Neutral Citation Number: [2023] EWHC 1089 (Admin)

Case No: CO/1597/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 May 2023

Before:

LORD JUSTICE BEAN
and
MR JUSTICE CHAMBERLAIN

- -

Between:

DEBORAH HICKS **Appellant**

– and –

DIRECTOR OF PUBLIC PROSECUTIONS **Respondent**

- -

Merry van Woodenberg (instructed by **Murray Hughman Solicitors**) for the **Appellant**
Richard Posner (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 26 - 27 April 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 9 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR JUSTICE CHAMBERLAIN

MR JUSTICE CHAMBERLAIN:

Introduction

1 On 19 January 2022, District Judge Wattam ("the judge"), sitting at Cheltenham Magistrates' Court, convicted Debbie Hicks of an offence of using threatening or abusive words or behaviour within sight or hearing of a person likely to be caused harassment, alarm or distress, contrary to s. 5 of the Public Order Act 1986 ("the 1986 Act").

2 Ms Hicks invited the judge to pose three questions: first, whether he had erred in finding that the evidence established to the requisite standard that Ms Hicks' words and behaviour were "threatening, abusive or disorderly" within the meaning of section 5 of the 1986 Act, and that she intended them to be such, or was aware of a risk that they would be perceived as such; second, whether he was correct in rejecting Ms Hicks' defence of reasonable excuse under s. 5(3) of the 1986 Act; third, whether he was correct to find that convicting Ms Hicks was a necessary and proportionate interference with her rights under Article 10 of the European Convention on Human Rights ("the ECHR").

3 The judge, while not accepting that these questions necessarily raised points of law, nonetheless invited this court to address them.

The incident giving rise to the charge

4 The charge arose from an incident on 28 December 2020, during one of the lockdowns imposed to contain the transmission of Covid-19.

5 Ms Hicks was concerned about reports in the mainstream media about the effect of Covid-19 on hospitals. She doubted that hospitals were really overflowing with patients. She therefore decided to go to the Gloucester Royal Hospital ("the Hospital") to witness what was happening there, video it on her mobile phone and publicise it on Facebook.

6 Her first visit was on the day before the incident which gave rise to this charge, 27 December 2020, when she took video of the inside of the hospital and streamed it on or uploaded it to Facebook. She wanted to do so again, from different parts of the hospital, to demonstrate that the hospital was not busy. She attended on the afternoon of 28 December 2020.

7 Ms Hicks was in the stairwell of the main block of the Hospital, on the fifth floor, when she came across a small group of health care professionals who worked there. This group included Katie Williams and Sophie Brown. Ms Hicks interacted with Ms Williams and Ms Brown for a short period (no more than one minute, on the judge's finding), after which Ms Williams went to the site office to report that Ms Hicks was present. At that point, Ms Hicks left voluntarily.

The case stated and the agreed summary of the evidence

8 The case stated was originally prepared on 22 April 2022. On 10 October 2022, Sir Ross Cranston, sitting as a judge of this Court, noted that the first question related to the evidential sufficiency of the judge's finding that the appellant's behaviour was

"threatening, abusive or disorderly". The judge had set out some of the evidence in the case stated, but Sir Ross Cranston considered that the court would need a fuller account. This would require the parties to prepare an agreed version of the evidence to assist the judge in his task. The case stated was accordingly returned to the judge with a direction that the parties prepare an agreed summary of the evidence.

9 The agreed summary was duly prepared. Rather than substantively amend the body of the case stated, the judge included one additional paragraph to the effect that the parties had drafted an agreed summary of the evidence, which was appended to the new version of the case stated, dated 28 November 2022. The agreed summary may therefore be treated as forming part of the case stated.

