager in relation to a gathering takes the required precautions for the purposes of this Part by meeting both of the following requirements.
>
> (2) The first requirement is that the organiser or manager **has carried out a risk assessment** that would satisfy the requirements of Regulation 3 of the Management of Health and Safety at Work Regulations 1999(34) (whether or not the organiser or manager is subject to those Regulations).
>
> (3) The second requirement is that the organiser or manager **has taken all reasonable measures to limit the risk of transmission of the coronavirus**, taking into account—
>
> (a) the risk assessment carried out under paragraph (2), and
>
> (b) **any guidance issued by the government which is relevant to the gathering**.

13. Considering the first limb of the requirements, it is submitted that a risk assessment was carried out by the organiser and that such assessment would satisfy the requirements as set

out above and annexed to this Skeleton Argument. In short, they do not require any assessment to be committed to writing.

14. It is for the Crown to prove their case, namely that the defendants were involved in holding a relevant gathering. To prove that case, they must prove the gathering was a relevant gathering. In finding a gathering to be a relevant gathering under r.10(5) the Crown must be satisfied that r.10(6) does not apply and if it does, that such a risk assessment has not been carried out by the organiser.

15. In reference to the second limb of the requirements, all reasonable measures were taken to limit the risk of transmission of coronavirus, including but not limited to:
    a. The relatively small numbers present at the protest
    b. That it took place in the open air;
    c. In weather conditions described by police as "exceptionally poor, high winds and heavy rain";
    d. The distance between the protestors
    e. Masks are not mandated to be worn outdoors;
    f. The government allowed the Remembrance Sunday gatherings to go ahead the weekend before.

16. In summary, the defendants admit attendance at the Freedom Rally but attendance is not sufficient to prove they were holding the gathering. In any event, the gathering is not a relevant gathering for the purposes of r.10(1) because r.10(6) applies, and it is for the Crown to prove that it does not.

Submission 2

17. It is clear from r.10(2) that merely attending the gathering is not to be taken as being involved in holding the gathering. The defendants spoke on stage with a loudhailer, as did many other attendees.

18. It is for the Crown to prove that the defendants were *holding* the event.

Submission 3

19. If the Court is satisfied beyond reasonable doubt that the defendants were holding or involved in holding the gathering, then the Court must next consider whether the defendants had a reasonable excuse.

20. R.10 is to be read in conjunction with r.20:

> A person commits an offence if, **without reasonable excuse**, the person—
>
> contravenes a restriction or requirement imposed under regulation 5, 8, 9, 10, 15, 16 or 18,

21. R.11 sets out the 14 exemptions to the gatherings and political protests are not named as an exemption.

22. However, it is submitted that the Regulations must be read in conjunction with Article 11 of the Human Rights Act 1998; everyone has the right to freedom of peaceful assembly and to freedom of association with others.

23. It is clear from the Judgment in *DPP v Ziegler [2019] EWHC 71* that Court must undertake a factual inquiry when determining whether Convention Rights can be embraced by domestic laws. The High Court gave clear guidance on how to navigate the relationship between the HRA 1998 and other legislation (Paragraphs 59-65 [emphasis added]):

> 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 judgement, 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 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 para. (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 subquestions 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 enquiry.

24. In response to the questions outlined in Paragraph 63, it is submitted that the defendants were exercising their rights under Article 11, that there was an interference by a public authority with that right when they were arrested, that interference is prescribed by law by way of the Regulations, the interference is in pursuit of public safety and that it is not necessary in a democratic society.

25. In considering the last question, the sub-questions in Paragraph 64 are relevant; the defendants submit that the aim is not sufficiently important to interfere with a fundamental right given how low the COVID-19 cases were in Cornwall at the time, there were less restrictive alternatives available such as asking protestors to form two smaller groups and protest separately, and there was not a fair balance between the rights of the individuals and the general interests of the community for the reasons outlined in Paragraph 15 of this Skeleton Argument.

26. The matter of whether the Coronavirus Regulations could be incompatible with Article 11 was further explored in *R (on the application of Dolan and others) v Secretary of State for Health and Social Care and another) [2020] EWCA Civ 1605,* where the Court of Appeal held that

In our view, the regulations cannot be regarded as incompatible with art 11 given the express possibility of an exception where there was a reasonable excuse.

27. It follows, therefore, that exercising one's Article 11 right must be capable of providing a reasonable excuse for the purposes of the Regulations, because if they were not capable of constituting a reasonable excuse, then the Regulations would be incompatible with the Convention Rights.

CONCLUSION

28. It is for the Crown to prove their case beyond reasonable doubt; the Crown must prove that the defendants were involved in holding the gathering, that the gathering was a relevant gathering and so r.6 does not apply – and if it does, the requirements were not complied with – and if they did contravene r.10, that the defendants did not have a reasonable excuse for doing so.

29. The defendants maintain that their Article 11 rights remain paramount, and afford them a reasonable excuse such that they have not breached the Regulations.

Simranjit Kamal
Albion Chambers
13.7.21

STATUTORY INSTRUMENTS

2020 No. 1200

The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020

PART 3

Restrictions on gatherings

Organisation or facilitation of gatherings

10.—(1) No person may hold, or be involved in the holding of, a relevant gathering.

(2) For the purposes of paragraph (1) a person who only participates in a gathering by attending it is not to be taken as being involved in the holding of the gathering.

(3) A gathering is a "relevant gathering" for the purposes of this regulation if it falls within paragraph (4) or (5).

(4) A gathering falls within this paragraph if it—

(a) consists of more than 30 persons,

(b) takes place indoors, and

(c) would be a gathering of the kind mentioned in section 63(1) of the Criminal Justice and Public Order Act 1994(**1**) (powers to remove persons attending or preparing for a rave) if it took place in the open air.

(5) A gathering falls within this paragraph if (not falling within paragraph (4)) it—

(a) consists of more than 30 persons,

(b) takes place—

(i) in a private dwelling,

(ii) on a vessel (other than a government vessel, a vessel used for public transport or a houseboat), or

(iii) on land which satisfies the condition in paragraph (7),

(c) is not a gathering in relation to which any of the exceptions set out in regulation 11, so far as capable of applying to the gathering, or the exception in paragraph (6), applies.

(6) This paragraph applies if, in the case of a gathering described in paragraph (5)(b)(ii) or (iii), the person holding the gathering or, if they are not the person responsible for organising that gathering, the gathering organiser—

(a) is a business, a charitable, benevolent or philanthropic institution, a public body or a political body, and

(b) has taken the required precautions (see regulation 14).

(7) Land satisfies the condition in this paragraph if it is a public outdoor place which is not—

(**1**) 1994 c. 33. Section 63(1) was amended by section 58(2) of the Anti-social Behaviour Act 2003 (c. 38).

(a) operated by a business, a charitable, benevolent or philanthropic institution, or

(b) part of premises used for the operation of a business, a charitable, benevolent or philanthropic institution, or a public body.

STATUTORY INSTRUMENTS

2020 No. 1200

The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020

PART 3

Restrictions on gatherings

Exceptions in relation to gatherings

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

Exception 1: same or linked households

(2) Exception 1 is that all the people in the gathering—

(a) are members of the same household, or

(b) are members of two households which are linked households in relation to each other (see regulation 12).

Exception 2: gatherings necessary for certain purposes

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

(a) for work purposes or for the provision of voluntary or charitable services;

(b) for the purposes of education or training;

(c) to provide emergency assistance;

(d) to enable one or more persons in the gathering to avoid injury or illness or to escape a risk of harm;

(e) to provide care or assistance to a vulnerable person, including relevant personal care within the meaning of paragraph 7(3B) of Schedule 4 to the Safeguarding Vulnerable Groups Act 2006(**1**);

(f) to facilitate a house move.

Exception 3: legal obligations and proceedings

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

Exception 4: criminal justice accommodation

(5) Exception 4 is that the gathering takes place in criminal justice accommodation.

Exception 5: support groups

(6) Exception 5 is that—

(**1**) 2006 c. 47.

(a) the gathering—

(i) is of a support group,

(ii) consists of no more than 15 persons, and

(iii) takes place at premises other than a private dwelling, and

(b) it is reasonably necessary for members of the group to be physically present at the gathering.

(7) In determining whether the limit in paragraph (6)(a)(ii) is complied with, no account is to be taken of any child who is below the age of five.

(8) For the purposes of paragraph (6), "support group" means a group or one to one support which is organised by a business, a charitable, benevolent or philanthropic institution or a public body to provide mutual aid, therapy or any other form of support to its members or those who attend its meetings, for example those providing support—

(a) to victims of crime (including domestic abuse);

(b) to those with, or recovering from, addictions (including alcohol, narcotics or other substance addictions) or addictive patterns of behaviour;

(c) to new parents;

(d) to those with, or caring for persons with, any long-term illness or terminal condition or who are vulnerable;

(e) to those facing issues related to their sexuality or identity including those living as lesbian, gay, bisexual or transgender;

(f) to those who have suffered bereavement;

(g) to vulnerable young people.

Exception 6: respite care

(9) Exception 6 is that the gathering is reasonably necessary for the purposes of—

(a) respite care being provided for a vulnerable person or a person with a disability, or

(b) a short break being provided in respect of a looked after child (within the meaning given in section 22 of the Children Act 1989).

Exception 7: births and visiting persons receiving treatment etc

(10) Exception 7 is that the person concerned ("P") is—

(a) attending a person giving birth ("M") at M's request, or

(b) visiting a person ("V") receiving treatment in a hospital or staying in a hospice or care home, or accompanying V to a medical appointment and P is—

(i) a member of V's household,

(ii) a close family member of V, or

(iii) a friend of V.

Exception 8: marriages and civil partnerships etc

(11) Exception 8 is that—

(a) the gathering is for the purposes of—

(i) the solemnisation of a marriage in accordance with the Marriage (Registrar General's Licence) Act 1970(**2**);

(**2**) 1970 c. 34.

