

ROSAMUND SMITH

FINAL

APPELLANT E-BUNDLE

Kate Tidmarsh & William Sanders

20.10.25

CONTENTS:

LIST OF AUTHORITIES: 3

MOOT PROBLEM: 4 - 10

WRITTEN CASE ON BEHALF OF THE APPELLANT: 11 - 17

Boddington v British Transport Police [1999] 2 A.C. 143: 18 - 35

R (on the application of Ammori) v Secretary of State for the Home Department [2025] EWHC 2013 (Admin): 36 - 42

Sheldrake v Director for Public Prosecutions [2004] 3 W.L.R.: 43 - 50

R v Sarti (Chiara) & Others [2025] 1 W.L.R.: 51 - 60

In re Abortion Services (Safe Access Zones) Northern Ireland Bill [2023] 2 W.L.R.: 61 - 80

Terrorism Act 2000: 81 - 94

European Convention on Human Rights: 95 - 98

Human Rights Act 1998: 99 - 107

LIST OF AUTHORITIES:

<u>Boddington v British Transport Police</u> [1999] 2 A.C. 143	PAGES: 143 – 146, 152 – 162, 164 – 165, 176
<u>R (on the application of Ammori) v Secretary of State for the Home Department</u> [2025] EWHC 2013 (Admin)	§§: 38, 43 – 44, 46, 48, 57
<u>Sheldrake v Director of Public Prosecutions</u> [2004] 3 W.L.R.	PAGES: 976 – 986, 1005, 1008, 1010 §§: 54, 62, 66
<u>R v Sarti (Chiara) & Others</u> [2025] 1 W.L.R.	PAGES: 3276 – 3279, 3282, 3285 – 3286, 3290, 3295 – 3296 §§: 18, 29, 46, 70, 72 – 76
<u>In re Abortion Services (Safe Access Zones) Northern Ireland Bill</u> [2023] 2 W.L.R.	PAGES: 33 – 37, 41, 45 – 55, 68 – 70 §§: 10, 24, 29 – 30, 34 – 35, 40 – 42, 44 – 46, 48, 50 – 51, 54 – 59, 63 – 67, 116 – 118, 123

MIDDLE TEMPLE ROSAMUND SMITH MOOTING COMPETITION 2025
IN THE SUPREME COURT OF THE UNITED KINGDOM

DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

v.

HADDOCK

Respondent

THE FACTUAL AND LEGAL BACKGROUND

1. On 15 September 2023, members of the protest group Combat War carried out arson attacks on the Ministry of Defence and companies supplying arms to the United Kingdom's armed forces. In a press release later that night, Mr Haddock, the Chair of Combat War, said that the organisation was opposed to all military activity, and opposed all military action, including military action by the UK's armed forces against enemies of the UK or in support of allies of the UK.
2. On 30 September 2023, the Home Secretary exercised the power pursuant to section 3 of the Terrorism Act 2000 to make an order amending Schedule 2 to that Act by adding Combat War to the list of proscribed organisations under the Act. Section 3 as amended, so far as relevant, provides:

3 Proscription.

(1) For the purposes of this Act an organisation is proscribed if—

(a) it is listed in Schedule 2, or

(b) it operates under the same name as an organisation listed in that Schedule.

...

(3) The Secretary of State may by order—

(a) add an organisation to Schedule 2;

(b) remove an organisation from that Schedule;

(c) amend that Schedule in some other way.

(4) The Secretary of State may exercise his power under subsection (3)(a) in respect of an organisation only if he believes that it is concerned in terrorism.

(5) For the purposes of subsection (4) an organisation is concerned in terrorism if it—

(a) commits or participates in acts of terrorism,

(b) prepares for terrorism,

(c) promotes or encourages terrorism, or

(d) is otherwise concerned in terrorism.

(5A) The cases in which an organisation promotes or encourages terrorism for the purposes of subsection (5)(c) include any case in which activities of the organisation—

(a) include the unlawful glorification of the commission or preparation (whether in the past, in the future or generally) of acts of terrorism; or

(b) are carried out in a manner that ensures that the organisation is associated with statements containing any such glorification.

(5B) The glorification of any conduct is unlawful for the purposes of subsection (5A) if there are persons who may become aware of it who could reasonably be expected to infer that what is being glorified, is being glorified as—

(a) conduct that should be emulated in existing circumstances, or

(b) conduct that is illustrative of a type of conduct that should be so emulated.

(5C) In this section—

“glorification” includes any form of praise or celebration, and cognate expressions are to be construed accordingly;

“statement” includes a communication without words consisting of sounds or images or both.

...

3. “Terrorism” is defined by section 1 of the Act as follows:

1 Terrorism: interpretation.

(1) In this Act “terrorism” means the use or threat of action where—

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government [F]or an international governmental organisation] or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.

(2) Action falls within this subsection if it—

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person’s life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section—

(a) “action” includes action outside the United Kingdom,

- (b) *a reference to any person or to property is a reference to any person, or to property, wherever situated,*
- (c) *a reference to the public includes a reference to the public of a country other than the United Kingdom, and*
- (d) *“the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.*
- (5) *In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.*

4. Combat War applied, pursuant to section 4 of the Act, to the Home Secretary to remove the organisation from the list of proscribed organisations on the grounds that (i) the organisation was peace-loving and strongly disapproved of terrorism, (ii) the order interfered with the exercise of the organisation’s Convention rights and those of its members and supporters, particularly the rights under ECHR Articles 9 (freedom of thought, conscience and religion), 10 (freedom of expression) and 11 (freedom of peaceful assembly and association), (iii) there were no proportionate grounds for interfering with the rights by proscribing the organisation, and (iv) the order was in any case irrational in the circumstances. The Home Secretary rejected the application. Combat War did not exercise its right under section 5 of the Act to appeal against this refusal to the Proscribed Organisations Appeal Commission.
5. On 17 September 2024, Mr Haddock was standing outside the Ministry of Defence building in London carrying a placard which carried the words, ‘Combat War: Make Love not War’. He was arrested, and charged with one offence of being a member of a proscribed organisation contrary to section 11(1) of the Terrorism Act 2000, and one offence of supporting a proscribed organisation, namely Combat War, contrary to section 12(1A) of the Terrorism Act 2000 as amended by the Counter-terrorism and Border Security Act 2019. Section 11 as amended provides:

- (1) A person commits an offence if he belongs or professes to belong to a proscribed organisation.*
- (2) It is a defence for a person charged with an offence under subsection (1) to prove—*
 - (a) that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and*
 - (b) that he has not taken part in the activities of the organisation at any time while it was proscribed.*
- (3) A person guilty of an offence under this section shall be liable—*
 - (a) on conviction on indictment, to imprisonment for a term not exceeding 14 years, to a fine or to both, or*

(b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

(4) In subsection (2) “proscribed” means proscribed for the purposes of any of the following—

(a) this Act;

(b) the Northern Ireland (Emergency Provisions) Act 1996;

(c) the Northern Ireland (Emergency Provisions) Act 1991;

(d) the Prevention of Terrorism (Temporary Provisions) Act 1989;

(e) the Prevention of Terrorism (Temporary Provisions) Act 1984;

(f) the Northern Ireland (Emergency Provisions) Act 1978;

(g) the Prevention of Terrorism (Temporary Provisions) Act 1976;

(h) the Prevention of Terrorism (Temporary Provisions) Act 1974;

(i) the Northern Ireland (Emergency Provisions) Act 1973.

Section 12 of the Terrorism Act 2000 as amended provided:

12 Support.

(1) A person commits an offence if—

(a) he invites support for a proscribed organisation, and

(b) the support is not, or is not restricted to, the provision of money or other property (within the meaning of section 15).