10 Ms Williams' evidence was that the conversation with Ms Hicks lasted for about 30 seconds. Ms Hicks was "hostile, quizzical and offensive", said that she paid their wages through taxes and could film if she wanted. Ms Hicks was "loud and sharp in tone, and it was not a pleasant tone". Ms Williams said: "the hospital is not the correct place to express those views" and "everyone is entitled to an opinion, but to film a closed department is a breach of confidentiality, so I knew I needed to go and seek help. I didn't know if people were outside waiting to attack us." Ms Hicks did not, however, say anything personal to her, touch her or threaten her. Ms Williams said: "coming into contact with someone who says they have the right to film, it was aggressive, so I took myself out of the situation", and "that's what was distressing, that it took my time away from people who needed it".

11 Ms Brown's evidence was that Ms Hicks was "abrupt", "belittling", "not necessarily aggressive or swearing, just sort of inflammatory. She was trying to walk away from us and thought she was better than us really"; she "started asking a lot of questions about my opinions and hospital and the lockdown'; she did not shout or swear; "she said Covid was a hoax and a shambles, which was aggressive and accusative". Ms Hicks held the phone an arm's length from Ms Brown's face, pointed at her face, but she accepted that, given the width of the stairwell, it would not have been possible for Ms Hicks to stand more than a metre and a half away. Ms Brown said: "it was more the disrespect, the violation of my personal space"; "the main thing was that I had seen the video and seen how popular it was and that there were lots of comments. After having the camera in my face, I thought that I might be seen by thousands of people who might be abusive, which was intimidating"; and she confirmed that her distress was caused "partly by the possible repercussions of the video" and partly due to DH's "tone". Ms Hicks did not touch anyone in the group, and did not make any threats or personal comments.

12 Ms Hicks gave evidence that she was a long-standing political campaigner and had formed the view that the Covid-19 pandemic had led to inappropriate restrictions of civil liberties. When she encountered the group on the stairwell, she tried to avoid their attention. When asked what she was doing, she had answered: "Do you not feel the public have a right to know what's going on? We pay taxes for the NHS." She did not want to have this conversation, but she had been unable to get past the group of workers on the stairwell. She had no intention to distress anyone.

The facts found by the judge, as recorded in the case stated

13 The parts of the case stated where the judge recorded his findings of fact were as follows:

> "25… I found that both Ms Williams and Ms Brown gave evidence that was cogent, credible and without exaggeration. Their accounts stood up well to cross examination.
>
> 26. Whilst it is clear that Ms Hicks did not, at first, seek confrontation with these two women on that stairwell, once enquiry was made as to whether she required 'any help' a confrontation did develop. And once engaged with them I have no doubt that both Ms Williams and Ms Brown did feel threatened and abused by Ms Hicks' words and behaviour on the stairwell of these hospital premises that afternoon. That she was aggressive and dismissive of them and attempted to conduct a non-consensual interview with them whilst holding a mobile camera phone towards their faces at arms-length and apparently filming them. Both women were visibly distressed when giving evidence about the contemporaneous impact of Ms Hicks' behaviour upon them. Both told me that they were intimidated by Ms Hicks and were concerned that any film that she was taking with her camera phone was being streamed online and that they might be identified from that footage later.
>
> 27. Both were aware of and had seen the video footage livestreamed by Ms Hicks the previous day. Both told me that in view of their own recent experiences they found that footage and what was said by Ms Hicks in her running commentary distressing. Both told me that they were aware – contemporaneously – of online comments made by others (so called antivaxxers and the like) which demonstrated the strength of feeling about the issue Ms Hicks sought to highlight.
>
> 28. Both women also expressed concern for the confidentiality of patients in that place - at the hospital. Ms Williams was so alarmed that she sought help immediately, reporting what had happened to the site office – 'raising the alarm' as she put it - so that Ms Hicks might be removed from the hospital. Both witnesses described this all to me on oath and, taken together my finding of fact is that Ms Hicks' behaviour clearly did amount to harassment and was threatening and abusive to both Ms Brown and Ms Williams.
>
> 29. I am also sure as to Ms Hicks' subjective state of mind, namely that she was bound to be aware in all of these circumstances, that her behaviour might be threatening and/or abusive to others. Ms Hicks' own case is that her attendance at the hospital was 'undercover'. Clearly she understood that she had no business being at the hospital; that she should not be there. In fact her livestream video commentary demonstrates Ms Hicks making efforts not to be noticed at all. I am also struck by the fact that, despite having the ability to do so, Ms Hicks decided, on reflection, not to live stream the key encounter with the two witnesses on the stairwell. She told me that she went on to delete the video footage that she had taken of the