(ii) the solemnisation of a marriage by special licence under the Marriage Act 1949(**3**), where at least one of the parties to the marriage is seriously ill and not expected to recover;

(iii) the formation of a civil partnership under the special procedure provided for in Chapter 1 of Part 2 of the Civil Partnership Act 2004(**4**);

(iv) the conversion of a civil partnership to a marriage under the special procedure provided for in regulation 9 of the Marriage of Same Sex Couples (Conversion of Civil Partnership) Regulations 2014(**5**), or

(v) an alternative wedding ceremony, where one of the parties to the marriage is seriously ill and not expected to recover, and for these purposes, "alterative wedding ceremony" has the meaning given in regulation 6(11),

(b) the gathering consists of no more than 6 people,

(c) the gathering takes place—

(i) at a private dwelling,

(ii) at premises which are operated by a business, a charitable, benevolent or philanthropic institution or a public body,

(iii) at premises which are part of premises used for the operation of a business, a charitable, benevolent or philanthropic institution or a public body, or

(iv) in a public outdoor place not falling within paragraph (ii) or (iii), and

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

Exception 9: visiting a dying person

(12) Exception 9 is that the person concerned ("P") is visiting a person whom P reasonably believes is dying ("D"), and P is—

(a) a member of D's household,

(b) a close family member of D, or

(c) a friend of D.

Exception 10: funerals

(13) Exception 10 is that—

(a) the gathering is for the purposes of a funeral,

(b) the gathering consists of no more than 30 persons,

(c) the gathering takes place at premises, other than a private dwelling, which—

(i) are operated by a business, a charitable, benevolent or philanthropic institution or a public body, or

(ii) are part of premises used for the operation of a business, a charitable, benevolent or philanthropic institution or a public body, and

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

Exception 11: commemorative event following a person's death

(**3**) 1949 c. 76.
(**4**) 2004 c. 33.
(**5**) S.I. 2014/3181, as amended by S.I. 2016/911.

(14) Exception 11 is that—

(a) the gathering is for the purposes of a commemorative event to celebrate the life of a person who has died (for example, scattering ashes or a stone setting ceremony),

(b) the gathering consists of no more than 15 persons,

(c) the gathering takes place at premises other than a private dwelling, and

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

Exception 12: elite sports

(15) Exception 12 is that—

(a) the person concerned is an elite sportsperson, the coach of an elite sportsperson or (in the case of an elite sportsperson who is a child) the parent of an elite sportsperson, and

(b) the gathering is necessary for training or competition.

Exception 13: children

(16) Exception 13 is that the gathering is reasonably necessary—

(a) for the purposes of arrangements for access to, and contact between, parents and a child where the child does not live in the same household as their parents or one of their parents;

(b) for the purposes of arrangements for contact between siblings where they do not live in the same household and one or more of them is—

(i) a child looked after by a local authority, within the meaning of section 22 of the Children Act 1989(**6**), or

(ii) a relevant child, within the meaning of section 23A(**7**) of that Act;

(c) for the purposes of arrangements for prospective adopters (including their household) to meet a child or children who may be placed with the prospective adopters as provided for by an adoption placement plan drawn up in accordance with the Adoption Agencies Regulations 2005(**8**) (see regulation 35(2) of those Regulations);

(d) subject to paragraph (17), for the purposes of—

(i) childcare provided by a person registered under Part 3 of the Childcare Act 2006(**9**), or

(ii) supervised activities for children;

(e) for the purposes of informal childcare, for children aged 13 or under, provided by a member of a household to a member of their linked childcare household (see regulation 13).

(17) Paragraph (16)(d) only applies where the childcare is reasonably necessary to enable the parent, or the person who has parental responsibility for, or care of, the child in question, to work, to search for work or to undertake training or education.

Exception 14: Remembrance Sunday and Armistice Day

(18) Exception 14 is that—

(a) the gathering takes place—

(**6**) 1989 c. 41. Section 22 was amended by the Local Government Act 2000 (c. 22), section 107 and Schedule 5, paragraph 19; the Children (Leaving Care) Act 2000 (c. 35), section 2; the Adoption and Children Act 2002 (c. 38), section 116; the Children Act 2004 (c. 31), section 52; the Children and Young Persons Act 2008 (c. 23), section 44; the Children and Families Act 2014 (c. 6), section 99; and S.I. 2016/413.
(**7**) Section 23A was inserted by the Children (Leaving Care) Act 2000 (c. 35).
(**8**) S.I. 2005/389.
(**9**) 2006 c. 21.

(i) outdoors in a place which is not a private dwelling to commemorate Remembrance Sunday, or

(ii) in Westminster Abbey on 11th November 2020 to commemorate Armistice Day and the centenary of the burial of the Unknown Soldier;

(b) the persons attending the gathering are limited to—

(i) persons there as part of their work,

(ii) persons providing voluntary services in connection with the event,

(iii) members of the armed forces,

(iv) veterans of the armed forces or their representatives or carers, and

(v) spectators who participate in the gathering alone or only with members of their household, linked household or their linked childcare household, and

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

STATUTORY INSTRUMENTS

2020 No. 1200

The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020

PART 3

Restrictions on gatherings

The required precautions

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

(2) The first requirement is that the organiser or manager has carried out a risk assessment that would satisfy the requirements of regulation 3 of the Management of Health and Safety at Work Regulations 1999(**1**) (whether or not the organiser or manager is subject to those Regulations).

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

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

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

(**1**) S.I. 1999/3242, as amended by S.I. 2005/1541, 2015/21 and 2015/1637.

STATUTORY INSTRUMENTS

2020 No. 1200

The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020

PART 5

Enforcement

Offences and penalties

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

(a) contravenes a restriction or requirement imposed under regulation 5, 8, 9, 10, 15, 16 or 18,

(b) contravenes a requirement imposed, or a direction given, under regulation 19,

(c) fails to comply with a reasonable instruction or a prohibition notice given by a relevant person under regulation 19, or

(d) obstructs any person carrying out a function under these Regulations (including any person who is a relevant person for the purposes of regulation 19).

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

(3) If an offence under this regulation committed by a body corporate is proved—

(a) to have been committed with the consent or connivance of an officer of the body corporate, or

(b) to be attributable to any neglect on the part of such an officer,

the officer (as well as the body corporate) is guilty of the offence and liable to be prosecuted, proceeded against and punished accordingly.

(4) In paragraph (3), "officer", in relation to a body corporate, means a director, manager, secretary or other similar officer of the body corporate.

(5) Section 24 of the Police and Criminal Evidence Act 1984(**1**) applies in relation to an offence under this regulation as if the reasons in subsection (5) of that section included—

(a) to maintain public health;

(b) to maintain public order.

(**1**) 1984 c. 60. Section 24 was substituted by s. 110(1) of the Serious Organised Crime and Police Act 2005 (c. 15).

STATUTORY INSTRUMENTS

2009 No. 649

The Health and Social Care (Financial Assistance) Regulations 2009

Interpretation

2. In these Regulations—

"the 2008 Act" means the Health and Social Care Act 2008;

"charity" has the meaning given in section 1 of the Charities Act 2006(**1**);

"community interest company" means a company as referred to in section 26 of the Companies (Audit, Investigations and Community Enterprise) Act 2004(**2**);

"constitution" means—

(a) in the case of a company, the company's memorandum and articles of association, and

(b) in the case of any other body, a written instrument which sets out the purpose, objectives, proposed activities and provisions for the governance of the body, including any provisions relating to the membership of the body and the distribution of profits and assets;

"distributable profits" means—

(a) in relation to a company, the company's profits available for distribution, within the meaning of section 830 of the Companies Act 2006(**3**),

(b) in relation to any other body, its accumulated, realised profits, so far as not previously utilised by distribution, less its accumulated, realised losses, so far as not previously written off;

"financial year" means the 12 month period that a body uses for accounting purposes;

"governmental authority" includes—

(a) any national, regional or local government in the United Kingdom or elsewhere, including any organ or agency of any such government,

(b) the European Community, or any of its institutions or agencies, and

(c) any organisation which is able to make rules or adopt decisions which are legally binding on any governmental authority falling within paragraph (a) or (b);

"political party" includes any person standing, or proposing to stand, as a candidate at any election, and any person holding public office following election to that office;

"political campaigning organisation" means any person carrying on, or proposing to carry on activities—

(a) to promote, or oppose, changes in any law applicable in the United Kingdom or elsewhere, or any policy of a governmental or public authority (unless such activities are incidental to other activities carried on by that person), or

(**1**) 2006 c.50.
(**2**) 2004 c.27.
(**3**) 2006 c.46.

(b) which could reasonably be regarded as intended to affect public support for a political party, or to influence voters in relation to any election or referendum (unless such activities are incidental to other activities carried on by that person);

"public authority" includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature;

"realised losses" and "realised profits" means the losses or profits of the business carried on by the body as fall to be treated as realised in accordance with generally accepted accounting practice;

"referendum" includes any national or regional referendum or other poll held in pursuance of any provisions made by or under the law of any state on one or more questions or propositions specified in or in accordance with any such provision;

"remuneration committee" means a body of persons to which a company or other body has delegated the function of setting remuneration policies;

"remuneration policies" means policies as to the remuneration of directors or other senior managers of a company or other body;

"residual assets" means, in relation to the dissolution or winding up of a body, the assets of the body which remain after satisfaction of the body's liabilities.

STATUTORY INSTRUMENTS

1999 No. 3242

HEALTH AND SAFETY

The Management of Health and Safety at Work Regulations 1999

Made - - - -	*3rd December 1999*
Laid before Parliament	*8th December 1999*
Coming into force - -	*29th December 1999*

The Secretary of State, being a Minister designated(**1**) for the purposes of section 2(2) of the European Communities Act 1972(**2**) in relation to measures relating to employers' obligations in respect of the health and safety of workers and in relation to measures relating to the minimum health and safety requirements for the workplace that relate to fire safety and in exercise of the powers conferred on him by the said section 2 and by sections 15(1), (2), (3)(a), (5), and (9), 47(2), 52(2), and (3), 80(1) and 82(3)(a) of and paragraphs 6(1), 7, 8(1), 10, 14, 15, and 16 of Schedule 3 to, the Health and Safety at Work etc. Act 1974(**3**) ("the 1974 Act") and of all other powers enabling him in that behalf—

(a) for the purpose of giving effect without modifications to proposals submitted to him by the Health and Safety Commission under section 11(2)(d) of the 1974 Act after the carrying out by the Commission of consultations in accordance with section 50(3) of that Act; and

(b) it appearing to him that the modifications to the Regulations marked with an asterisk in Schedule 2 are expedient and that it also appearing to him not to be appropriate to consult bodies in respect of such modifications in accordance with section 80(4) of the 1974 Act,

hereby makes the following Regulations:

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Management of Health and Safety at Work Regulations 1999 and shall come into force on 29th December 1999.