(1A) A person commits an offence if the person—

(a) expresses an opinion or belief that is supportive of a proscribed organisation,

and

(b) in doing so is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.]

(2) A person commits an offence if he arranges, manages or assists in arranging or managing a meeting which he knows is—

(a) to support a proscribed organisation,

(b) to further the activities of a proscribed organisation, or

(c) to be addressed by a person who belongs or professes to belong to a proscribed organisation.

(3) A person commits an offence if he addresses a meeting and the purpose of his address is to encourage support for a proscribed organisation or to further its activities.

(4) Where a person is charged with an offence under subsection (2)(c) in respect of a private meeting it is a defence for him to prove that he had no reasonable cause to believe that the address mentioned in subsection (2)(c) would support a proscribed organisation or further its activities.

(5) In subsections (2) to (4)—

(a) “meeting” means a meeting of three or more persons, whether or not the public are admitted, and

(b) a meeting is private if the public are not admitted.

(6) A person guilty of an offence under this section shall be liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 14 years, to a fine or to both, or

(b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

THE LEGAL ISSUES AT TRIAL

6. At his trial at Westminster Magistrates’ Court, Mr Haddock (a litigant in person) made two submissions in relation to both charges.
7. First, he argued that the order proscribing Combat War was unlawful because (i) it violated his Convention rights and (ii) it was *Wednesbury* unreasonable. This invalidity should be available by way of defence to a charge under section 3 of the Terrorism Act 2000: see particularly *Boddington v. British Transport Police* [1998] UKHL 13, [1999] 2 AC 143, HL. Combat War was listed as a proscribed organisation in primary legislation, but that would be of no effect if the subordinate legislation inserting the organisation’s name in Schedule 2 to the Act was invalid: *RR v. Secretary of State for Work and Pensions* [2019] UKSC 52, [2019] 1 WLR 6430.
8. Secondly, he sought to lead evidence that he had been exercising his right under ECHR Article 10 when holding up his placard, and that it was therefore incumbent on the prosecution to demonstrate that convicting him would not unlawfully violate his Convention right under section 6(1) of the Human Rights Act 1998: *Director of Public Prosecutions v. Ziegler* [2021] UKSC 23, [2022] AC 408, SC.
9. In response to the first submission, counsel for the prosecutor argued that: (i) the court had no jurisdiction to entertain the Convention rights argument, because the only forum for raising it was the Proscribed Organisations Appeal Commission (see Proscribed Organisations Appeal Commission (Human Rights Act 1998 Proceedings) Rules 2006, SI 2006/2290, rule 2, made under section 7 of the Human Rights Act 1998); and (ii) it was an abuse of the process of the Magistrates’ Court to use it to launch an attack on the proscription order in criminal proceedings by reference to *Wednesbury* unreasonableness when Combat War had failed either to exercise its right to challenge the refusal to de-proscribe the organisation before the Proscribed Organisations Appeal Commission or to

apply for judicial review. Counsel relied on *O'Reilly v. Mackman* [1983] 2 AC 237, HL, especially *per* Lord Diplock at p. 285; *R. v. Wicks* [1998] AC 92, HL; and *R. v. Clayton* [2014] EWCA Crim 1030, [2014] 1 WLR 3994, CA. As to the second point, regardless of the Court's decision on the first point, it was not open to the defendant to argue that the proscription order had violated Convention rights, because the Act made it clear that Parliament had authoritatively determined that the process could never amount to a disproportionate interference with Convention rights; proportionality was 'baked into' the statute itself, so there was no scope for the court to make its own assessment. Counsel relied on *Director of Public Prosecutions v. Cuciurean* [2022] EWHC 734 (Admin), [2022] QB 888, DC; *Attorney General's Reference (No. 1 of 2023)* [2024] EWCA Crim 243, [2024] 1 WLR 3205, CA; *In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32, [2023] AC 505, SC; and *R. v. Sarti (Chara)* [2025] EWCA Crim 61, [2025] 1 WLR 3276, CA.

10. The court rejected the prosecutor's argument on issue (i), because: (a) the instant proceedings were for a criminal offence, whereas section 7 of the Human Rights Act 1998 and the Proscribed Organisations Appeal Commission (Human Rights Act 1998 Proceedings) Rules 2006 related only to proceedings for acts incompatible with Convention rights; and (b) it would not be an abuse of process for Mr Haddock to raise the invalidity of the proscription order by way of defence to a criminal charge. However, the court accepted the prosecutor's argument in relation to the second issue, and accordingly declined to admit evidence relating to justifications for the interference with the defendant's Convention rights or to make an assessment of the compatibility of the legislation with Convention rights, and in due course convicted Mr Haddock, sentencing him to a fine of £1 on each charge.

THE DIVISIONAL COURT'S JUDGMENT

11. On appeal by the defendant on the second point and the prosecutor on the first point, the Divisional Court dismissed the appeal, concluding that the Magistrates' Court had applied the correct principles on both points, although Mr Justice Wool, delivering the judgment of the Court, remarked that he could not understand why it had been thought to be in the public interest to bring the prosecution. His Lordship also said that, in his respectful view, the case-law on the availability of Convention rights by way of defence to criminal charges was lacking clarity, and suggested that it would be appropriate for the Supreme Court to revisit the matter. He concluded that, had the issues been open to the court, he would have been sceptical about the sufficiency of the Home Secretary's reasons for

having made the proscription order and of the justification advanced for the undoubted interference with the organisation's and Mr Haddock's Convention rights.

THE APPEAL TO THE SUPREME COURT

12. The Divisional Court certified that two questions of general public importance arose: first, whether it could be said in the circumstances that challenging the validity of the proscription order in the course of criminal proceedings was an abuse of process of the court; secondly, whether it would have been open to the defendant to argue that his Convention rights had been violated by way of defence to a criminal charge.
13. With the permission of the Supreme Court, Mr Haddock now appeals on the second issue and the prosecutor appeals on the first issue. Mr Haddock has been prevailed upon to allow counsel to represent him *pro bono* on the appeal.
14. Leading counsel should address the first issue, concerning the appropriateness of challenging the validity of the proscription order in the criminal proceedings. Junior counsel should address the second issue, concerning the defendant's argument that the trial court should have made an assessment of the proportionality of the interference with his Convention rights by reason of the prosecution.

David Feldman KC (Hon), FBA

Rouse Ball Professor Emeritus of English Law and Fellow Emeritus of Downing College,
University of Cambridge; Hon. Professor, University of Manchester; Academic Associate, 39 Essex
Chambers

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE HIGH COURT OF JUSTICE (ENGLAND AND WALES)
KING'S BENCH DIVISION
DIVISIONAL COURT
BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

-and-

HADDOCK

Appellant

Respondent

WRITTEN CASE ON BEHALF OF THE APPELLANT

Submissions

Ground One: Challenging the validity of the proscription order in the criminal proceedings was inappropriate and amounted to an abuse of process:

1. Sections 10 – 12 of the **Terrorism Act 2000** (“the Act”) set out three offences: of belonging to, supporting, or indicating support of a proscribed organisation. A critical fact in each case is whether the organisation is proscribed at the relevant time (this is clearly established at s10(2)) and a person who belongs to, or supports, or indicates support of a proscribed organisation is guilty of an offence.
2. In *Boddington v British Transport Police* [1999] 2 A.C. 143 the court held that:
 - 2.1 A defendant to a criminal prosecution is in general entitled to challenge the validity of subordinate legislation in criminal proceedings; but
 - 2.2 That right is not unqualified and must be balanced with the public interest in orderly administration.
3. Accordingly, such a right can be circumscribed by the statutory context and the provisions of the relevant statute. (Compare *Boddington* p. 152F-H).
4. The Act provides a single exclusive route for a challenge to proscription:

- 4.1 s4 allows an application to the Secretary of State for removal of an organisation from the proscribed list;
 - 4.2 If an application is refused an appeal may be made pursuant to s5 to the Proscribed Organisations Appeal Commission (POAC); the POAC is to allow the appeal 'if it considers that the decision to refuse was flawed when considered in light of the principles applicable on an application for judicial review'; and
 - 4.3 s6 allows a further appeal on a question of law to the Court of Appeal.
5. A decision by the Secretary of State is not retrospective, it simply results in an organisation's removal from the proscribed list. An appeal against a refusal to remove has the same effect—see s5(5). An appeal has retrospective effect only as regards convictions on the basis of activities carried out after the date of a refusal to deproscribe ("**post refusal Act convictions**").
6. It follows that, other than as regards post refusal Act convictions, a proscription is intended to be valid and effective until it is set aside under the mechanism established by the statute (unless possibly it is quashed on a judicial review application). For the purposes of this appeal, it is not contended that the Act rules out judicial review (see for example, *R (on the application of Ammori) v Secretary of State for the Home Department* [2025] EWHC 2013 (Admin)). In contrast to challenges in the criminal courts, the availability of judicial review is tightly controlled and, apart from the route set out in the Act, is the only appropriate route for a challenge.
7. Accordingly, the Act rules out a challenge to the validity of proscription in the Magistrates' or Crown Court ("**The general ground**").
8. The scheme of the Act is logical and understandable:
 - 8.1 The question of proscription depends only on whether the organisation is on the proscribed list at the relevant time.
 - 8.2 It avoids the risk of divergent decisions. It is clear from events concerning Palestine Action that many hundreds or even thousands of people might be prosecuted. If each individual were permitted to challenge the invalidity of the proscription order in criminal proceedings, there is a high risk of divergent decisions which 'would be a recipe for chaos'. (See *Ammori*, §46).
9. In any event, the Respondent's position is sharply different from that of Mr Boddington. The Respondent was given 'clear and ample opportunity provided by the scheme of the relevant legislation...to challenge the legality of those acts, before being charged with an offence' and as a result, the Respondent cannot now elect to challenge proscription in the criminal courts. (Compare *Boddington*, pp161G and 176E).
10. The Respondent is the chair of Combat War and so was in a unique position either to encourage Combat War to challenge the proscription or to challenge it himself either by using the clearly defined legislative mechanism or by applying for judicial review. He elected to do neither. He cannot complain that it may be too late to apply for judicial review and since he had a clear and ample opportunity to challenge proscription under the Act, he cannot challenge it in the criminal courts ("**The specific ground**").

11. There are therefore two independent reasons why the Respondent cannot challenge proscription in the criminal courts:
- 11.1 The general ground: it is the plain intention of the legislation that, leaving aside judicial review, an organisation on the proscribed list remains proscribed until it is deproscribed under the statutory mechanism; and a person who supports a body which is on the proscribed list is guilty of an offence; and
 - 11.2 The specific ground: the Respondent has been given clear and ample opportunity to challenge proscription under the legislative mechanism and challenging the proscription in the criminal courts is unavailable to him.
12. It is therefore an abuse of process to allow the Respondent to raise the validity of the proscription during criminal proceedings.

Ground Two: The trial court was not obliged to make an assessment of proportionality with regard to the interference of the Respondent's Convention rights by way of defence to a criminal charge:

13. **Convention rights:**
- 13.1 The rights engaged by Articles 9, 10 and 11 of the Convention are qualified rights, meaning that each Article operates on the basis that in pursuance of legitimate aims (such as upholding national security, public safety, preventing disorder or crime and protecting the rights and freedoms of others, see *Sheldrake v Director of Public Prosecutions* [2004] 3 W.L.R., §54) those rights may be lawfully interfered with. (See Articles 9(2), 10(2) and 11(2) of the Convention and *R v Sarti (Chiara) & Others* [2025] 1 W.L.R., §18).
 - 13.2 Decision-makers enjoy a margin of appreciation in relation to interference with these rights. Courts must therefore accord appropriate respect to a given decision-maker's assessments. (See *In re Abortion Services (Safe Access Zones) Northern Ireland Bill* [2023] 2 W.L.R., §55G).
 - 13.3 Moreover, this wider margin of appreciation is also applied to limitations on the location, time and manner of protests more generally, which in this case is met by the 'manner' in which the Respondent protested in the context of their proscription. (See *Sarti*, §75). (See also 17.2.)
14. **General background:**
- 14.1 It is well-established authority that it is possible for general legislative measures to be constructed so as to be applied in such a way as to per se meet the requirements of proportionality under the Convention without requiring further evaluation of the specific circumstances of individual cases. (See *In re Abortion*, §35 and §63).
 - 14.2 This has been accepted in both the European and domestic courts of highest authority. (See *In re Abortion*, §35 and §§45 – 46).
15. **The test:**

15.1 *In re Abortion* stands as the conclusive authority regarding matters of proscription, Convention rights and proportionality. The judgment, delivered by Lord Reed PSC, was agreed with unanimously by a panel of seven justices.

15.2 The test established therein governs cases where a defendant relies on Articles 9, 10 or 11 and their attendant Convention rights as a defence to protest-related offences: (See *In re Abortion*, §§54 – 56).

(i) Are those articles engaged?

(ii) Is the offence one where the ingredients of the offence themselves strike the proportionality balance, so that if the ingredients are made out and the defendant convicted, there can have been no breach of his or her Convention rights? and

(a) The essential caveat is included that: 'If the offence is so defined as to ensure that any conviction will meet the requirements of proportionality, the court does not have to go through the process of verifying that a conviction would be proportionate on the facts of every individual case.'

(iii) Is there a means by which the proportionality of a conviction can be ensured?

16. The second limb:

16.1 Plainly, the caveat at 15.1(ii)(a) emphasises that the trial court in this case was not obliged to make an assessment of proportionality in dealing with the Respondent's defence to the criminal charges of both being a member of and supporting a proscribed organisation. Conviction on the basis of these charges is intrinsically, (without the need for a separate consideration of proportionality), a justified and proportionate interference with those Convention rights.

16.2 These charges are governed by s11(1) and s12(1A) of the **Terrorism Act 2000**, and the statute includes no mention of an additional proportionality ingredient for the prosecution to prove: excusing the trial court from the process of verifying the proportionality of the conviction on an individual case basis.

16.3 This is permitted by reference to s3 of the **Human Rights Act 1998** which enables the court to construe the relevant provision in a way which renders it compatible with the Convention by interpreting that section such that a conviction will always meet the requirements of proportionality.

16.4 Once the specific ingredients of the offence have been made out by the prosecution, (as enacted by Parliament) the Respondent's conduct has per se gone beyond what could be regarded as reasonable conduct in the exercise of their Convention rights.

16.5 In other words, it impossible for conviction for the charges made against the Respondent to be disproportionate. (See *In re Abortion*, §57).