> women on the stairwell. This suggests to me that she was well aware of the potential deleterious impact of that, had she done it. Ms Brown and Ms Williams were not to know that she was not livestreaming their encounter at the time, of course. Indeed they both told me that they thought that Ms Hicks was doing this. Both women were demonstrably alarmed by Ms Hicks behaviour toward them at their place of work.
>
> 30. At first sight, therefore the prosecution case is made out."

14 Later, the judge summarised his findings of fact in this way:

> "47. At the trial I made the following findings of fact: when approached by Ms Williams a health care professional at the hospital (who was concerned about Ms Hicks' behaviour and recognised her voice from the video livestream the day before) Ms Hicks was confrontational, derogatory, and aggressive in her tone towards Ms Williams and her colleague Ms Brown.
>
> 48. Having initially lied about her purpose for visiting the hospital she told both Ms Williams and Ms Brown that: she could film in the hospital and purported to do so; that she paid taxes and therefore paid the wages of the staff; implied that the Covid pandemic was a hoax; and made derogatory comments about NHS provision in the pandemic."

15 The judge considered the decision of this Court in *Abdul v DPP* [2011] EWHC 247, [2011] HRLR 16. He took the view that the question was whether the defendant's conduct was objectively reasonable, having regard to all the circumstances, including importantly those for which Article 10 itself provides. He noted that Ms Hicks' own description of her conduct was "guerrilla journalism" and asked five questions derived from the judgment of the Supreme Court in *DPP v Ziegler* [2021] UKSC 23, [2022] AC 408.

16 As to Article 10 ECHR, the first question was whether Ms Hicks' behaviour was an exercise of her Article 10 rights. The answer was "Yes". Second, he asked whether there was an interference by a public authority with that right. Again, the answer was that both her arrest and her subsequent prosecution constituted such an interference. The third question was whether the interference was prescribed by law, to which the answer was again in the affirmative: the interference was prescribed by the 1986 Act. Fourth, the judge asked whether the interference pursues a legitimate aim. Again, the answer was that it did: the preservation of public order. Fifth, he asked whether the interference was necessary and proportionate.

17 The judge concluded that "caselaw tells us that Convention rights are capable of being considered within the express words of statute and do not superimpose a separate legal test of proportionality by which a decision to prosecute itself might be challenged". Accordingly, the prosecution did not have to establish, separately from Ms Hicks' guilt of the offence with which she had been charged, the proportionality of the decision to prosecute.

18 The judge found that there were other reasonable ways for Ms Hicks to convey and express her opinions about the pandemic and the authorities' response to it. Her conduct on this occasion was not reasonable and Ms Williams and Ms Brown deserved

"not to be molested (in the ordinary sense of that word) whilst at work, and should be protected by the law". Thus, the prosecution had established that the restriction of Ms Hicks' Article 10 rights was proportionate and Ms Hicks had not made out the defence under s. 5(3) of the 1986 Act.

The law

19 Section 5 of the 1986 Act provides as follows:

> "(1) A person is guilty of an offence if he—
>
> > (a) uses threatening or abusive words or behaviour, or disorderly behaviour, or
> >
> > (b) displays any writing, sign or other visible representation which is threatening or abusive,
>
> within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.
>
> …
>
> (3) It is a defence for the accused to prove—
>
> …
>
> > (c) that his conduct was reasonable."

20 In its original form, the offence could be committed by the use of "threatening, abusive or insulting" words or behaviour, but the word "insulting" was removed by the Crime and Courts Act 2013.

21 Section 6(4) of the 1986 Act provides:

> "A person is guilty of an offence under section 5 only if he intends his words or behaviour, or the writing, sign or other visible representation, to be threatening or abusive, or is aware that it may be threatening or abusive or (as the case may be) he intends his behaviour to be or is aware that it may be disorderly."