(2) In these Regulations—

"the 1996 Act" means the Employment Rights Act 1996(**4**);

(**1**) S.I. 1992/1711 and S.I. 1999/2027.
(**2**) 1972. c. 68; the enabling powers conferred by section 2(2) were extended by virtue of section 1 of the European Economic Area Act 1993 (c. 51).
(**3**) 1974 c. 37; sections 15 and 50 were amended by the Employment Protection Act 1975 (c. 71), Schedule 15, paragraphs 6 and 16 respectively.
(**4**) 1996 c. 18.

"the assessment" means, in the case of an employer or self-employed person, the assessment made or changed by him in accordance with regulation 3;

"child"—

(a) as respects England and Wales, means a person who is not over compulsory school age, construed in accordance with section 8 of the Education Act 1996(**5**); and

(b) as respects Scotland, means a person who is not over school age, construed in accordance with section 31 of the Education (Scotland) Act 1980(**6**);

"employment business" means a business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) which supplies persons (other than seafarers) who are employed in it to work for and under the control of other persons in any capacity;

"fixed-term contract of employment" means a contract of employment for a specific term which is fixed in advance or which can be ascertained in advance by reference to some relevant circumstance;

"given birth" means delivered a living child or, after twenty-four weeks of pregnancy, a stillborn child;

"new or expectant mother" means an employee who is pregnant; who has given birth within the previous six months; or who is breastfeeding;

"the preventive and protective measures" means the measures which have been identified by the employer or by the self-employed person in consequence of the assessment as the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions and by Part II of the Fire Precautions (Workplace) Regulations 1997(**7**);

"young person" means any person who has not attained the age of eighteen.

(3) Any reference in these Regulations to—

(a) a numbered regulation or Schedule is a reference to the regulation or Schedule in these Regulations so numbered; or

(b) a numbered paragraph is a reference to the paragraph so numbered in the regulation in which the reference appears.

Disapplication of these Regulations

2.—(1) These Regulations shall not apply to or in relation to the master or crew of a sea-going ship or to the employer of such persons in respect of the normal ship-board activities of a ship's crew under the direction of the master.

(2) Regulations 3(4), (5), 10(2) and 19 shall not apply to occasional work or short-term work involving—

(a) domestic service in a private household; or

(b) work regulated as not being harmful, damaging or dangerous to young people in a family undertaking.

Risk assessment

3.—(1) Every employer shall make a suitable and sufficient assessment of—

(**5**) 1996 c. 56.
(**6**) 1980 c. 44.
(**7**) S.I. 1997/1840; amended by S.I. 1999/1877.

(a) the risks to the health and safety of his employees to which they are exposed whilst they are at work; and

(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,

for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions and by Part II of the Fire Precautions (Workplace) Regulations 1997.

(2) Every self-employed person shall make a suitable and sufficient assessment of—

(a) the risks to his own health and safety to which he is exposed whilst he is at work; and

(b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,

for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions.

(3) Any assessment such as is referred to in paragraph (1) or (2) shall be reviewed by the employer or self-employed person who made it if—

(a) there is reason to suspect that it is no longer valid; or

(b) there has been a significant change in the matters to which it relates; and where as a result of any such review changes to an assessment are required, the employer or self-employed person concerned shall make them.

(4) An employer shall not employ a young person unless he has, in relation to risks to the health and safety of young persons, made or reviewed an assessment in accordance with paragraphs (1) and (5).

(5) In making or reviewing the assessment, an employer who employs or is to employ a young person shall take particular account of—

(a) the inexperience, lack of awareness of risks and immaturity of young persons;

(b) the fitting-out and layout of the workplace and the workstation;

(c) the nature, degree and duration of exposure to physical, biological and chemical agents;

(d) the form, range, and use of work equipment and the way in which it is handled;

(e) the organisation of processes and activities;

(f) the extent of the health and safety training provided or to be provided to young persons; and

(g) risks from agents, processes and work listed in the Annex to Council Directive 94/33/EC(**8**) on the protection of young people at work.

(6) Where the employer employs five or more employees, he shall record—

(a) the significant findings of the assessment; and

(b) any group of his employees identified by it as being especially at risk.

Principles of prevention to be applied

4. Where an employer implements any preventive and protective measures he shall do so on the basis of the principles specified in Schedule 1 to these Regulations.

(**8**) OJ No. L216, 20.8.94, p.12.

Judgments

Director of Public Prosecutions v Ziegler

[2019] EWHC 71 (Admin)

Queen's Bench Division (Divisional Court)

Singh LJ and Farbey J

22 January 2019

Judgment

John McGuinness QC (instructed by **the Crown Prosecution Service**) for the **Appellant**

Henry Blaxland QC, Blinne Ní Ghrálaigh and Owen Greenhall (instructed by **Hodge Jones & Allen** and **Bindmans**) for the **Respondents**

Hearing date: 29 November 2018

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Approved Judgment

Lord Justice Singh and Mrs Justice Farbey:

Introduction

1. This is the judgment of the Court.

2. These are appeals by way of case stated in relation to two separate trials which concerned materially similar facts. The first trial was *R v Ziegler, Cullinan, Frew and Cole* ("*Ziegler and Ors*"), heard between 1 and 2 February 2018; and the second was *R v Cooper, Donaldson, Dorton and Franklin* ("*Cooper and Ors*"), heard between 7 and 8 February 2018, both taking place before DJ (MC) Hamilton ("DJ Hamilton" or "the District Judge") at Stratford Magistrates' Court. All eight defendants (now the Respondents) faced a charge of obstruction of the highway, contrary to section 137 of the Highways Act 1980 (the "1980 Act").

3. All of the charges arose out of protests in which each of the Respondents 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 the case of *Ziegler and Ors*, all four defendants lay in the middle of an approach road 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 "5 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 Centre) was entirely blocked as a consequence.

5. In *Cooper and Ors*, 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 5 stage process).

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 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

8. The primary facts were not in dispute and can be summarised briefly.

9. Shortly before 9.00 am on 5 September 2017, a vehicle containing the Respondents 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 5 stage process to try and persuade them to remove themselves voluntarily from the road. When the defendants failed to respond to the 5 stage process, they were arrested. All were arrested by 9.05 am. 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 am.

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 am, 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 5 stage process had been initiated, the defendants were arrested between 11.58 am and 12.06 pm, although they were not all removed from the bridge until 12.58 pm.

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 of *R v Ammori, Hill, Johnson, Kirkeby and Sinfield* (involving charges of obstruction of the highway contrary to section 137 of the 1980 Act, on the same road as the eight Respondents' 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 of *R v Dixon, Gibbons, Lysaczenko, Pasteur and Reader*, taking place between 14 to 16 February 2018, the prosecution was discontinued for all but Lysaczenko, who was acquitted.

17. The CPS served an application to state a case in *R v Ziegler and Ors* on 26 February 2018, and in *R v Cooper and Ors* on 14 March 2018. DJ Hamilton completed the draft Case Stated relating to all eight Respondents on 15 March 2018, and the Court served this on the Respondents on 20 March 2018.

The judgments of the District Judge

18. As we have mentioned, DJ Hamilton handed down his judgment in *Ziegler and Ors* 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 in light of the defendants' rights under Articles 10 and 11 of the European Convention on Human Rights ("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 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 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 Brian 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 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 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 longstanding 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 and Ors* 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 and Ors* were so similar that he chose to adopt the same reasoning and reached the same conclusions. DJ Hamilton referred to his reasoning in *Ziegler and Ors* at paras. 23-27. Significantly, the "checklist" of factors set out in *Ziegler and Ors* at para. 41 equally applied to these defendants: para. 26. Indeed, in relation to the fourth factor, the defendants in *Cooper and Ors* 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 and Ors*, 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 that:

"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 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 Sch. 1 to the HRA. 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 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."

31. Article 11, so far as material, 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. …"

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 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.

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 Respondents' 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 Respondents' 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) & Another* [1999] 2 AC 240. Mr McGuinness submits that, in the present cases, the express purpose of the Respondents 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 Respondents' 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 Respondents' Convention rights set out in Articles 10(2) and 11(2) respectively. The issue before the court was whether, giving due weight to the Respondents' 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 Respondents 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 Respondents' submissions

40. Mr Henry Blaxland QC made submissions on behalf of the Respondents 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 Respondents 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 Appellant wrongly ignores an established line of authority that makes clear that the 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 Respondents' 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 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 para. (2) of Articles 10 and 11. He has said as such throughout the Case Stated, and his “factors” enumerated therein plainly mirror the criteria identified in case law on the ECHR. The contention that the DJ 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 Appellant's fourth ground as to the reasons given by DJ Hamilton in his judgments is misplaced and demonstrates a failure to appreciate that he was required to undertake a balancing exercise between the different interests in the case. He was correct to consider that the Respondents' 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 Respondents' 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 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 Appellant 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 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 Respondents, 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 this judgment, after we have addressed the main appeal, which relates to all of the Respondents.

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 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 disapprove": see *Hashman and Harrup v United Kingdom* (2000) 30 EHRR 241, at para. 28. In that passage the Court cited its earlier judgment in the case of *Steel v United Kingdom* (1999) 28 EHRR 603, at 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 the case of *Kudrevičius v Lithuania* (2016) 62 EHRR 34, at 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 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)

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.

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 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 para. (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 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 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 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.

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* [2006] UKHL 55; [2007] 2 AC 105, at 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 of *Redmond-Bate v Director of Public Prosecutions* 163 JP 789, at p.795.

58. In our judgement 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 judgement, 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 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 para. (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 enquiry.

The pre-HRA caselaw

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 All ER 78 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.80 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 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, 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, at p.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 that:
>
> "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 DPP* [2000] Crim LR 301, at 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 and Agu* provides a good example of that."

73. In that passage, Rose LJ recognised, as the citation of *Hirst and Agu* 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.

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.

76. We would respectfully suggest that even the decision of the House of Lords in *DPP 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, as inserted by section 70 of the Criminal Justice and Public Order Act 1994, which prohibited the 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 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 surveyed the caselaw from the 19th century, including *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 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 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 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 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."