17. The first limb:

- 17.1 In the alternative, the caveat to **15.2(i)** is that the conduct in question will fall outside the protection of Articles 9 – 11 of the Convention if it involves violent intentions, incites violence, otherwise rejects the foundations of a democratic society or if Article 17 applies: Article 17 provides that the Convention does not confer any right on a person to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set out in the Convention. (See *In re Abortion*, §54B).
- 17.2 In this case the Respondent's conduct per se involved violent intentions, rejected the foundations of a democratic society and, in any event, was caught by Article 17. In the context of their proscription, the Respondent's protest (even if the act was itself non-violent) is rendered antithetical to the established democratic principles of society and is to be considered to be aimed at the destruction of the rights and freedoms set out in the Convention for the benefit of the rest of society.
- 17.3 The Respondent's proscribed status creates a vital distinguishment between the Respondent and the protestors considered in relevant authorities: this distinction further bolsters a presumption that the Respondent's Convention rights are even less likely to be found to be engaged.
- 17.4 Otherwise legitimate protestors and their Convention rights are not disturbed by a finding that the Respondent's case is not covered by Articles 9 – 11.
- 17.5 As the director of a proscribed organisation, (itself an offence under s56(1) of the Act) the Respondent was necessarily engaged in conduct at odds with society at large (itself a fact that is capable of justifying interference with Convention rights in pursuance of a legitimate aim). The principled underpinning of the system of proscription is to:
- (i) Express the condemnation of society both for the proscribed organisation itself and its aims, thereby averting the risk of public outrage in the form of public disorder;
 - (ii) Provide a powerful deterrent; and
 - (iii) Signal the rejection of the intolerable nature of the proscribed organisation by both Parliament and society more generally so as to deny its legitimacy. (See *Sheldrake*, §62 and §66).

As such, the Respondent's position as the director of a proscribed organisation is contrary to the democratic foundations of society, which unavoidably means that his conduct falls outside the scope of the Convention rights relied on in defence to his criminal charges.

18. Conclusively, if the relatively minor charge of contravention of the **Criminal Damage Act 1971** is held to be conduct falling outside the scope of Articles 9 – 11, then the grave charges prosecuted against the Respondent ought to be treated similarly. (See *In re Abortion*, §58). Combatting terrorism is on par with or even arguably an even more 'obvious and pressing social need' as the protection of key national infrastructure, as was the case in the successful arguments advanced in *Sarti* at §46. (See also *Sheldrake*, §54).
19. Practically, to permit those proscribed as terrorists to circumvent the legislation designed specifically to impede them through reliance on their Convention rights would produce a logically absurd state of

affairs that cannot be argued to either have been or be the intended effect of either European or domestic legislators in implementing the Convention.

20. This effect would also create needless uncertainty concerning proportionality ingredients for countless other criminal offences. It is principally unjustified to suggest that such additional ingredients are required to render the legislation compatible with the Convention.

21. **Primary legislation:**

- 21.1 In the alternative, even if a proportionality assessment were held to be required, if the **Terrorism Act 2000** cannot be interpreted in accordance with s3 of the **Human Rights Act 1998** to resolve any incompatibility, the court is nevertheless bound to give effect to primary legislation, notwithstanding the violation of Convention rights. (See *In re Abortion*, §59).

22. **Proportionality assessment:**

- 22.1 In the alternative, were an assessment of proportionality (itself not a question of fact) held to be necessary, the Respondent's claim that the interference with their Convention rights was disproportionate would not succeed on the test set out in *In re Abortion* (§§116 – 124):

- (i) Is the aim sufficiently important to justify interference with a fundamental right?
- (ii) Is there a rational connection between the means chosen and the aim in view?
- (iii) Are there less restrictive alternative means available to achieve that aim?
- (iv) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

- 22.2 Per the analysis at 17. – 19., any interference with the Respondent's Convention rights is permissible given:

- (i) The importance of the aims of proscription (including but not limited to promotion of national security and the public interest);
- (ii) The rational connection between the proscription procedure and these aims;
- (iii) The necessity of the proscription procedure in achieving these aims; and
- (iv) The balance struck in the protection of the rights and interests of society, even at the cost of the violation of the Respondent's Convention rights.

- 22.3 In any event, an individualised assessment of the proportionality of the conviction would not be carried out by either the trial court or the Divisional Court, as in matters of proscription POAC would appear to be the appropriate body responsible for determining proportionality. (See *Sarti*, §29(v)).

23. **It is the Appellant's ultimate submission that challenging the validity of the proscription order in the criminal courts is inappropriate and an abuse of process and that no assessment of proportionality is required to interfere with the Respondent's Convention rights. The**

court is respectfully invited to allow the appeal on the first ground and dismiss the cross-appeal on the second ground.

Kate Tidmarsh & William Sanders
16.10.25

2 A.C. In re B. (Adoption Order: Nationality) (H.L.(E.))

A learned friend, Lord Hoffmann. I agree with it, and for the reasons which he has given I also would allow the appeal.

LORD HUTTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann. I agree with it, and for the reasons he gives I, too, would allow the appeal.

B LORD MILLETT. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann. I agree with it, and for the reasons he gives I, too, would allow the appeal.

Appeal allowed.
Order of Sumner J. restored.

C *Solicitors: Blake Laphorn for Chivers Walsh Smith and Irvine & Co., Bradford; Treasury Solicitor.*

[Reported by SHIRANIKHA HERBERT, Barrister]

D

[HOUSE OF LORDS]

E

BODDINGTON APPELLANT
AND
BRITISH TRANSPORT POLICE RESPONDENT

F

1997 Nov. 10, 11; Lord Irvine of Lairg L.C., Lord Browne-Wilkinson,
1998 Jan. 15; Lord Slynn of Hadley, Lord Steyn
April 2 and Lord Hoffmann

G

*Railways—Byelaws—Validity—Byelaw banning smoking on trains—
Prosecution for contravention of byelaw—Whether criminal court
having jurisdiction to determine validity of byelaw in course of
proceedings—Whether distinction to be drawn between substantive
and procedural invalidity—Transport Act 1962 (c. 46), s. 67 (as
amended by Railways Act 1993 (c. 43), s. 129(5)(6)(a))—British
Railways Board Railways Byelaws 1965, byelaw 20*

H

On 1 January 1993 a railway company implemented a decision it had made earlier to ban all smoking in all carriages of its trains for purely commercial reasons after research into its passengers' views. The decision was widely advertised. On 5 November 1994 the defendant, who had been a regular passenger and season ticket holder of the company for several years before 1993, smoked a cigarette in a carriage where smoking was expressly prohibited by a notice conspicuously displayed to that effect. The defendant was convicted by a stipendiary magistrate of smoking a cigarette

Boddington v. British Transport Police (H.L.(E.))

[1999]

in such a carriage contrary to byelaw 20 of the Railways Byelaws 1965 made under section 67 of the Transport Act 1962 (as amended).¹ The stipendiary magistrate rejected the defendant's challenges to the validity of the byelaw and the administrative decision to implement the ban. On appeal by way of case stated the Divisional Court of the Queen's Bench Division dismissed the defendant's appeal, holding that issues of procedural and substantive invalidity of byelaws did not fall within the jurisdiction of a criminal court, and any challenge to the validity of an administrative decision was also beyond the jurisdiction of a criminal court.

On appeal by the defendant:—

Held, (1) that a defendant was not precluded from raising in a criminal prosecution the contention that a byelaw or an administrative act undertaken pursuant to it was ultra vires and unlawful, and in that regard there was no distinction to be drawn between substantive and procedural error; and that, accordingly, the defendant was entitled to raise the issue of the legality of the decision by the railway company to display no smoking notices throughout its trains (post, pp. 158D–E, 162C, 163H–164A, 164E–F, H, 176D–E).

(2) Dismissing the appeal, that the banning by the railway company of all smoking in its trains was a form of regulating the railway, or travel on the railway, and came within the ambit of section 67(1) of the Transport Act 1962, and that, therefore, there was nothing unlawful in the railway company's bringing byelaw 20 into operation as it did (post, pp. 163F–164A, 165F, 176D–E).