22 In *Percy v DPP* [2001] EWHC 1125 (Admin), Hallett J (with whom Kennedy LJ agreed) said this at [25]:

> "….the provisions of section 5 and section 6 of the Public Order Act, as enacted and applied by the courts of this country, contain the necessary balance between the right of freedom of expression and the right of others not to be insulted and distressed. The right to freedom of expression was well established in the United Kingdom before the incorporation of the Convention. Peaceful protest was not outlawed by section 5 of the Public Order Act. Behaviour which is an affront to other people, or is disrespectful or contemptuous of them, is not prohibited: see *Brutus v Cozens* [1973] AC 854. A peaceful protest will only come within the terms of section 5 and

> constitute an offence where the conduct goes beyond legitimate protest and moves into the realms of threatening, abusive or insulting behaviour, which is calculated to insult either intentionally or recklessly, and which is unreasonable."

23 In *Abdul v DPP*, this Court had to consider a case about protestors who had shouted that British soldiers were "murderers", "rapists" and "baby killers" (among other things) at a parade to mark the home-coming of a regiment from Afghanistan. They had been charged with offences under s. 5 of the 1986 Act, prior to its amendment in 2013. At [49], Gross LJ (with whom Davis J agreed) set out eight propositions explaining the proper approach to s. 5 of the 1986 Act in cases where Article 10 ECHR was engaged:

> "(i) The starting point is the importance of the right to freedom of expression.
>
> (ii) In this regard, it must be recognised that legitimate protest can be offensive at least to some—and on occasions must be, if it is to have impact. Moreover, the right to freedom of expression would be unacceptably devalued if it did no more than protect those holding popular, mainstream views; it must plainly extend beyond that so that minority views can be freely expressed, even if distasteful.
>
> (iii) The justification for interference with the right to freedom of expression must be convincingly established. Accordingly, while art.10 does not confer an unqualified right to freedom of expression, the restrictions contained in art.10(2) are to be narrowly construed.
>
> (iv) There is not and cannot be any universal test for resolving when speech goes beyond legitimate protest, so attracting the sanction of the criminal law. The justification for invoking the criminal law is the threat to public order. Inevitably, the context of the particular occasion will be of the first importance.
>
> (v) The relevance of the threat to public order should not be taken as meaning that the risk of violence by those reacting to the protest is, without more, determinative; some times it may be that protesters are to be protected. That said, in striking the right balance when determining whether speech is "threatening, abusive or insulting", the focus on minority rights should not result in overlooking the rights of the majority.
>
> (vi) Plainly, if there is no *prima facie* case that speech was "threatening, abusive or insulting" or that the other elements of the s.5 offence can be made good, then no question of prosecution will arise. However, even if there is otherwise a prima facie case for contending that an offence has been committed under s.5, it is still for the Crown to establish that prosecution is a proportionate response, necessary for the preservation of public order.
>
> (vii) If the line between legitimate freedom of expression and a threat to public order has indeed been crossed, freedom of speech will not have been impaired by 'ruling… out' threatening, abusive or insulting speech: per Lord Reid, in *Brutus v Cozens* [1973] A.C. 854, at p.862.

> (viii) The legislature has entrusted the decision in a case such as the present to Magistrates or a District Judge. The test for this Court on an appeal of this nature is whether the decision to which the District Judge has come was open to her or not. This Court should not interfere unless, on well-known grounds, the Appellants can establish that the decision to which the District Judge has come is one she could not properly have reached."

24 On the facts of the case, Gross LJ noted that the conviction was "rooted in the threat to public order, described in the Case": [50]. At [51] the Court distinguished *Dehal v CPS* [2005] EWHC 2154 (Admin) because in that case the key consideration (other than the paucity of reasons) was the absence of a threat to public order.