80. In our judgement, there is no conflict between what we say in the present case and what Lord Irvine 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 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 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 restriction under para. (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 caselaw upon it at that time.

The post-HRA caselaw

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 (QB), at para. 24, Gray J stated that:

"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 DPP* [2015] EWHC 3296 (Admin); [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.

86. However, that is not the contention advanced on behalf of the Respondents 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 the person is lawfully exercising the Convention rights in Articles 10 and 11, they are 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 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 POA 1986 offences, the position has been clear for some time. *Norwood's* case and *Hammond's* case 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's* case. It is the point on which the issue in *Abdul's* case 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 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 "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."

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 CPS* [2018] EWHC 1773 (Admin), at para. 20, Hickinbottom LJ said, after citing pre-HRA cases on section 137 such as *Nagy v Weston* and *Hirst and Agu*, 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 para. (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 para. (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.

96. Assistance can also be found in the judgment of the Court of Appeal in *City of London Corporation v Samede* [2012] EWCA Civ 160; [2012] PTSR 1624, at 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 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.

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 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.'

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 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 *Kuznetsov v Russia*, 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."

97. That passage in the judgment of Lord Neuberger MR helpfully sets out that, although the

inquiry under para. (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 Appellant and the Respondents 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 PSC in *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911. At paras. 91-94 of his judgment, Lord Neuberger 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 of 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).

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 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 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 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 appeal."

101. At the hearing before this Court it was suggested by Mr Blaxland on behalf of the Respondents, although only faintly as we understood his submission, that the approach recommended 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 the context of extradition proceedings.

102. A recent example of an extradition case in which *Re B* was applied is to be found in *Love v United States* [2018] EWHC 172 (Admin), in which the Divisional Court comprised Lord Burnett of Maldon CJ and Ouseley J. After citing Lord Neuberger's judgment in *Re B* at para. 24, the Court stated at para. 26:

"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 Celinski case 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 *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 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 and Ors*, 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 Respondents 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 judgement, 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 Respondents' 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 para. (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 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 and Ors* 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 Respondents' Convention rights.

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 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.

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 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” 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 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 insofar 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.

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 and Ors* lasted only about 90-100 minutes and in *Cooper and Ors* 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 Respondents 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 longstanding commitment of the Respondents 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 Respondents, 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 Respondents 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 Respondents, 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 Respondents.

Jurisdiction: the separate ground of appeal raised by the Fifth to Eighth Respondents

119. The charges against the Fifth to Eighth Respondents were dismissed on 8 February 2018. The DPP's application to state a case to the High Court in relation to these Respondents 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 twenty-one day period set down by section 111(2) of the Magistrates' Court Act 1980. As the application to the District Judge was late, he had had no jurisdiction to state a case in relation to these Respondents.

120. Mr McGuinness in his skeleton argument took the position that the application in relation to all the Respondents 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 Respondents. It was therefore not in dispute by the time of the hearing before us that the appeal in relation these Respondents should be dismissed on jurisdictional grounds. Given the importance of the point, it is nevertheless right that we set out our view of the relevant provisions.

121. Section 111(1) of the Magistrates' Court 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 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 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* [2017] EWHC 2869 (Admin); [2018] 1 WLR 1351). The District Judge's indication that time started to run on 20 February was legally irrelevant.

123. In our judgement, 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. Nothing that he said by way of subsequent reasons could change the outcome that the Respondents 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 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 Respondents 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 Respondents 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 Appeals 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 judgement, 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 Respondents we dismiss that appeal.

129. We allow the appeal in relation to the First to Fourth Respondents 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 Respondents: 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 Respondents. 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 Respondents 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 (DPP) v Stratford Magistrates' Court and Ditchfield* [2017] EWHC 1794 (Admin), 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.

134. In the present case it is submitted on behalf of the Appellants 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 Respondents that some of those cases raised separate 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 Respondents.

136. We do not accept those submissions. We prefer the submissions for 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 Respondents 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.

137. Accordingly in the case of the First to Fourth Respondents, convictions will be entered and the cases will be remitted for the purpose of sentencing.

Judgments

R (on the application of Dolan and others) v the Secretary of State for Health and Social Care and another

[2020] EWCA Civ 1605

Court of Appeal, Civil Division

Lord Burnett CJ, King J and Singh LJ

1 December 2020

Judgment

Mr Philip Havers QC and Mr Francis Hoar (instructed by **Wedlake Bell**) for the **Appellant**

Sir James Eadie QC, Ms Zoe Leventhal, Ms Jacqueline Lean and Mr Tom Cross (instructed by the **Government Legal Department**) for the **Respondents**

Hearing dates: 29 & 30 October 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties or their representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be **MONDAY, 1 DECEMBER 2020 at 2 O'clock.**

Lord Burnett of Maldon CJ, King LJ and Singh LJ :

Introduction

1. The appellants challenge regulations made in response to the Covid-19 pandemic on 26 March 2020 and since which introduced what was commonly known as a "lockdown" in England. They submit that the regulations imposed sweeping restrictions on civil liberties which were unprecedented and were unlawful on three grounds. First, the Government had no power under the legislation they used to make the regulations, namely the Public Health (Control of Disease) Act 1984, as amended by the Health and Social Care Act 2008 ("the 1984 Act"). Secondly, the regulations are unlawful applying ordinary public law principles; and thirdly they violated a number of the Convention rights which are guaranteed in domestic law under the Human Rights Act 1998 ("HRA"). Although the regulations were amended on several occasions and have since been repealed, the appellants contend that it remains important that

the legal issues which arise should be authoritatively determined in the public interest.

2. Lewis J refused permission to apply for judicial review on 6 July 2020 having heard oral argument four days earlier. This is an application for permission to appeal his order refusing permission. When considering such an application this Court has wide powers, including the power to grant permission to apply for judicial review (rather than permission to appeal); and, if it grants permission, it may retain the substantive claim for judicial review and determine that claim itself rather than remit the case to the High Court: see CPR 52.8(1), (5) and (6).

Factual Background

3. On 31 December 2019, the World Health Organisation ("WHO") was notified by China of a cluster of unusual pneumonia cases. These cases were later identified as being caused by a novel coronavirus now referred to as Covid-19, although it is technically called "severe acute respiratory syndrome coronavirus 2" or "SARS-CoV-2".

4. On 30 January 2020 the Director General of WHO declared a public health emergency of international concern over the global outbreak of Covid-19. He announced that there had been an outbreak of a previously unknown pathogen. There were by then 98 cases in countries outside China, in Asia, Europe and North America.

5. On 31 January 2020, the United Kingdom reported its first cases of Covid-19.

6. On 16 March 2020 the Government advised the public to avoid non-essential contact with others, to stop all unnecessary travel and to work from home wherever possible.

7. On 18 March 2020 the Government requested that schools should stop providing education to children on school premises. This did not apply to children of those classified as key workers or to vulnerable children.

8. On 23 March 2020 the Prime Minister announced that England was being placed in what became known as the "lockdown". The regulations to give effect to that announcement were made on 26 March 2020. At 13.00 on that date, the Health Protection (Coronavirus, Restrictions) (England) Regulations (SI 2020/350) were made, imposing restrictions on the activities of those living and working in England. They contained a review mechanism and were superseded by the time of the hearing before Lewis J.

9. The regulations were first reviewed on 16 April 2020. They were amended with effect from 22 April 2020 by the Health Protection (Coronavirus, Restrictions) (England) (Amendment) Regulations (SI 2020/447). They were reviewed again on 7 May 2020. On 13 May 2020, the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 2) Regulations (SI 2020/500) came into force. On 24 May 2020, the Government confirmed a request to schools that some groups of school children should begin to attend school again from 1 June 2020. On 1 June 2020, the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 3) Regulations (SI 2020/558) came into force. Then, on 13 June 2020, the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations (SI 2020/588) came into force. On 19 June 2020, it was announced by the Government that the coronavirus alert

level had reduced to level 3 (that the virus was in general circulation) from level 4 (that the rate of infection was increasing exponentially).

10. On 3 July 2020, the Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations (SI 2020/684) were made and came into force on 4 July 2020. These repealed and replaced the earlier regulations, which are the subject of these proceedings.

The parties

11. The first appellant is Mr Simon Dolan, who is a British citizen but lives in Monaco. He is the owner of businesses based in the United Kingdom, including Jota Aviation Limited, which leases planes to airlines. He visits this country to see family and friends. In his evidence he says that, if it had been permitted under the regulations, he would have wished to join in protests against the regulations.

12. The second appellant is Ms Lauren Monks, who works for a company owned by Mr Dolan. She is a British citizen and lives with her 10-year old son. She is a Roman Catholic. Her son attends a Roman Catholic school. From late March until June 2020 her son did not attend school. From 2 June 2020 he attended school for two days a week. Neither Ms Monks nor her son was able to attend mass at church at the relevant time.

13. The third appellant is a pupil at school. He benefits from an anonymity order.

14. The first respondent is the Secretary of State for Health and Social Care ("the Secretary of State"), who made the regulations under challenge in this case. The second respondent is the Secretary of State for Education ("the Education Secretary").

The regulations under challenge

15. The regulations under challenge were first made on 26 March 2020 by the Secretary of State.

16. The preamble to the regulations stated that they were made in response to "the serious and imminent threat to public health which is posed by the incidence and spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) in England". The preamble continued that the Secretary of State considered that the restrictions and requirements imposed by the regulations were "proportionate to what they seek to achieve, which is a public health response to that threat".

17. Regulations 4 and 5 as originally made required certain businesses to close during the emergency period. Businesses such as restaurants, cafes and public houses were prohibited from selling food and drink for consumption on the premises. They were permitted to sell takeaway food and drink. Other businesses and shops were required to close, save for specified exceptions, such as food retailers, pharmacies, banks and petrol stations. The regulations were later amended and, from 15 June 2020, other shops were permitted to open and to sell goods.

18. Regulation 5(5) as originally made provided that a place of worship had to close during the emergency period, save for limited purposes such as funerals. From 13 June 2020, places of worship were permitted to open for private prayer but not for acts of communal worship.