Anisimic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147, H.L.(E.) applied.

Director of Public Prosecutions v. Head [1959] A.C. 83, H.L.(E.) and *Reg. v. Wicks* [1998] A.C. 92, H.L.(E.) considered.

Bugg v. Director of Public Prosecutions [1993] Q.B. 473, D.C. overruled.

Decision of the Divisional Court of the Queen's Bench Division [1997] C.O.D. 3 affirmed on different grounds.

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

Anisimic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147; [1969] 2 W.L.R. 163; [1969] 1 All E.R. 208, H.L.(E.)

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Bugg v. Director of Public Prosecutions [1993] Q.B. 473; [1993] 2 W.L.R. 628; [1993] 2 All E.R. 815, D.C.

Calvin v. Carr [1980] A.C. 574; [1979] 2 W.L.R. 755; [1979] 2 All E.R. 440, P.C.

Chief Adjudication Officer v. Foster [1993] A.C. 754; [1993] 2 W.L.R. 292; [1993] 1 All E.R. 705, H.L.(E.)

Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374; [1984] 3 W.L.R. 1174; [1984] 3 All E.R. 935, H.L.(E.)

Director of Public Prosecutions v. Head [1959] A.C. 83; [1958] 2 W.L.R. 617; [1958] 1 All E.R. 679, H.L.(E.)

Director of Public Prosecutions v. Hutchinson [1990] 2 A.C. 783; [1990] 3 W.L.R. 196; [1990] 2 All E.R. 836, H.L.(E.)

¹ Transport Act 1962, s. 67(1): see post, p. 151A–D.

2 A.C. **Boddington v. British Transport Police (H.L.(E.))**

- A *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* [1931] A.C. 662, P.C.
Hoffmann-La Roche (F.) & Co. A.G. v. Secretary of State for Trade and Industry [1975] A.C. 295; [1974] 3 W.L.R. 104; [1974] 2 All E.R. 1128, H.L.(E.)
Kirklees Metropolitan Borough Council v. Wickes Building Supplies Ltd. [1993] A.C. 227; [1992] 3 W.L.R. 170; [1992] 3 All E.R. 717, H.L.(E.)
- B *Kruse v. Johnson* [1898] 2 Q.B. 91, D.C.
London & Clydeside Estates Ltd v. Aberdeen District Council [1980] 1 W.L.R. 182; [1979] 3 All E.R. 876, H.L.(Sc.)
Mercury Communications Ltd. v. Director General of Telecommunications [1996] 1 W.L.R. 48; [1996] 1 All E.R. 575, H.L.(E.)
O'Reilly v. Mackman [1983] 2 A.C. 237; [1982] 3 W.L.R. 1096; [1982] 3 All E.R. 1124, H.L.(E.)
- C *Percy v. Hall* [1997] Q.B. 924; [1997] 3 W.L.R. 573; [1996] 4 All E.R. 523, C.A.
Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government [1960] A.C. 260; [1959] 3 W.L.R. 346; [1959] 3 All E.R. 1, H.L.(E.).
Quietlynn Ltd. v. Plymouth City Council [1988] Q.B. 114; [1987] 3 W.L.R. 189; [1987] 2 All E.R. 1040, D.C.
Reg. v. Chief Constable of the Thames Valley Police, Ex parte Cotton [1990] I.R.L.R. 344, C.A.
- D *Reg. v. Hull University Visitor, Ex parte Page* [1993] A.C. 682; [1992] 3 W.L.R. 1112; [1993] 1 All E.R. 97, H.L.(E.)
Reg. v. Inland Revenue Commissioners, Ex parte Coombs (T.C.) & Co. [1991] 2 A.C. 283; [1991] 2 W.L.R. 682; [1991] 3 All E.R. 623, H.L.(E.)
Reg. v. Reading Crown Court, Ex parte Hutchinson [1988] Q.B. 384; [1987] 3 W.L.R. 1062; [1988] 1 All E.R. 333, D.C.
Reg. v. Wicks [1998] A.C. 92; [1997] 2 W.L.R. 876; [1997] 2 All E.R. 801, H.L.(E.)
- E *Ridge v. Baldwin* [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All E.R. 66, H.L.(E.)
Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee [1992] 1 A.C. 624; [1992] 2 W.L.R. 239; [1992] 1 All E.R. 705, H.L.(E.)
Smith v. East Elloe Rural District Council [1956] A.C. 736; [1956] 2 W.L.R. 888; [1956] 1 All E.R. 855, H.L.(E.)
Tarr v. Tarr [1973] A.C. 254; [1972] 2 W.L.R. 1068; [1972] 2 All E.R. 295, H.L.(E.)
- F *Toronto (City of) Municipal Corporation v. Virgo* [1896] A.C. 88, P.C.
Wandsworth London Borough Council v. Winder [1985] A.C. 461; [1984] 3 W.L.R. 1254; [1984] 3 All E.R. 976, H.L.(E.)

The following additional cases were cited in argument:

- G *Aldridge, In re* (1893) 15 N.Z.L.R. 361
Allingham v. Minister of Agriculture and Fisheries [1948] 1 All E.R. 780, D.C.
Avon County Council v. Buscott [1988] Q.B. 656; [1988] 2 W.L.R. 788; [1988] 1 All E.R. 841, C.A.
Durayappah v. Fernando [1967] 2 A.C. 337; [1967] 3 W.L.R. 289; [1967] 2 All E.R. 152, P.C.
Friend v. Brehout (1914) 111 L.T. 832, D.C.
Reg. v. Horseferry Road Magistrates' Court, Ex parte Bennett [1994] 1 A.C. 42; [1993] 3 W.L.R. 90; [1993] 3 All E.R. 138, H.L.(E.)
- H *Reg. v. Rose, Ex parte Wood* (1855) 19 J.P. 676
Waverley Borough Council v. Hilden [1988] 1 W.L.R. 246; [1988] 1 All E.R. 807
Wills v. Bowley [1983] 1 A.C. 57; [1982] 3 W.L.R. 10; [1982] 2 All E.R. 654, D.C. and H.L.(E.)

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

This was an appeal by leave dated 19 May 1997 of the House of Lords (Lord Slynn of Hadley, Lord Nicholls of Birkenhead and Lord Hope of Craighead) by the defendant, Peter James Boddington, from the judgment dated 5 July 1996 of the Divisional Court of the Queen's Bench Division (Auld L.J. and Ebsworth J.) dismissing his appeal by way of case stated from his conviction on 28 July 1995 by the stipendiary magistrate for the county of East Sussex sitting at Brighton. The defendant was convicted on an information preferred by the respondent, the British Transport Police, of smoking a cigarette in a railway carriage where smoking was expressly prohibited by a notice conspicuously exhibited to that effect, contrary to byelaw 20 of the Railways Byelaws 1965 made under section 67 of the Transport Act 1962, as amended.

The Divisional Court certified in accordance with section 1(2) of the Administration of Justice Act 1960 that a point of law of general public importance was involved in its decision, namely, whether a defendant might raise as a defence to a criminal charge a contention that a byelaw or an administrative decision made pursuant to powers conferred by it was ultra vires; and (2) if so (i) whether the answer to the question depended on whether the byelaw or the administrative decision was "bad on its face;" and (ii) whether the criminal court might consider whether the byelaw or administrative decision was reasonable, and if so, whether by reference to the criteria stated in *Kruse v. Johnson* [1898] 2 Q.B. 91, or those stated in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, or some other criteria. Leave to appeal was refused.