25 In *R (Campaign Against Antisemitism) v DPP* [2019] EWHC 9 (Admin), this Court dismissed a claim for judicial review of a decision by the DPP to take over and discontinue a private prosecution under s. 5 of the 1986 Act of a demonstrator who had used offensive language at a pro-Palestinian protest. At [7], Hickinbottom LJ (with whom Nicol J agreed) noted, referring to Lord Reid's speech in *Brutus v Cozens*, that the proper meaning of an ordinary word, such as "abusive", was a question of fact, but s. 5 nonetheless had to be read in the context of Article 10 ECHR. At [9], he noted that the effect of the amendment to s. 5(1) in 2013 was to shift the balance in favour of freedom of expression "by removing the word 'insulting', so that that to be criminal, the words or behaviour now have to be 'threatening or abusive'".

26 At [50], Hickinbottom LJ said this:

> "I fully understand the distress that Mr Ali's words may have caused to some of those who were present as the counter-demonstrators or simply as passers-by, and not just those who were Jewish or who were sympathetic or supportive of the state of Israel. His words may have been intemperate and offensive. But it is not the task of this court to judge whether they were or may have been distressing or offensive. As the authorities stress, article 10 does not permit the proscription or other restriction of words and behaviour simply because they distress some people, or because they are provocative, distasteful, insulting or offensive."

At [68(iv)], he distinguished *Abdul* because in that case there was a "very real threat to public order".

27 In *Ziegler*, the Supreme Court considered the correct approach to the offence of obstructing the highway contrary to s. 137 of the Highways Act 1980, to which there is a defence of lawful excuse. Lords Hamblen and Stephens (with whom Lady Arden in essence agreed) said at [70] that intentional action by protestors to disrupt by obstructing others enjoys the guarantees of Articles 10 and 11 ECHR but both the disruption and whether it is intentional are relevant factors in relation to an evaluation of proportionality. Intentional action even with an effect that is more than *de minimis* does not automatically lead to the conclusion that any interference with the protestors' Article 10 and 11 rights is proportionate. Rather there must be an assessment of the facts in each individual case to determine whether the interference with Article 10 and 11 was "necessary in a democratic society".

28 In *In Re Abortion Service (Safe Access Zones) (NI) Bill* [2022] UKSC 32, [2023] 2 WLR 33, Lord Reed (with whom the other members of the seven-judge Court agreed) held that questions of proportionality were often decided as a matter of general principle rather than on the facts of an individual case: [29]. When a defendant relied on Articles 9, 10 or 11 ECHR, the first question was whether those articles are engaged: [54]. If so, the court must then ask whether the offence is one where the ingredients themselves strike the proportionality balance so that if the ingredients are made out, and the defendant is convicted, there can have been no breach of his or her Convention rights. This will be the case with many commonly encountered criminal offences, such as offences of violence and offences concerning damage to property, which are likely to be defined in such a way as to make assessment of proportionality unnecessary: [55]. If proof of the elements of the offence does not itself ensure the proportionality of a conviction, the court must consider how to ensure compatibility with Convention rights: [56]. If the offence is statutory, s. 3 of the Human Rights Act 1998 may enable the court to construe the relevant provision compatibly with Convention rights, either by construing it in a way which means that a conviction will always be proportionate, or by interpreting it as allowing for an assessment of proportionality in individual cases: [57]. But the fact that there is a statutory defence of lawful or reasonable excuse does not mean that a proportionality assessment in respect of Convention rights is appropriate: [58].

29 The following principles applicable to the construction of s. 5 of the 1986 Act may be derived from an analysis of the statutory words and from the case law:

(a) The question whether a defendant used "threatening or abusive words or behaviour, or disorderly behaviour" is a question of objective fact. How the words or behaviour were in fact perceived by another person may be relevant to, but is not determinative of, that question.

(b) "Threatening", "abusive" and "disorderly" are ordinary English words, and their meaning is a question of fact, but they must be read in the context of Article 10 ECHR, and in the light of Parliament's decision to omit the word "insulting": *Campaign Against Antisemitism*, [7] and [9].