19. Regulation 6(1) as originally made prohibited a person from leaving the place where they were living without reasonable excuse. A non-exhaustive list of reasonable excuses was set out in regulation 6(2), including to obtain basic necessities (sub-para. (a)); to take exercise (sub-para. (b)); to travel for the purposes of work where it was not reasonably possible to work from home (sub-para. (f)); and to fulfil a legal obligation, including attending court (sub-para. (h)). From 1 June 2020, regulation 6 was replaced by a prohibition on a person staying overnight at any place other than where that person lived without reasonable excuse.

20. Regulation 7 in its original form prohibited gatherings in a public place of more than two people unless they came from the same household or for specified purposes such as work. Regulation 7 was amended and, from 1 June 2020, gatherings of more than six people in a public place, or two or more people indoors, were prohibited unless the persons were members of the same household. From 13 June 2020, a new concept of a "linked household" was introduced by regulation 7A, which permitted a household of a single adult to "link" with a second household. Members of the two linked households could gather together at outdoor or indoor places.

21. There were provisions for enforcing the regulations, including a power for specified persons to direct that persons should return to the place where they were living: see regulation 8. Contravention of regulations 4, 5, 7 or 8 was made a criminal offence punishable by a fine or a fixed penalty notice, but it should be noted that regulation 9(1)(a) contained a general provision that it was not a criminal offence if the act was done with "reasonable excuse". Contravention of regulation 6 was also made a criminal offence but, as we have already seen, that contained an exception where there was a reasonable excuse.

22. The regulations as made on 26 March 2020 were to expire at the end of six months. The Secretary of State was required to review the need for the restrictions every 21 days (later amended to every 28 days): see regulation 3. That regulation also required the Secretary of State to terminate any restriction or requirement as soon as he considered that it was no longer necessary to prevent, protect against, control or provide a public health response to the spread of infection. That is indeed what occurred, although later regulations have been made from time to time which are not the subject of the challenge before this Court.

The judgment of Lewis J

23. Lewis J held that the claim for judicial review of the original regulations 6 and 7 was academic and that he would refuse permission to bring a claim for judicial review on the basis that they allegedly involved a breach of articles 5 and 11 of the Convention: para. 32. He rejected the *vires* argument. He considered that ground to be unarguable, on the correct construction of the enabling powers conferred by the 1984 Act: paras 34 to 46. The judge considered that the domestic public law challenges were also unarguable: paras. 47 to 63.

24. The judge granted permission to re-amend the claim to challenge the version of regulation 6 which applied from 1 June 2020 on the ground that it violated article 5 of the Convention. He concluded that the ground was unarguable because there was no deprivation

of liberty for the purposes of that article: paras 67 to 73. He did so having regard to the decision of the Strasbourg Court in *Guzzardi v Italy* (1981) 3 EHRR 333 and the decision of the House of Lords in *Secretary of State for the Home Department v JJ* [2007] UKHL 45; [2008] AC 385.

25. The judge refused permission to advance the ground based on article 8 (private and family life). He considered that it was unarguable that any interference with article 8 rights was disproportionate: paras 74 to 78. In relation to article 9 (freedom of religion), he noted that regulation 5 had been amended on the day after the hearing, 3 July 2020, with effect from 4 July. He considered that the claim may therefore have become academic and proposed to adjourn consideration of this issue. Subsequently, after considering further written submissions from the parties, he refused permission on this ground in an order sealed on 22 July 2020. He also concluded that it was not arguable that there was any disproportionate interference with article 11 rights (freedom of assembly and association).

26. The judge considered the right to peaceful enjoyment of possessions in article 1 of the First Protocol to the Convention ("A1P1"). He concluded, first, that there was no evidence that the regulations had deprived the first appellant or anyone else of any possessions. Secondly, the first appellant had not provided sufficient evidence that the regulations had involved any unlawful interference with his property such as would justify permitting the claim to proceed on this ground. The judge noted that, so far as the airline leasing business was concerned, there was "simply no realistic basis on which it could be said that the regulations have caused the loss or damage to that business". He concluded that it was overwhelmingly more likely that the cause of any economic harm to that business was the restrictions on flights imposed by other countries; or the fact that people were unable or unwilling to fly because of restrictions or fears about the situation in other countries. Accordingly, he refused permission on this ground and an associated application to re-amend the claim: paras 97 to 105.

27. The judge also refused permission in relation to the right to education protected by article 2 of the First Protocol (A2P1): paras. 106-112. He did so on the basis that there was no order made under the Coronavirus Act 2020 to close any school in England. The factual position was that, as at about 18 March 2020, the Government considered that education should not be provided at school premises in England save for the children of key workers and vulnerable children. There was no legal measure made by either of the two respondents requiring those responsible for running schools to close those schools. Regulation 7 specifically exempted educational facilities from the general prohibition on gatherings in a public place. The judge also refused permission to re-amend the grounds in support of this claim.

Grounds of appeal

28. Although the grounds of appeal are formulated in various ways, in substance this is a renewed application for permission to bring the underlying claim for judicial review. On behalf of the appellants Mr Philip Havers QC submits that the judge was wrong to refuse permission to bring the claim for judicial review, because the grounds are properly arguable.

29. At one time the appellants sought permission from this Court to amend the judicial review grounds to permit challenges to limited parts of the regulations that repealed and replaced the regulations under challenge with effect from 4 July 2020; effectively a rolling claim to all and any iterations of the regulations. That application was not pursued.

Procedural issues

Standing

30. The first procedural issue which arises, although it was not the subject of oral submissions at the hearing before us, is the question whether the appellants have standing to bring these proceedings. The test for standing is different in applications for judicial review as compared to a claim under section 7 of the HRA. For the former, the test is whether the applicant has "a sufficient interest in the matter to which the application relates": see section 31(3)(a) of the Senior Courts Act 1981. For the latter, the test is whether the claimant is, or would be, a "victim" of the alleged violation of Convention rights: see section 7(7) of the HRA and article 34 of the Convention, to which it expressly cross-refers. If proceedings under the HRA are brought by way of an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act: see section 7(3).

31. It is well established that the test of "sufficient interest" is broader than that of a "victim", since the latter requires that an individual is personally and directly affected, whereas the former does not. Nevertheless, in the circumstances of the present case, we would not have refused permission to bring this claim for judicial review on the ground that the appellants lack standing.

Time limits

32. The rules provide that an application for judicial review must be filed "promptly" and "in any event not later than three months after the grounds to make the claim first arose": see CPR 54.5(1)(a) and (b).

33. The time limit for a claim under the HRA is normally one year but this is subject to any stricter time limit in relation to the procedure in question (in this case judicial review): see section 7(5)(a) and (b) of the HRA.

34. It is clear from the text of CPR 54.5(1), and is also well established in the authorities, that there is no right to wait for a full three months. The claim form must be filed "promptly"; there may be undue delay even if an application is filed within three months.

35. The judge held that the present claim was not filed with undue delay in view of its complexity and importance (see para. 30 of his judgment) and no attempt has been made by the respondents to upset that conclusion. Nonetheless, we make clear our serious doubts about whether it was in fact made promptly in the circumstances of this case, without relying on them to determine the application before us. Firstly, this was a case that called for very quick action indeed given the fast-moving situation from late March. Secondly, many third parties were potentially affected by the challenge, not least in possible criminal proceedings. Thirdly, the issue of *vires* was one which was the subject of public debate, certainly amongst lawyers, immediately around the time that the regulations were first made in late March. It could have been dealt with very quickly. Fourthly, we bear in mind that one of the arguments that was made before us as to why this Court should grant permission to bring a claim for judicial review even if the case has become academic is that otherwise a claim could never be brought

because the regulations have been changed many times. If anything, that point underlines how important it is for a challenge such as this to be brought very soon after the regulations are made. In our view, this is not a case in which it should have taken almost two months until the claim form was filed, on 21 May 2020.

Is the claim academic and, if so, should it nevertheless be considered in the public interest?

36. The judge held that the claim, as originally brought, was in part academic on the ground that it sought to quash the original regulations of 26 March, which had been significantly amended by the time of the hearing before him. Shortly after the hearing before Lewis J on 2 July 2020, and just before he gave judgment on 6 July, the regulations were repealed and replaced by a different set of regulations with effect from 4 July.

37. Before us Mr Havers submits that the claim was not academic at the time when it was brought, on 21 May. Further, he submits that, although the original remedy sought (a quashing order) could no longer be granted, since the regulations are no longer in force, there would be nothing to prevent this Court from granting a declaration or even simply saying that the regulations were unlawfully made.

38. On behalf of the respondents, Sir James Eadie QC invited us to refuse permission on the ground that the claim is academic. Nevertheless, at the hearing before us, he recognised that there might be a distinction to be drawn between the different grounds on which the claim is brought. He recognised that there was merit in dealing substantively with the *vires* ground. The other grounds, he maintained, should not be entertained, since they would turn on the facts and, in particular, the facts as they were at the time when the regulations were made. He submitted, with force in our view, that this Court should not allow those parts of the claim to proceed in any event, since any decision on those grounds would not lay the foundation for any useful precedent for the future.

39. In our view, the present claim is clearly academic. The regulations under challenge have been repealed. The crucial question is whether, nevertheless, this Court should permit the claim for judicial review to proceed in the public interest and, if so, on what grounds.

40. The principle which governs the exercise of the Court's jurisdiction to hear judicial review cases which have become academic was set out by Lord Slynn of Hadley in *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450, at 456 to 457. There is a discretion to hear disputes which have become academic but the discretion, even in the area of public law, must be exercised with caution; appeals which are academic between the parties should not be heard “unless there is a good reason in the public interest for doing so”. By way of example (but stressing that this was only by way of example) Lord Slynn said:

“When a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.”

41. In our view, the present is such a case but only in relation to Ground 1, that is the *vires* issue. We have come to the conclusion that it would serve the public interest if this Court itself

were to decide that issue now rather than leave it, for example, to be raised potentially by way of defence in criminal proceedings in the Magistrates' Court and no doubt on appeal from there to the higher courts. In *Boddington v British Transport Police* [1999] 2 AC 143 the House of Lords held that a public law argument about the *vires* of an instrument in which a criminal offence is created can be raised by way of defence in criminal proceedings. Furthermore, the question whether the Secretary of State had the *vires* to make regulations of this type continues to be a live issue even though the particular regulations under challenge have been repealed. New regulations continue to be made under the same enabling power.