The facts are stated in the opinion of Lord Irvine of Lairg L.C.

Francis Jones for the defendant. Section 67(1) of the Transport Act 1962 confers a power to "regulate." It is well established that a power to regulate does not normally include a power to prohibit: see *Municipal Corporation of the City of Toronto v. Virgo* [1896] A.C. 88, 93 and *Tarr v. Tarr* [1973] A.C. 254, 265G–268A. Section 67(1) of the Act of 1962 replaced the repealed power under section 109 of the Railway Clauses Consolidation Act 1845 to make regulations "for preventing the smoking of tobacco, and the commission of any other nuisance." "Power to prevent" was replaced with power to "regulate."

The principle of judicial control of byelaws was established in *Kruse v. Johnson* [1898] 2 Q.B. 91, 99, 100. The stipendiary magistrate should have considered and decided whether it was an unnecessary and unreasonable exercise of the power conferred by section 67(1) of the Act of 1962 to impose a total prohibition of smoking on the railway company's trains without reserving a carriage or a part of a carriage for smokers. The principle of *Kruse v. Johnson* applies even though the challenge is not to the content of byelaw 20 but to a decision to use it to impose a ban on smoking on trains.

The contentions that section 67(1) of the Act of 1962 does not authorise a total prohibition of smoking and that the smoking ban fails to satisfy the *Kruse v. Johnson* principle are challenges to substantive validity as outlined by Woolf L.J. in *Bugg v. Director of Public Prosecutions* [1993]

to post these notices had the effect of nullifying their validity, so that byelaw 20 was not properly brought into operation. This, he said, gave him a defence to the offence with which he was charged.

A

He also sought to raise a related, but distinct, defence: that the notices were posted by Network South Central rather than the British Railways Board as such. He argued that neither the primary legislation nor byelaw 20 authorised Network South Central to post the notices, and that the British Railways Board could not delegate the decision to post notices. Mr. Boddington did not pursue this argument before your Lordships.

B

Mr. Boddington's primary defence, therefore, raises the question of the extent to which a defendant to a criminal charge may defend himself by pointing to the unlawfulness of subordinate legislation, or an administrative act made under that legislation, the breach of which is alleged to constitute his offence. The Divisional Court held that Mr. Boddington was not entitled to put forward his public law defence in the criminal proceedings against him.

C

Raising public law defences to criminal charges

These arguments are regularly raised in the courts in cases in the public law field, concerned with applications for judicial review. The issue is whether the same arguments may be deployed in a criminal court as a defence to a criminal charge.

D

Challenge to the lawfulness of subordinate legislation or administrative decisions and acts may take many forms, compendiously grouped by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374 under the headings of illegality, procedural impropriety and irrationality. Categorisation of types of challenge assists in an orderly exposition of the principles underlying our developing public law. But these are not watertight compartments because the various grounds for judicial review run together. The exercise of a power for an improper purpose may involve taking irrelevant considerations into account, or ignoring relevant considerations; and either may lead to an irrational result. The failure to grant a person affected by a decision a hearing, in breach of principles of procedural fairness, may result in a failure to take into account relevant considerations.

E

F

The question of the extent to which public law defences may be deployed in criminal proceedings requires consideration of fundamental principle concerning the promotion of the rule of law and fairness to defendants to criminal charges in having a reasonable opportunity to defend themselves. However, sometimes the public interest in orderly administration means that the scope for challenging unlawful conduct by public bodies may have to be circumscribed.

G

Where there is a tension between these competing interests and principles, the balance between them is ordinarily to be struck by Parliament. Thus whether a public law defence may be mounted to a criminal charge requires scrutiny of the particular statutory context in which the criminal offence is defined and of any other relevant statutory provisions. That approach is supported by authority of this House.

H

In *Director of Public Prosecutions v. Head* [1959] A.C. 83 a defendant was convicted of an offence under section 56(1)(a) of the Mental Deficiency

2 A.C. **Boddington v. British Transport Police (H.L.(E.))**

A Act 1913, of carnal knowledge of “a woman . . . under care or treatment
in an institution or certified house or approved home, or whilst placed out
on licence therefrom.” She had been sent to an institution for defectives as
a “moral defective,” under an order made by the Secretary of State in
purported exercise of his powers under the Act and subsequent orders had
been made to transfer her to other institutions. At the time of the alleged
offences, she was out on licence from one of these institutions. At the trial,
B the prosecution conceded that the original order had been made without
proper evidence that the woman was a “moral defective” and that it could
be successfully challenged on an application for certiorari or a writ of
habeas corpus. The Court of Criminal Appeal quashed the conviction, on
the ground that the woman was not lawfully detained in the institution.
This House, by a majority, upheld that decision.

C The majority and Viscount Simonds treated the issue as turning on the
proper construction of section 56 of the Act. As a matter of construction
did it require the prosecution to prove that the woman was lawfully
detained in the institution? The majority (Lord Reid, Lord Tucker and
D Lord Somervell of Harrow) held that, whilst proof of detention in an
institution established a *prima facie* case that a woman was a defective
lawfully under care, that presumption could be rebutted if the defendant
showed that the detention was in fact unlawful: see especially p. 103, *per*
Lord Tucker. The defendant in the case was assisted by the fact that the
prosecution had itself adduced the evidence from which the invalidity of
the order appeared. But the language of Lord Tucker, delivering the
leading speech for the majority, is consistent with an entitlement in the
defendant to adduce such evidence himself. If the defendant had adduced
E other evidence, for instance to show that the Secretary of State had made
his order for some improper purpose, so that it could be quashed, I think
the majority’s view would have entailed the criminal court reviewing this
evidence to determine whether the defendant had made out a defence on
the basis of it.

F Lord Denning, who was in the minority, was of the view that the order
was valid as at the date of the alleged offence, so that the alleged offence
was made out (p. 113), even although the order was voidable and therefore
liable to be quashed on certiorari. The majority, however, did not accept
that the order was voidable rather than void, but in any event doubted
that, even if it was to be characterised as voidable rather than void, a
defendant could not raise the matter by way of defence. As Lord Somervell
of Harrow put it, at p. 104: “Is a man to be sent to prison on the basis
G that an order is a good order when the court knows it would be set aside
if proper proceedings were taken? I doubt it.” Viscount Simonds, at p. 98,
Lord Reid, at p. 98 and Lord Tucker, at pp. 103–104, agreed with these
views. In my judgment the answer to Lord Somervell’s question must be
“No.” It would be a fundamental departure from the rule of law if an
individual were liable to conviction for contravention of some rule which
H is itself liable to be set aside by a court as unlawful. Suppose an individual
is charged before one court with breach of a byelaw and the next day
another court quashes that byelaw—for example, because it was
promulgated by a public body which did not take account of a relevant
consideration. Any system of law under which the individual was convicted

and made subject to a criminal penalty for breach of an unlawful byelaw would be inconsistent with the rule of law.

In my judgment the views of the majority in *Director of Public Prosecutions v. Head* [1959] A.C. 83 have acquired still greater force in the light of the development of the basic principles of public law since that case was decided. Lord Denning had dissented on the basis of the historic distinction between acts which were ultra vires (“outside the jurisdiction of the Secretary of State”), which he accepted were nullities and void, and errors of law on the face of the relevant record, which rendered the relevant instrument voidable rather than void. He felt able to assign the order in question to the latter category. But in 1969, the decision of your Lordships’ House in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147 made obsolete the historic distinction between errors of law on the face of the record and other errors of law. It did so by extending the doctrine of ultra vires, so that any misdirection in law would render the relevant decision ultra vires and a nullity: see *Reg. v. Hull University Visitor, Ex parte Page* [1993] A.C. 682, 701–702, per Lord Browne-Wilkinson (with whom Lord Keith of Kinkel and Lord Griffiths agreed, at p. 692), citing the speech of Lord Diplock in *O’Reilly v. Mackman* [1983] 2 A.C. 237, 278. Thus, today, the old distinction between void and voidable acts on which Lord Denning relied in *Director of Public Prosecutions v. Head* [1959] A.C. 83 no longer applies. This much is clear from the *Anisminic* case [1969] 2 A.C. 147 and these later authorities.

