

28 September 2022

PRESS SUMMARY

Case No: 202201151 B3

ATTORNEY GENERAL'S REFERENCE ON A POINT OF LAW

No. 1 of 2022

(pursuant to section 36 of the Criminal Justice Act 1972)

**THE LORD BURNETT OF MALDON, LORD CHIEF JUSTICE OF ENGLAND
AND WALES, MR JUSTICE HOLGATE AND MR JUSTICE SAINI**

NOTE This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full opinion of the Court [2022] EWCA Crim [] is the only authoritative document and has been handed down at the same time as release of this summary

BACKGROUND TO THE REFERENCE AND JUDGMENT

This is a judgment on a reference in which Her Majesty's Attorney General seeks the opinion of the Court of Appeal (Criminal Division) ("the Court") on three questions of law which arose in the trial in Bristol Crown Court of four defendant protestors for allegations of criminal damage on 7 June 2020 to a statue of the English merchant Edward Colston (1636-1721). The statue had been erected in Bristol to commemorate his philanthropy but it was not in dispute that Edward Colston accumulated his substantial fortune from activities which included the trading of African slaves. The specific questions on the reference and the Court's answers to them are set out below but the main issue concerns the extent to which the European Convention on Human Rights ("the Convention") sanctions the use of violence against property during protest, thereby rendering lawful the causing of damage to property which would otherwise be a crime. The jury acquitted the four defendants who ran a range of defences. The defence with which this judgment is concerned was that the damage done to the statue was lawful because it was a proportionate exercise of the right to protest. At a preliminary hearing, the defendants argued that the prosecution involved a disproportionate interference with their rights under Articles 10 and 11 of the Convention and was an abuse of process. In response, the prosecution argued that the conduct in question was not peaceful and so was not protected by the Convention. The trial Judge rejected the abuse of process argument but did not rule on this prosecution submission. He did however decide that that if there were an interference with Convention rights the jury could consider proportionality.

The Court has concluded that the prosecution was correct in its submission that the conduct fell outside the protection of the Convention. Specifically, the circumstances in which the statue was damaged did not involve peaceful protest. The toppling of the statute was violent. Moreover, the damage to the statue was significant. The proportionality of the conviction could not arise. Debate about the fate of the statue had to be resolved through appropriate legal

channels, irrespective of a view that those channels were thought to have been slow or inefficient, and not by what might be described as a form of self-help.

It is not possible to know whether the jury acquitted on the basis of the Convention arguments or one of the others advanced at trial. This reference has no bearing on the acquittals and is confined to the Convention issue.

The questions on the reference turn on the extent to which the Convention could protect from conviction for criminal damage the use of violence against property in the course of a demonstration and/or causing significant damage to property.

The Convention does not provide any protection for violent/non-peaceful conduct in the course of protest. Neither would it be disproportionate to convict someone of causing significant damage to property or damage to private property. But the Strasbourg jurisprudence does not support the proposition that the protection of the Convention is lost (alternatively prosecution and conviction would always be proportionate for an offence of causing damage) when any damage is inflicted on property during protest, however minor. The cases show that causing damage to State property which is transient or insignificant has not been treated as placing the perpetrator outside the protection of the Convention altogether. The question whether somebody should be prosecuted for criminal damage is a matter for the Crown Prosecution Service (CPS) independently exercising its powers. The CPS makes its decision applying the well-known evidential and public interest test to the question whether to prosecute. It must be sensitive to the Convention rights of protesters and its guidance demonstrates that decisions to prosecute will respect those rights. The common law has always been sensitive to the position of protesters when it comes to both prosecution and sentencing. These features of our system are important because they show prosecutors should avoid prosecutions which are themselves disproportionate in Convention terms and that disproportionate sentences are an unlikely outcome.

THE QUESTIONS AND THE COURT'S ANSWERS

Question 1: Does the offence of criminal damage fall within that category of offences, identified in *James v DPP* [2016] 1 WLR 2118 and *DPP v Cuciurean* [2022] EWHC 736 (Admin), where conviction for the offence is - intrinsically and without the need for a separate consideration of proportionality in individual cases – a justified and proportionate interference with any rights engaged under Articles 9, 10 and 11 of the European Convention on Human Rights ('the Convention')?

The offence of criminal damage does not automatically fall within the category of offences identified whereby proof of the relevant ingredients of the offence is sufficient to justify *any* conviction as a proportionate interference with any rights engaged under Articles 9, 10 and 11, without the need for a fact-specific proportionality assessment in individual cases. However, the circumstances in which such an assessment would be needed are very limited.

Questions 2: If the answer to Q1 is negative and it is necessary to consider human rights issues in individual cases of criminal damage, what principles should judges in the Crown Court apply when determining whether the qualified rights found in Articles 9, 10 and 11 of the Convention are engaged by the potential conviction of defendants purporting to be carrying out an act of protest. Question 3: If those rights are engaged, under what circumstances should any question of proportionality be withdrawn from a jury?

A judge should withdraw an issue from the jury if no reasonable jury properly directed could reach a particular conclusion and the context of these issues. The Convention does not provide protection to those who cause criminal damage during protest which is violent or not peaceful. Articles 9, 10 and 11 are not engaged in those circumstances and no question of proportionality arises. Moreover, prosecution and conviction for causing significant damage to property, even if inflicted in a way which is “peaceful”, could not be disproportionate in Convention terms. Given the nature of cases that are heard in the Crown Court it is inevitable that, for one or both reasons the issue should not be left to the jury. However, it is theoretically possible that cases involving minor or trivial damage to property heard in the Magistrates’ Court (albeit that “significant damage” would be caused a long way below the £5,000 threshold for cases to be tried summarily) may raise a question of the proportionality of conviction. In those limited circumstances, a conviction may not be a proportionate response in the context of protest.