(c) The Article 10 context includes the principle that "[b]ehaviour which is an affront to other people, or is disrespectful or contemptuous of them, is not prohibited": *Percy*, [25]; nor is behaviour which is merely "distressing", "offensive", "distasteful", "insulting" or "intemperate": *Campaign Against Antisemitism*, [50]. See also the well-known observations of Sedley LJ in *Redmond-Bate v DPP* [2000] HRLR 249, [20]: "Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having."

(d) In deciding whether a defendant's words were "threatening or abusive", or whether his behaviour was "disorderly", it is appropriate to ask whether the line between legitimate freedom of expression and a threat to public order has been crossed. If so, the interference with Article 10 rights is unlikely to have been impaired: *Abdul*, [49(vii)], [50] and [51].

(e) Provided that the words "threatening", "abusive" and "disorderly" are given an appropriately narrow construction, in accordance with s. 3 of the Human Rights Act 1998 and with due attention to the line between legitimate freedom of expression and a threat to public order, proof of the elements of the offence, and a failure by the defendant to establish the defence in s. 5(3), will generally be sufficient to demonstrate the proportionality of a conviction: *In Re Abortion Service (Safe Access Zones) (NI) Bill*, [57].

Question 1: Did the judge err in finding the elements of the offence established?

The proper approach to facts on an appeal by case stated

30 In *Ziegler*, Lords Hamblen and Stephens considered how an appellate court should approach the question whether there was a "lawful excuse". The appellate court should consider whether there was "an error of law material to the decision reached which is apparent on the face of the case" or "the decision is one which no reasonable court, properly instructed as to the relevant law, could have reached on the facts found". Where the statutory defence depends upon an assessment of proportionality, an appeal would lie if there was "an error of law in the reasoning on the face of the case which undermines the cogency of the conclusion on proportionality". That assessment should be made "on the basis of the primary and secondary findings set out in the case stated, unless there was no evidence for them or they were findings which no reasonable tribunal could have reached".

31 In my judgment, this approach applies not only to the question whether a conviction is proportionate, but also to the prior question whether the elements of the offence are satisfied. It follows that the answer to question 1 depends on whether the judge's findings of fact and conclusions of law were vitiated by any material error of law on the face of the case. If not, this court can intervene only if those findings were not rationally open to the judge on the evidence recorded in the case stated and the agreed summary (which, given the judge's endorsement of it, may be treated as forming part of the case stated).

Did the judge err in law or reach conclusions that were not open to him on the evidence in finding the elements of the offence established?

32 Merry van Woodenberg for the appellant submitted that the evidence demonstrates that what took place on 28 December 2020 was a conversation of limited duration. The descriptions of Ms Hicks' conduct in the agreed summary are consistent with words and behaviour which are offensive or insulting, but do not show that either her words or her behaviour was threatening or abusive or that her behaviour was disorderly if those words are given an appropriately narrow meaning.

33 Richard Posner for the Crown argued that Ms van Woodenberg's submissions focus too narrowly on the words used. Tone, demeanour, encroaching on to personal space and the holding of a mobile telephone in the face of one witness are relevant factors as to whether the offence was committed. Given his finding that Ms Hicks was "confrontational, derogatory and aggressive in her tone", he was entitled to conclude that her behaviour amounted to harassment and was threatening and abusive.

34 The first findings recorded by the judge, in paragraph 26 of the case stated, concern – either in large part or in their entirety – how Ms Hicks' words and behaviour made Ms Williams and Ms Brown feel: they felt threatened and abused and intimidated by the prospect of their images appearing online. It is not clear whether the sentence beginning "That she was aggressive and dismissive…" is a finding of objective fact or a further recitation of how Ms Williams and Ms Brown experienced Ms Hicks' conduct. Paragraphs 27 and 28 record that the two witnesses had been distressed by seeing the footage streamed by Ms Hicks on the previous day and were concerned about patient confidentiality. The final sentence of paragraph 28 appears, however, to be a finding that Ms Hicks' behaviour was (rather than was perceived as) threatening and abusive to Ms Williams and Ms Brown. Paragraph 47 records findings that Ms Hicks was "confrontational, derogatory, and aggressive in her tone".