42. Accordingly, we propose to grant permission to bring this claim for judicial review but only in respect of the *vires* ground. We propose also to deal with that claim in this Court rather than remit it to the High Court for a substantive hearing. We consider that the other aspects of the claim are academic and there is no good reason in the public interest for them to be considered. We will, however, address the merits of those other grounds later in this judgment, since we have had the benefit of full argument about them.

Ground 1

43. Ground 1 is the *vires* issue. It turns on the correct construction of Part 2A of the 1984 Act, as amended.

44. Section 45A is the interpretation provision for Part 2A. It states, at subsection (3), that any reference to “infection” or “contamination” is a reference to infection or contamination which presents or could present significant harm to human health.

45. Section 45C provides:

“45C Health protection regulations: domestic

(1) The appropriate Minister may by regulations make provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales (whether from risks originating there or elsewhere).

(2) The power in subsection (1) may be exercised—

(a) in relation to infection or contamination generally or in relation to particular forms of infection or contamination, and

(b) so as to make provision of a general nature, to make contingent provision or to make specific provision in response to a particular set of circumstances.

(3) Regulations under subsection (1) may in particular include provision—

(a) imposing duties on registered medical practitioners or other persons to record and notify

cases or suspected cases of infection or contamination,

(b) conferring on local authorities or other persons functions in relation to the monitoring of public health risks, and

(c) imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health.

(4) The restrictions or requirements mentioned in subsection (3)(c) include in particular—

(a) a requirement that a child is to be kept away from school,

(b) a prohibition or restriction relating to the holding of an event or gathering,

(c) a restriction or requirement relating to the handling, transport, burial or cremation of dead bodies or the handling, transport or disposal of human remains, and

(d) a special restriction or requirement.

(5) The power in subsection (1) is subject to section 45D.

(6) For the purposes of this Part—

(a) a 'special restriction or requirement' means a restriction or requirement which can be imposed by a justice of the peace by virtue of section 45G(2), 45H(2) or 45I(2), but

(b) a restriction or requirement mentioned in subsection (4)(a), (b) or (c) is not to be regarded as a special restriction or requirement."

46. Section 45D also needs to be set out in full:

"45D Restrictions on power to make regulations under section 45C

(1) Regulations under section 45C may not include provision imposing a restriction or requirement by virtue of subsection (3)(c) of that section unless the appropriate Minister considers, when making the regulations, that the restriction or requirement is proportionate to what is sought to be achieved by imposing it.

(2) Regulations under section 45C may not include provision enabling the imposition of a restriction or requirement by virtue of subsection (3)(c) of that section unless the regulations provide that a decision to impose such a restriction or requirement may only be taken if the person taking it considers, when taking the decision, that the restriction or requirement is

proportionate to what is sought to be achieved by imposing it.

(3) Regulations under section 45C may not include provision imposing a special restriction or requirement mentioned in section 45G(2)(a), (b), (c) or (d).

(4) Regulations under section 45C may not include provision enabling the imposition of a special restriction or requirement unless—

(a) the regulations are made in response to a serious and imminent threat to public health, or

(b) imposition of the restriction or requirement is expressed to be contingent on there being such a threat at the time when it is imposed.

(5) For the purposes of this section—

(a) regulations 'enable the imposition of a restriction or requirement' if the restriction or requirement is imposed by virtue of a decision taken under the regulations by the appropriate Minister, a local authority or other person;

(b) regulations 'impose a restriction or requirement' if the restriction or requirement is imposed without any such decision."

47. Section 45F makes it clear, amongst other things, that "health protection regulations" may create offences: see subsection (2)(b). They may also amend any enactment, for the purpose of giving effect to an international agreement or arrangement: see subsection (3).

48. Section 45G relates to the jurisdiction of a justice of the peace to order health measures in relation to persons. Subsections (1) and (2) provide:

"(1) A justice of the peace may make an order under subsection (2) in relation to a person ('P') if the justice is satisfied that—

(a) P is or may be infected or contaminated,

(b) the infection or contamination is one which presents or could present significant harm to human health,

(c) there is a risk that P might infect or contaminate others, and

(d) it is necessary to make the order in order to remove or reduce that risk.

(2) The order may impose on or in relation to P one or more of the following restrictions or

requirements—

(a) that P submit to medical examination;

(b) that P be removed to a hospital or other suitable establishment;

(c) that P be detained in a hospital or other suitable establishment;

(d) that P be kept in isolation or quarantine;

(e) that P be disinfected or decontaminated;

(f) that P wear protective clothing;

(g) that P provide information or answer questions about P's health or other circumstances;

(h) that P's health be monitored and the results reported;

(i) that P attend training or advice sessions on how to reduce the risk of infecting or contaminating others;

(j) that P be subject to restrictions on where P goes or with whom P has contact;

(k) that P abstain from working or trading."

49. Section 45H confers power on a justice of the peace to make an order in relation to things.

50. Section 45I confers power on a justice of the peace to make an order in relation to premises. This may include an order that the premises be closed: see subsection (2)(a).

51. Section 45J provides that the powers in sections 45G, 45H and 45I include power to make an order in relation to "a group of persons, things or premises": see subsection (1).

52. Section 45P provides that the power to make regulations under Part IIA is exercisable by statutory instrument.

53. Section 45Q provides that an instrument containing regulations under that Part, except one to which subsection (4) applies, is subject to annulment (a) in the case of English regulations, in pursuance of a resolution of either House of Parliament: see subsection (1). Subsection (4) provides that, subject to section 45R, an instrument to which this subsection

applies may not be made unless (a) in the case of English regulations, a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

54. Section 45R provides as follows:

“45R Emergency procedure

(1) This section applies to an instrument to which subsection (4) of section 45Q applies by virtue of subsection (2)(a) or (b) of that section.

(2) The instrument may be made without a draft having been laid and approved as mentioned in subsection (4) of that section if the instrument contains a declaration that the person making it is of the opinion that, by reason of urgency, it is necessary to make the order without a draft being so laid and approved.

(3) After an instrument is made in accordance with subsection (2), it must be laid—

(a) in the case of English regulations, before each House of Parliament; …

(4) Regulations contained in an instrument made in accordance with subsection (2) cease to have effect at the end of the period of 28 days beginning with the day on which the instrument is made unless, during that period, the instrument is approved—

(a) in the case of English regulations, by a resolution of each House of Parliament; …

(5) But if on any day during that period, on proceedings on a motion that (or to the effect that) the instrument be so approved, either House of Parliament … comes to a decision rejecting the instrument, the regulations cease to have effect at the end of that day instead.

(6) In reckoning any such period of 28 days, no account is to be taken—

(a) in the case of English regulations, of any time during which Parliament is prorogued or dissolved or during which both Houses are adjourned for more than 4 days; …

(7) Subsections (4) and (5) do not—

(a) affect anything done in reliance on the regulations before they ceased to have effect, or

(b) prevent the making of new regulations.

(8) In this section 'English regulations' … have the same meaning as in section 45Q.”

55. In the present context, the regulations of 26 March 2020 were certified, in the opinion of the Secretary of State, to be necessary to be made without a draft having been laid before Parliament, in accordance with the emergency procedure in section 45R.

56. According to the preamble to those regulations, the Secretary of State made them in exercise of the powers conferred by sections 45C(1), (3)(c), (4)(d), 45F(2) and 45P of the 1984 Act.

57. At the hearing before us Mr Havers laid stress on the fact that the regulations referred to having been made under section 45C(4)(d). That is a reference to "a special restriction or requirement".

58. Mr Havers also submits that, when one turns to the provisions of sections 45G, 45H and 45I, which deal with special restrictions or requirements, orders made under those sections can only be in respect of either an individual or a group of persons: see section 45J.

59. In our view, that does not mean that the Secretary of State does not have power to make the regulations under challenge. If all that was required by way of a public health response was orders in respect of individuals or groups of persons, no doubt it would suffice to make an application to a justice of the peace. The purpose of the new regime introduced in 2008 was to cater for the possibility of a much greater public health response which might be needed in order to deal with an epidemic.

60. When section 45C(4)(d) refers to a special restriction or requirement, it does not mean that such a requirement may only be imposed by the Secretary of State in circumstances where an order could be made a justice of the peace. If it were confined in that way, there would be no need for a power to be conferred on the Secretary of State. The true construction of these provisions, in our view, is that a special restriction or requirement is a restriction or requirement of the type which could be imposed by a justice of the peace, for example that a person be subject to restrictions on where he or she goes or with whom he or she has contact: see section 45G(2)(j).

61. We also note that Parliament has expressly provided that regulations under section 45C may not include provision imposing a special restriction or requirement of the types mentioned in section 45G(2)(a), (b), (c) or (d). Those are the following specific requirements:

(a) that P submits to medical examination;

(b) that P be removed to a hospital or other suitable establishment;

(c) that P be detained in a hospital or other suitable establishment; and

(d) that P be kept in isolation or quarantine.

This express exclusion suggests that Parliament intended the Secretary of State to be able to impose the other types of restrictions and requirements listed in section 45G(2).

62. Most importantly, in our view, Mr Havers' submission fails to grapple with the fact that the Secretary of State had power to make the regulations under section 45C(1) and (2). The breadth of those provisions is not to be cut down by the more particular provisions of subsections (3) and (4). The words of subsection (1) could not be broader. Furthermore, subsection (3) makes it clear that regulations under subsection (1) "may in particular include" provision of the types then set out in paragraphs (a), (b) and (c): that makes it clear that what follows is not exhaustive. Furthermore, the words of paragraph (c) are themselves broad:

"imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health."

63. Finally, in relation to the statutory language, subsection (4) makes it clear that the restrictions or requirements mentioned in subsection (3)(c) "include in particular" what is then set out in paragraphs (a) through to (d). Again therefore it is abundantly clear that, when Parliament referred to a special restriction or requirement in paragraph (d), that was not a provision which cuts down the generality of the power conferred on the Secretary of State earlier in section 45C.