What was in issue in the *Anisminic* case was a decision of the Foreign Compensation Commission. The plaintiffs brought an action for a declaration that the decision was a nullity. The Commission replied that the courts were precluded from considering the question by section 4(4) of the Foreign Compensation Act 1950. It provided: “The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law.” Lord Reid summarised the case for the Commission in this way, at p. 169:

“The respondent maintains that these are plain words only capable of having one meaning. Here is a determination which is apparently valid: there is nothing on the face of the document to cast any doubt on its validity. If it is a nullity, that could only be established by raising some kind of proceedings in court. But that would be calling the determination in question, and that is expressly prohibited by the statute.”

This submission was rejected in Lord Reid’s speech. He made it clear that all forms of public law challenge to a decision have the same effect, to render it a nullity: see especially p. 171B–F. (Also see pp. 195–196, per Lord Pearce and p. 207D–H, per Lord Wilberforce.) The decision of the Commission was wrong in law, and therefore a nullity, rather than a “determination” within the protection of the ouster clause: see pp. 170–171.

Thus the reservation of Lord Somervell in *Director of Public Prosecutions v. Head* [1959] A.C. 83, 104 (with which the majority allied themselves) whether the order of the Secretary of State could be described

2 A.C. **Boddington v. British Transport Police (H.L.(E.))**

A as voidable has been vindicated by subsequent developments. It is clear, in
the light of *Anisminic* and the later authorities, that the Secretary of State's
order in *Director of Public Prosecutions v. Head* would now certainly be
regarded as a nullity (i.e. as void ab initio), even if it were to be analysed
as an error of law on the face of the record. Equally, the order would be
regarded as void ab initio if it had been made in bad faith, or as a result
B of the Secretary of State taking into account an irrelevant, or ignoring a
relevant, consideration—that is, matters not appearing on the face of the
record, but having to be established by evidence.

C Subordinate legislation, or an administrative act, is sometimes said to
be presumed lawful until it has been pronounced to be unlawful. This does
not, however, entail that such legislation or act is valid until quashed
prospectively. That would be a conclusion inconsistent with the authorities
to which I have referred. In my judgment, the true effect of the presumption
is that the legislation or act which is impugned is presumed to be good
until pronounced to be unlawful, but is then recognised as never having
had any legal effect at all. The burden in such a case is on the defendant
to establish on a balance of probabilities that the subordinate legislation
or the administrative act is invalid: see also *Reg. v. Inland Revenue*
Commissioners, Ex parte T. C. Coombs & Co. [1991] 2 A.C. 283.

D This is the principle to which Lord Diplock referred in *F. Hoffmann-
La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975]
A.C. 295. There the Secretary of State sought an interlocutory injunction
under section 11(2) of the Monopolies and Restrictive Practices (Inquiry
Control) Act 1948, to restrain the appellant from charging prices in excess
of those fixed by a statutory instrument the Secretary of State had made.
E The appellant argued that the statutory instrument was ultra vires, because
it had been based upon a report by the Monopolies Commission, which
the appellant maintained had been produced without due regard to
principles of natural justice. The Secretary of State objected to giving a
cross undertaking in damages and this House ruled that he was not
required to give such an undertaking. The ratio of the decision, as
subsequently explained in *Kirklees Metropolitan Borough Council v. Wickes*
Building Supplies Ltd. [1993] A.C. 227, per Lord Goff of Chieveley, at
F pp. 271–273 and 274, was that a public authority is not required as a rule
to give such an undertaking in a law enforcement action. However, in his
speech, Lord Diplock expressed views about the legal status of the
statutory instrument in question. He made it clear [1975] A.C. 295, 365
that the courts could “declare it to be invalid” if satisfied that the minister
acted outwith his powers conferred by the primary legislation, whether the
G order was “ultra vires by reason of its contents (patent defects) or by
reason of defects in the procedure followed prior to its being made (latent
defects).” He then said:

H “Under our legal system, however, the courts as the judicial arm of
Government do not act on their own initiative. Their jurisdiction to
determine that a statutory instrument is ultra vires does not arise until
its validity is challenged in proceedings inter partes either brought by
one party to enforce the law declared by the instrument against
another party or brought by a party whose interests are affected by
the law so declared sufficiently directly to give him locus standi to

initiate proceedings to challenge the validity of the instrument. Unless there is such challenge and, if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it are presumed. It would, however, be inconsistent with the doctrine of ultra vires as it has been developed in English law as a means of controlling abuse of power by the executive arm of Government if the judgment of a court in proceedings properly constituted that a statutory instrument was ultra vires were to have any lesser consequence in law than to render the instrument incapable of ever having had any legal effect upon the rights or duties of the parties to the proceedings (cf. *Ridge v. Baldwin* [1964] A.C. 40). Although such a decision is directly binding only as between the parties to the proceedings in which it was made, the application of the doctrine of precedent has the consequence of enabling the benefit of it to accrue to all other persons whose legal rights have been interfered with in reliance on the law which the statutory instrument purported to declare.”

Thus, Lord Diplock confirmed that once it was established that a statutory instrument was ultra vires, it would be treated as never having had any legal effect. That consequence follows from application of the ultra vires principle, as a control on abuse of power; or, equally acceptably in my judgment, it may be held that maintenance of the rule of law compels this conclusion.

This view of the law is supported by the decision of this House in *Wandsworth London Borough Council v. Winder* [1985] A.C. 461. That case concerned rent demands made by a local authority landlord on one of its tenants. The local authority, pursuant to its powers under the Housing Act 1957, resolved to increase rents generally. The tenant refused to pay the increased element of the rent. When sued by the local authority for that element, he sought to defend himself by pleading that the resolutions and notices of increase were ultra vires and void, on the grounds that they were unreasonable in the *Wednesbury* sense (i.e. irrational: see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223), and counterclaiming for a declaration to that effect. It seems clear from the particulars given in the defence (set out at pp. 466–467) that the tenant proposed adducing some evidence to support his case of unreasonableness. The local authority sought to strike out the defence and counterclaim as an abuse of process, on the grounds that the tenant should be debarred from challenging the conduct of the local authority other than by application for judicial review under R.S.C., Ord. 53. This House ruled that Mr. Winder was entitled as of right to challenge the local authority’s decision by way of defence in the proceedings which it had brought against him. The decision was based squarely on “the ordinary rights of private citizens to defend themselves against unfounded claims:” *per* Lord Fraser of Tullybelton, delivering the leading speech, at p. 509. As a matter of construction of the relevant legislation, those rights had not been swept away by the procedural reforms introducing the new R.S.C., Ord. 53: pp. 509–510.