35 I accept that the tone in which words are spoken may in some cases be a relevant factor in deciding whether words or behaviour are threatening or abusive. But in my view the tone in which words are said will rarely be sufficient to convert an unpleasant altercation into a criminal offence if – as here – the words used are not themselves threatening or abusive. Section 5 of the 1986 Act does not impose an obligation to be adopt a tone that is polite or quiet or respectful: see by analogy *McNally v Saunders* [2021] EWHC 2012 (QB), [2022] EMLR 3, [76]-[78], and the case law referred to there. I bear in mind also that Ms Brown said at one point that Ms Hicks was "not necessarily aggressive or swearing, just sort of inflammatory" and that both witnesses agreed that Ms Hicks had not threatened or made any personal comment to them.

36 There are also indications that part at least of the witness's reaction to Ms Hicks' conduct was to the content of what she was saying ("Covid is a hoax", "I'm paying your wages", etc.), which they found belittling or disrespectful. Paragraph 48 of the case stated suggests that the judge also had some regard to the derogatory content of Ms Hicks' words. It must be firmly borne in mind that s. 5 of the 1986 Act does not impose an obligation to express oneself in a way that is moderate or well-judged or appropriate to context, nor does it impose a prohibition on rudeness. If it did, a very large number of social interactions would be at risk of criminalisation.

37 Had it not been for Ms Hicks' behaviour in filming the interaction, there would have been force in Ms van Woodenberg's submissions. However, in my view, the act of filming took this case beyond the bounds of legitimate free speech. Although there was no evidence that filming was prohibited *per se* in this part of the Hospital, it is important to consider both the context and how the filming was done. The judge found that both witnesses were aware of the video streamed on the previous day and of the comments it had generated online. The interaction took place on a narrow stairwell at the witnesses' place of work, during a pandemic. The phone was pointed at Ms Brown's face, an arm's length away. There was a violation of Ms Brown's personal space. Both witnesses felt intimidated and threatened by the prospect that Ms Hicks might be streaming their images and that as a result they might be subject to online abuse. The judge accepted their evidence as cogent, credible and free of exaggeration. In my view, this constituted a sufficient evidential basis for the conclusion that Ms Hicks' conduct was, objectively speaking, threatening and abusive, as distinct from merely distressing, offensive, distasteful, insulting or intemperate.

38 I can detect no error of law in the judge's findings as to Ms Hicks' intention as to or awareness of the effects of her behaviour. Those findings were open to the judge, who had the advantage of hearing and seeing the witnesses.

39 I therefore conclude that the judge was entitled to conclude on the evidence before him that the elements of the offence were made out.

Question 2: Was the judge correct to reject Ms Hicks' defence of reasonable excuse?

40 Ms van Woodenberg submitted that the judge erred in taking into account the location of the incident at a hospital, which was the witnesses' place of work, and the fact that the witnesses deserved not to be "molested" there. This was wrong because the authorities recognise the importance of location to the expressive content of speech in protest cases. She relied on Lord Neuberger MR's statement that "[t]he right to express views publicly… extends to the manner in which the defendants wish to express their views and to the location where they wish to express and exchange their views": *Hall v Mayor of London* [2010] EWCA Civ 817, [2011] 1 WLR 504, [37]. The judge also failed to attribute proper weight to Ms Hicks' status as a citizen journalist or to the fact that she was engaged in political speech, or to the need for protest to be disruptive or even offensive if it is to be effective.

41 Mr Posner submitted that the judge was entitled to have regard to the location of the incident as part of the context. Ms Hicks was not convicted because of the content of her views but because of the way she behaved to two individuals who were likely to be, and were, harassed alarmed and distressed.