64. We should mention one other submission of Mr Havers, based on the language of section 45C(4)(a), (b) and (c). He emphasises the use of the singular "a", "an" etc. He accepted, as he had to, that, unless the contrary appears, the singular is taken to include the plural and vice versa: see section 6(c) of the Interpretation Act 1978. Nevertheless, Mr Havers submitted that those references must have been, for example, to keeping children from a specific school and not the population generally from schools in England. That submission founders, as King LJ observed during the hearing before us, on the fact that subsection 3(c) refers to "persons, things or premises" in the plural in any event.

65. We are reinforced in this interpretation of the relevant statutory provisions by the Explanatory Memorandum which accompanied the amendments made in 2008. That makes it clear that this new regime was introduced in order to update legislation which was outdated, dating as it did from 19th century conditions, precisely in order to meet a modern epidemic such as that caused by SARS in the early part of this century. If the power to make regulations were as limited as Mr Havers submits, it would not be effective in achieving that purpose.

66. Mr Havers also relies upon the principle of legality, as set out in, for example, *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, at 131-132 (Lord Hoffmann):

"… The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

As Lord Hoffmann made clear in that passage, it is not only express language which may evince an intention to the contrary. Necessary implication will suffice.

67. Furthermore, as Sir James pointed out before us, it is not sufficient that there may be an interference with fundamental rights; what is required is that such rights would otherwise be "overridden".

68. We also accept the submission by Sir James that, in the present context, the words used by Parliament are not "general or ambiguous". The issue of construction which the *vires* issue raises concerns precisely questions such as whether restrictions on a person's movement or the persons with whom they may associate can be imposed; or whether premises can be ordered to be closed. There can be no doubt, even on Mr Havers' submission, that a justice of the peace has all of those powers. The issue of construction which his argument raises is the relatively narrow one of whether the Secretary of State has power to impose such restrictions or requirements not only in relation to an individual or a group of persons but also in relation to the population generally in England. That issue of construction is not, on proper analysis, touched by the principle of legality in *Simms*.

69. In that context we would also accept the submission made before us by Sir James in reliance on *R (Black) v Secretary of State for Justice* [2017] UKSC 81; [2018] AC 215, at para. 36 (Lady Hale PSC). In that passage Lady Hale set out a number of "simple propositions" about statutory interpretation. They included the following:

"(3) The goal of all statutory interpretation is to discover the intention of the legislation.

(4) That intention is to be gathered from the words used by Parliament, considered in the light of their context and their purpose."

70. She noted that, in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21; [2003] 1 AC 563, at para. 45, Lord Hobhouse of Woodborough had said that: "A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context" (emphasis in original). Lady Hale said that that dictum "must be modified to include the purpose, as well as the context, of the legislation".

71. In the present case, we have reached the conclusion that the purpose of the amendments that were made in 2008 clearly included giving the relevant Minister the ability to make an effective public health response to a widespread epidemic such as the one that SARS might have caused and which Covid-19 has now caused.

72. Finally, we should refer to Mr Havers' submission in reliance on the Civil Contingencies Act 2004 ("the 2004 Act"). Mr Havers submitted that regulations of the kind that were made in this case could have been made under the 2004 Act. Although we did not hear detailed submissions about this, that would appear to be correct. The meaning of an "emergency" in section 19(1)(a) would apply to the present circumstances:

"An event or situation which threatens serious damage to human welfare in the United Kingdom or in a Part or region …"

73. Under section 20(1) of the 2004 Act, Her Majesty may by Order in Council make

emergency regulations if satisfied that the conditions in section 21 are satisfied. Under subsection (2) a senior Minister of the Crown may make emergency regulations if satisfied (a) that the conditions in section 21 are satisfied, and (b) that it would not be possible, without serious delay, to arrange for an Order in Council under subsection (1).

74. One of the conditions in section 21 is that (a) existing legislation cannot be relied upon without the risk of serious delay, (b) it is not possible without the risk of serious delay to ascertain whether the existing legislation can be relied upon, or (c) the existing legislation might be insufficiently effective: see section 21(5) of the 2004 Act.

75. As Sir James submits the 2004 Act is an Act of last resort. The existence of those emergency powers does not detract from the fact that the *vires* to make the regulations under challenge in this case exists under the 1984 Act, as amended in 2008.

76. In any event, as Sir James also submits, it is simply not to the point that regulations might have been made under another Act of Parliament. The critical issue which arises before this Court is whether the 1984 Act, as amended, confers power on the Secretary of State to make the regulations which he did. We have come to the clear conclusion that it does. That conclusion is not affected by the fact that the Secretary of State might have had power to make the regulations under the 2004 Act as well.

77. Mr Havers pointed to various differences in the procedure and timetable for the laying of regulations under the two different Acts: see, for example, section 27 of the 2004 Act, which deals with Parliamentary scrutiny of emergency regulations made under that Act. We do not consider that this detracts from the fundamental point that the Secretary of State may well have had a choice of options and could have acted under the 2004 Act. It does not follow that he was required to do so; nor that he is somehow prevented from using the powers which Parliament has conferred upon him in the 1984 Act, as amended.

78. For those reasons, we have come to the conclusion that, although permission to bring this claim for judicial review should be granted, in view of the public interest in the resolution of this important issue, the correct construction is that the Secretary of State did have power to make the regulations under the 1984 Act, as amended in 2008. We would therefore reject Ground 1.

Ground 2

79. Under Ground 2 Mr Havers renews various arguments which were rejected by the judge based on domestic public law.

80. First, Mr Havers submits that the Secretary of State fettered his discretion by imposing five tests before he would be prepared even to consider the easing of the initial “lockdown” which was imposed on 26 March 2020.

81. We do not accept this submission. In company with the judge we have come to the clear conclusion that setting five tests did not fetter discretion but was an exercise of Governmental policy as to how that discretion would be exercised. The principle against fettering of discretion

does not prevent a public authority from adopting a policy, even a strict policy. What it does do is to prevent it from being "willing to listen to anyone with something new to say": see *British Oxygen Co Ltd v Board of Trade* [1971] AC 610, at 625 (Lord Reid). That is not what the Secretary of State did on the facts of the present case. At all times is has been possible for those who disagree with the Government to make representations to invite it to ease restrictions or to do so earlier than in fact occurred. That was open to Parliamentarians as well as to others in society.

82. The second ground which Mr Havers advances in this context is that the Secretary of State failed to take account of relevant considerations, in particular as set out in the Amended Statement of Facts and Grounds at para. 71. There are five considerations set out there:

"The Government could only make this determination after adequate consideration of (at least) the following: (a) the uncertainty of scientific evidence about the effectiveness of the restrictions; and in particular the unreliability of the evidence of Prof Ferguson and the Imperial College teams (as set out in para 92 below); (b) the effect of the restrictions on public health, including deaths, particularly from untreated or undiscovered cancer and heart disease, mental health and the incidence of domestic violence; (c) the economic effect of the restrictions relative to the economic effect of alternative less restrictive means of limiting its spread; (d) the medium- and long-term consequences of the measures; and (e) whether, in the light of those considerations, less restrictive measures than those adopted would have been a more proportionate means of obtaining the objective of restricting the spread of the coronavirus without causing disproportionate harms."

83. This submission fails for want of an evidential foundation, without needing to travel into the question whether each of the matters identified was a legally relevant factor. The Secretary of State was well aware of all of these matters and, on the evidence before the judge, he was entitled to reach the conclusion that the Secretary of State did have regard to them.

84. The third ground of challenge in this context is irrationality. Mr Havers submits that the regulations, or at least the decision not to repeal them earlier, was arguably irrational because there could have been more targeted measures, for example to protect those in the most vulnerable groups in society. He relies on evidence consisting of data which suggests that, at around 12 May 2020, "only" 253 people under the age of 60 had died in hospital of Covid-19.

85. Mr Havers also submits that it was arguably irrational not to ease the restrictions by the end of April, because at that time there were 3,000 spare beds in the National Health Service.

86. We must bear in mind that the regulations were approved by Parliament using the affirmative resolution procedure, albeit this occurred some weeks after they were made, as they were made in accordance with the emergency procedure in section 45R. Although this does not preclude judicial review of the regulations, it does go to the weight which the courts should give to the judgement of the executive, because it has received the approval of Parliament.

87. Furthermore, this argument takes no account of the fact that the health consequences of the virus are not to be measured only in the number of deaths. It is well known that many people, including those under the age of 60, were hospitalised and many placed in intensive care units, with intrusive treatment. We also bear in mind that, when the regulations were made in March 2020, the state of medical knowledge was uncertain and continues to develop.

For example, what has since become clear is that there can be the phenomenon of "long Covid". The exact long-term consequences remain unclear.

88. Moreover, in our view, the Government was entitled to take into account public opinion. It is apparent that a number of different interests had to be weighed in the balance, not only the effect on public health but also the effect on the economy, the effect on education and so on. In that context the opinion of members of the public, for example schoolteachers, who may have felt reluctance to go back to teaching pupils physically in a school environment before conditions were ready, were perfectly legitimate matters for the Government to weigh in the balance.

89. We also bear in mind that this is an area in which the Secretary of State had to make difficult judgements about medical and scientific issues and did so after taking advice from relevant experts. Although this case does not arise under European Union law, we consider that an analogy can be drawn with what was said by Lord Bingham of Cornhill CJ in *R v Secretary of State for Health, ex parte Eastside Cheese Co* [1999] 3 CMLR 123, at para. 47: "on public health issues which require the evaluation of complex scientific evidence, the national court may and should be slow to interfere with a decision which a responsible decision-maker has reached after consultation with its expert advisers".

90. We find it impossible to accept that a court could possibly intervene in this context by way of judicial review on the ground of irrationality. There were powerfully expressed conflicting views about many of the measures taken by the Government and how various balances should be struck. This was quintessentially a matter of political judgement for the Government, which is accountable to Parliament, and is not suited to determination by the courts.

Ground 3

91. Under Ground 3 Mr Havers submits that the regulations were unlawful because they were incompatible with various Convention rights, contrary to section 6(1) of the HRA.

Article 5

92. Article 5 protects the right to personal liberty. Mr Havers submits that, both as a consequence of the original regulations enacted in late March and as a result of amendments which had been made by the time of the hearing before the judge on 2 July, the position was clear: that everyone had to stay in their own home. Mr Havers submits that this amounted in effect to a curfew or house arrest.

