Neutral Citation Number: [2019] EWHC 71 (Admin)

Case No: CO/1789/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2019

Before:

LORD JUSTICE SINGH
and
MRS JUSTICE FARBEY

- -

Between :

DIRECTOR OF PUBLIC PROSECUTIONS	**Appellant**
- and -	
NORA ZIEGLER	**Respondents**
HENRIETTA CULLINAN	
JOANNA FREW	
CHRISTOPHER COLE	
NICHOLAS COOPER	
SAMUEL DONALDSON	
LOUIS DORTON	
TOM FRANKLIN	

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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.

<u>The approach to be taken by an appellate court</u>

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.