42 For my part, I would readily accept that Ms Hicks had attended the Hospital in order to gather footage which she intended to communicate for journalistic and/or political purposes. The fact that she was not an accredited member of the press did not disentitle her to the protections of Article 10 ECHR in respect of such communications: see e.g. *McNally v Saunders*, [70]-[73] and the cases referred to there. The fact that she was present at the Hospital for that purpose might have been highly relevant if her conviction had been for merely attending a hospital. But it was not. Whereas the footage gathered on 27 December 2021 formed a core part of her journalistic/political aims (demonstrating, as she believed, the falsity of the narrative that hospitals were being overwhelmed by Covid), the footage of the conversation in the stairwell on 28 December 2021 was of much more peripheral relevance to those aims: it did not illustrate the occupancy of the hospital.

43 Against that background, the submission that the judge should have taken into account the need for protest to be disruptive if it to be effective is inapposite here. What happened on the stairwell was not a protest in any real sense. The words spoken may have conveyed political opinions (and so engaged Article 10 ECHR), but it was not more effective to convey them in a way which was threatening or abusive. Put shortly, there was no need to threaten or abuse anyone. For that reason, the judge was in my view correct to conclude that the statutory defence was not made out.

Ground 3: Did the judge err in not concluding a proper balancing exercise?

44 Ms van Woodenberg submitted that the judge erred in failing to conduct a proper balancing exercise. She noted that Ms Hicks had been arrested at home and conveyed to a police station in handcuffs. This, she said, was a disproportionate response.

45 Mr Posner submitted that Ms Hicks' rights under Article 10 ECHR were not engaged because this was private property: see *Appleby v United Kingdom* (2003) 37 EHRR 783, [47] and [52] and *DPP v Cuciurean* [2022] EWHC 736 (Admin), [2022] QB 888, [46]-[47]. If they were engaged, the judge conducted the balancing exercise properly in accordance with *Ziegler*.

46 Mr Posner's submission that Articles 10 and 11 are not engaged where expressive speech takes place on private land on which the speaker is trespassing seems to me to be ambitious. But it is not necessary to decide it, for two reasons. First, and critically, there was no finding by the judge that Ms Hicks was trespassing. Second, the judge approached the case on the express basis that Article 10 was engaged.

47 Equally, I do not think that the judge erred in failing to take account of the circumstances of the arrest. The arrest and the conviction were quite separate interferences with Ms Hicks' Article 10 rights. The judge was obliged to consider whether the conviction was a proportionate interference with Article 10 rights. He was not, however, hearing a claim against the police, so was not obliged or entitled to consider the circumstances of the arrest.

48 In this case, and in the light of the approach of the Supreme Court in *In Re Abortion Service (Safe Access Zones) (NI) Bill*, once the elements of the offence (construed in accordance with Article 10 ECHR in the way I have indicated) were established, and the defence of reasonable conduct had been rejected, there was no need to undertake a separate proportionality analysis. The conclusion that Ms Hicks' behaviour had crossed the line from legitimate free speech to behaviour that was threatening and abusive (and not merely distressing, offensive, distasteful, insulting or intemperate), together with the absence of a defence, meant that the conviction was proportionate.

49 If I am wrong about that, the judge was in my view not only entitled but correct to conclude that the conviction was a proportionate interference with Ms Hicks' right to freedom of expression, given the matters in [42]-[43] above and the need to protect the rights of Ms Williams and Ms Brown to go about their work without being subject to threatening and abusive conduct.

Conclusion

50 For these reasons, I would answer the questions posed in the case stated as follows:

Question 1: Did the judge err in finding that the evidence established to the requisite standard that Ms Hicks' words and behaviour were "threatening, abusive or disorderly" within the meaning of section 5 of the 1986 Act, and that she intended them to be such, or was aware of a risk that they would be perceived as such? Answer: No.

Question 2: Was the judge correct in rejecting Ms Hicks' defence of reasonable excuse under s. 5(3) of the 1986 Act? Answer: Yes.

Question 3: Was the judge correct to find that convicting Ms Hicks was a necessary and proportionate interference with her rights under Article 10? Answer: Yes.

51 I would accordingly dismiss the appeal.

LORD JUSTICE BEAN:

52 I agree.