93. The fundamental difficulty with that submission is that there was no deprivation of liberty within the meaning of article 5, in accordance with the criteria set out by the European Court of Human Rights in *Guzzardi v Italy*. In our view, it is a mischaracterisation to refer to what happened under the regulations as amounting in effect to house arrest or even a curfew. No proper analogy can be drawn with the decision of the House of Lords in *JJ*, which concerned control orders imposed on suspected terrorists. The obligation to stay at home in the original version of regulation 6(1) was subject to numerous, express exceptions, which were non-exhaustive, and the overriding exception of having a reasonable excuse.

94. In our view, it is unarguable that what happened under these regulations amounted to a deprivation of liberty. Accordingly, there is no need to bring the situation within any of the express exceptions set out in article 5, for example article 5(1)(e), which refers to the lawful detention of persons for the purpose of the prevention of the spreading of infectious diseases.

Article 8

95. Article 8 guarantees the right to respect for private and family life. It is one of the qualified rights in the Convention. In that context we would reject the submission to the effect that if it is arguable that there has been an interference with a qualified Convention right, permission must be granted, since the onus is on a defendant to show justification for that interference. There is no such general principle. Much will depend on the particular facts. If it is possible for a court to say with confidence, even at the permission stage, that there was unarguably a justification for any interference with a qualified Convention right, it may properly refuse permission.

96. There can be no doubt that the regulations did constitute an interference with article 8 but it is clear that such interference was justified under article 8(2). It was clearly in accordance with law. It pursued a legitimate aim: the protection of health. The interference was unarguably proportionate.

97. In this context, as in the case of the other qualified rights, we consider that a wide margin of judgement must be afforded to the Government and to Parliament. This is on the well-established grounds both of democratic accountability and institutional competence. We bear in mind that the Secretary of State had access to expert advice which was particularly important in the context of a new virus and where scientific knowledge was inevitably developing at a fast pace. The fact that others may disagree with some of those expert views is neither here nor there. The Government was entitled to proceed on the basis of the advice which it was receiving and balance the public health advice with other matters.

Article 9

98. Article 9 guarantees the right to freedom of thought, conscience and religion and, in particular, the right to manifest one's beliefs, for example through worship with others.

99. After the hearing before him the judge refused permission on this ground because amendments made to the regulations with effect from 4 July 2020 had rendered the point academic. In our view, he was right to do so.

100. In any event, we bear in mind that Swift J had already given permission to bring a claim for judicial review in a case in which the regulations are challenged under article 9: *R (Hussain) v Secretary of State for Health and Social Care* [2020] EWHC 1392 (Admin). A substantive hearing is pending in the High Court. In those circumstances we do not consider that it would be appropriate to say any more about the merits of the argument under article 9.

Article 11

101. Article 11 guarantees the right to peaceful assembly and association. On the face of it, regulation 7 as originally enacted in March 2020 might be thought to have taken away this right altogether. Nevertheless, it must always be recalled that regulation 9(1)(a) provided a general defence of "reasonable excuse".

102. In *R (JCWI) v Secretary of State for the Home Department* [2020] EWCA Civ 542; [2020] HLR 30, Hickinbottom LJ summarised the applicable principles. He noted that a distinction must be made between challenges under the HRA to legislation and challenges to the application of that legislation to a particular case. At para. 118, he said that "legislation will not be unjustified (and, so, not unlawful) unless it is incapable of being operated in a proportionate way in all or nearly all cases".

103. The first difficulty with Mr Havers' submissions on article 11 is that he submits that the regulations must necessarily be regarded as being incompatible with article 11 in all, or nearly all, circumstances. It is difficult to see how that can be so when the regulations themselves include the inbuilt exception of "reasonable excuse". That would necessarily focus attention on the particular facts of a given case in the event of an alleged breach. In our view, the regulations cannot be regarded as incompatible with article 11 given the express possibility of an exception where there was a reasonable excuse. It may well be that in the vast majority of cases there will be no reasonable excuse for a breach of regulation 7 as originally enacted. There were powerful public interests which lay behind the enactment of regulation 7, given the gravity of the pandemic in late March.

104. Furthermore, as Sir James submits, the phrase "reasonable excuse" is not materially different from the phrase "lawful excuse", which is used in section 137 of the Highways Act 1980 and which was construed by the Divisional Court in *DPP v Ziegler* [2019] EWHC 71 (Admin); [2020] QB 253 as being capable in principle of embracing the exercise of Convention rights, in particular article 11, depending on the particular facts: see paras. 58 to 65 in the judgment of the Court (Singh LJ and Farbey J). In particular, we would emphasise the way in which the Divisional Court concluded, at para. 65: "This is inherently a fact-specific inquiry".

105. There are also powerful arguments that the restrictions, time limited and subject to review as they were, were in any event proportionate.

106. Finally, Sir James reminds us that the HRA is primary legislation, whereas the regulations are subordinate legislation. If there were any conflict between them, it is the HRA and not the regulations that would have to take priority. It would be possible to resolve any potential conflict by the process of interpretation required by section 3 of the HRA were there an incompatibility with a Convention right: see *Poplar Housing and Regeneration Community Association Ltd* [2001] EWCA Civ 595; [2002] QB 48, at para. 75, in particular at sub-para. (a) (Lord Woolf CJ).

107. We therefore conclude that the ground based on article 11 is unarguable.

Article 1 of the First Protocol

108. A1P1 guarantees the right to peaceful enjoyment of possessions.

109. The judge made findings of fact which were adverse to the first appellant in this regard: paras. 101to 104 (see [26] above). We do not consider that it is arguable that the judge was wrong on the evidence before him.

110. In any event, it is impossible to conceive that there was a disproportionate interference with the right in A1P1. The margin of judgement to be afforded to the executive is particularly wide in this context, because this was a "control of use" case and not a deprivation of property case. Furthermore, the balance to be struck under this A1P1 would have to take account of the well-known measures of financial support which the Government introduced in the exceptional situation created by the pandemic.

111. There is no arguable basis for the contention that there was a breach of A1P1.

Article 2 of the First Protocol

112. Article 2 of the First Protocol guarantees the right to education.

113. The judge made a finding of fact which was adverse to the appellants: paras. 109 to 110 of his judgment (see [27] above). He was entitled to make that finding. The fundamental problem for the appellants' submission is that there was no order by the Education Secretary or Government that schools had to close. Nor was there any order that all education had to cease. The wish of all concerned, including the Education Secretary, was that schoolchildren should receive education by remote means, for example through online instruction.

114. Further and in any event, article 2 of the First Protocol, reflecting a theme which runs throughout the Convention, envisages a fair balance having to be struck between the rights of the individual and the general interests of the community. In the exceptional circumstances of the pandemic, there is no arguable ground on which a court could interfere with the actions of the Government in this respect.

Conclusion

115. For the reasons we have given we have reached the following conclusions:

i) Permission to bring a claim for judicial review is granted but limited to Ground 1 (the *vires* argument).

ii) The substantive claim for judicial review is retained within this Court and not remitted to the High Court.

iii) We dismiss the claim for judicial review on Ground 1. The Secretary of State did have the power to make the regulations under challenge.

iv) We refuse permission to appeal against the decision of Lewis J insofar as he refused permission to bring a claim for judicial review in respect of Ground 2 (the domestic public law arguments) and Ground 3 (the arguments under the HRA). Those grounds are now academic, because the regulations under challenge have been repealed, and, in any event, they are not properly arguable.

Postscript

116. In a number of recent cases this Court has noted that there is "increasing concern about the need for appropriate procedural rigour in judicial review cases": see *R (Spahiu) v Secretary of State for the Home Department: Practice Note* [2018] EWCA Civ 2064; [2019] 1 WLR 1297, at para. 2, where earlier authorities are set out (Coulson LJ). The present case leads us to repeat that concern.

117. Procedural rigour is important not for its own sake. It is important in order for justice to be done. It is important that there must be fairness to all concerned, including the wider public as well as the parties. It is important that everyone should know where they stand, so that, for example, the defendant can properly prepare evidence in a timely fashion.

118. This Court has also deprecated the trend towards what has become known as a "rolling" approach to judicial review, in which fresh decisions, which have arisen after the original challenge and sometimes even after the first instance judgment, are sought to be challenged by way of amendment: see *Spahiu*, paras. 60-63. Although, as Coulson LJ said, at para. 63, "there is no hard and fast rule", he was right to say that it will usually be better for all parties if judicial review proceedings are not treated as "rolling" or "evolving". In our view, that is particularly so in a context like the present, where the regulations have been amended, sometimes very quickly, and where the issues raised by the grounds will often turn on the state of the evidence as it was at a particular time. As we have mentioned, at one time, there was an application to amend the grounds so as to permit a challenge to be made to the regulations that were made on 3 July 2020. Fortunately, we did not have to determine that application, since it was not pursued, but we consider that this is precisely the kind of case in which "rolling" judicial review challenges should not be brought.

119. We have a particular concern in this case about the length and complexity of the grounds of challenge. The Amended Statement of Facts and Grounds runs to 87 pages. This was followed by Supplementary Grounds, which were another 13 pages. It is impossible to see how such statements can be regarded as complying with the requirement in the Administrative Court Judicial Review Guide 2020, at para. 6.3.1.1: that the document "should be as concise as reasonably possible, while setting out the claimant's arguments. The grounds must be stated shortly and numbered in sequence". That Guide was published after the present proceedings were commenced but similar guidance was given in earlier editions of that Guide: see e.g. the 2019 edition, at para. 6.3.4.1. Furthermore, this Court has, on more than one occasion, emphasised the need for a clear and succinct statement of the grounds: see e.g. *R (Talpada) v Secretary of State for the Home Department* [2018] EWCA Civ 841, at para. 68 (Singh LJ).

120. Despite these statements, we are concerned that a culture has developed in the context of judicial review proceedings for there to be excessive prolixity and complexity in what are supposed to be concise grounds for judicial review. As often as not, excessively long documents serve to conceal rather than illuminate the essence of the case being advanced. They make the task of the court more difficult rather than easier and they are wasteful of costs.

It is for these reasons that skeleton arguments are subject to length constraints and so too, for example, the length of printed cases in the Supreme Court.

121. Although the Administrative Court Judicial Review Guide is clear, we consider that the time has come to invite the Civil Procedure Rule Committee to consider whether any amendments to the Rules or Practice Direction governing judicial review claims are called for to contain the problem we have identified.