2 A.C. **Boddington v. British Transport Police (H.L.(E.))**

A In my judgment, precisely similar reasoning applies, a fortiori, where a private citizen is taxed not with private law claims which are unfounded because based upon some ultra vires decision, but with a criminal charge which is unfounded, because based upon an ultra vires byelaw or administrative decision. The decision of the Divisional Court in *Reg. v. Reading Crown Court, Ex parte Hutchinson* [1988] Q.B. 384 (and the principal authorities referred to in it, including the classic decision in *Kruse v. Johnson* [1898] 2 Q.B. 91) is in accord with this view. There it was held that a defendant to a charge brought under a byelaw is entitled to raise the question of the validity of that byelaw in criminal proceedings before magistrates or the Crown Court, by way of defence. There was nothing in the statutory basis of the jurisdiction of the justices which precluded their considering a challenge to the validity of a byelaw: pp. 391–393, *per* Lloyd L.J.

C In *Bugg v. Director of Public Prosecutions* [1993] Q.B. 473 the Divisional Court departed from this trend of authority. They expressed the view, at p. 493, that “except in the ‘flagrant’ and ‘outrageous’ case a statutory order, such as a byelaw, remains effective until it is quashed.” Three authorities were cited which were said to support this approach: *London & Clydeside Estates Ltd. v. Aberdeen District Council* [1980] 1 W.L.R. 182, 189–190 in the speech of Lord Hailsham of St. Marylebone L.C.; *Smith v. East Elloe Rural District Council* [1956] A.C. 736, 769–770, in the speech of Lord Radcliffe and *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295, 366, in the speech of Lord Diplock. This approach was then elevated by the Divisional Court into a rule that byelaws which are on their face invalid or are patently unreasonable (termed “substantive” invalidity) may be called in question by way of defence in criminal proceedings, whereas byelaws which are invalid because of some defect in the procedure by which they came to be made (termed “procedural” invalidity) may not be called in question in such proceedings, so that a person might be convicted of an offence under them even if the byelaws were later quashed in other proceedings.

F Strong reservations about the decision of the Divisional Court in *Bugg v. Director of Public Prosecutions* [1993] Q.B. 473 have recently been expressed by this House in *Reg. v. Wicks* [1998] A.C. 92. I have reached the conclusion that the time has come to hold that it was wrongly decided.

G I am bound to say that I do not think that the three authorities to which I have referred support the position as stated in *Bugg’s* case [1993] Q.B. 473. In my judgment Lord Diplock’s speech in the *F. Hoffmann-La Roche* case [1995] A.C. 295, when read as a whole, makes it clear that subordinate legislation which is quashed is deprived of any legal effect at all, and that is so whether the invalidity arises from defects appearing on its face or in the procedure adopted in its promulgation. Lord Diplock himself cited, at p. 366, the speech of Lord Radcliffe in *Smith v. East Elloe Rural District Council* [1956] A.C. 736, 769–770 and regarded him as saying no more about the presumption of validity than he (Lord Diplock) was saying. I agree with that view.

H In my judgment, Lord Hailsham L.C., in the passage of his speech relied upon by the Divisional Court in *Bugg’s* case, was simply making the observation that in a flagrant case of invalidity a private citizen might feel

sure enough of his ground to proceed and rely on his rights to assert the “defect in procedure” (as Lord Hailsham L.C. describes it) as a defence in proceedings brought against him; that, on the other hand, where a defect in procedure is trivial (i.e. one which would not render the public body’s act ultra vires), the public body may feel safe to proceed without taking further steps to shore up the validity in law of what it had done by reconsideration of the matter; and that in cases in the grey area between these clear examples, it might be necessary for the private citizen to safeguard his position by taking the prudent course of seeking a declaration of his rights, or for the public body to reconsider the matter. But that would be for the citizen or the public body, as the case might be, to decide. Subject to any statutory qualifications upon his right to do so, the citizen could, in my judgment, choose to accept the risk of uncertainty, take no action at all, wait to be sued or prosecuted by the public body and then put forward his arguments on validity and have them determined by the court hearing the case against him. That is a matter of right in a case of ultra vires action by the public authority, and would not be subject to the discretion of the court: see *Wandsworth London Borough Council v. Winder* [1985] A.C. 461. In my judgment any other interpretation of Lord Hailsham L.C.’s speech could not be reconciled with the decision of this House in the *Anisminic* case [1969] 2 A.C. 147.

In my judgment the reasoning of the Divisional Court in *Bugg’s* case, suggesting two classes of legal invalidity of subordinate legislation, is contrary both to the *Anisminic* case and the subsequent decisions of this House to which I have referred. The *Anisminic* decision established, contrary to previous thinking that there might be error of law within jurisdiction, that there was a single category of errors of law, all of which rendered a decision ultra vires. No distinction is to be drawn between a patent (or substantive) error of law or a latent (or procedural) error of law. An ultra vires act or subordinate legislation is unlawful simpliciter and, if the presumption in favour of its legality is overcome by a litigant before a court of competent jurisdiction, is of no legal effect whatsoever.

The Divisional Court in *Bugg’s* case [1993] Q.B. 473 themselves drew attention to Lord Denning’s dissenting speech in *Director of Public Prosecutions v. Head* and, whilst avowing that “The distinction between orders which are void and voidable is now clearly not part of our law” identified his approach as interesting, because Lord Denning “was drawing a distinction, as we are seeking to do, between different types of invalidity:” see p. 496G. However, the distinction which Lord Denning drew is one which was made redundant by the decision in the *Anisminic* case, in which all categories of unlawfulness were treated as equivalent and as having the same effect.

Further, the Divisional Court thought that there was no authority where it had been held that it is proper for a criminal court to inquire into questions of procedural irregularity. With respect to the court, I think it overlooked that that was one basis for the decision of the majority of this House in *Director of Public Prosecutions v. Head* [1959] A.C. 83. Lord Tucker, at p. 103, envisaged that documents upon which the administrative order were based might be adduced in evidence to rebut the presumption of invalidity. Lord Reid and Lord Somervell agreed with his speech. Lord

2 A.C. **Boddington v. British Transport Police (H.L.(E.))**

A Somervell, at p. 104, thought that the facts of the case itself could also be analysed not as a case of patent error, but as a case where it was shown by evidence that the minister had made his order without having any evidence available to him to justify it, that is, a case of latent procedural, rather than patent, error. Viscount Simonds, Lord Reid and Lord Tucker all agreed. Indeed, on the facts of the case, and this, in my view, was Lord Somervell's point, it was simply fortuitous that the minister's order had made reference on its face to the medical certificates. The result of the case could not have been any different if it had not done so, but appeared on its face to be normal and valid.

B Also, in my judgment the distinction between orders which are "substantively" invalid and orders which are "procedurally" invalid is not a practical distinction which is capable of being maintained in a principled way across the broad range of administrative action. This emerges from the discussion of *Wandsworth London Borough Council v. Winder* [1985] A.C. 461 by the Divisional Court in *Bugg v. Director of Public Prosecutions* [1993] Q.B. 473, 495–496. The court regarded it as a case of "substantive invalidity," i.e. in which either the decision to increase rents or the rent demands themselves were on their face invalid. I disagree. The rent demands appeared perfectly valid on their face. The decision was said by the tenant to be *Wednesbury* unreasonable, because irrelevant matters had, or relevant matters had not, been taken into account, as set out in his pleading. At trial, he would have had to adduce evidence to make out that case. It was not an error on the face of the decision. In *Reg. v. Wicks* [1998] A.C. 92, 114, Lord Hoffmann made the same point and at pp. 113–114, referred to another problem of the application of the categories proposed by the Divisional Court. Many different types of challenge, which shade into each other, may be made to the legality of byelaws or administrative acts. The decision in *Anisminic* freed the law from a dependency on technical distinctions between different types of illegality. The law should not now be developed to create a new, and unstable, technical distinction between "substantive" and "procedural" invalidity.

F In this case, the judgment of Auld L.J. in the Divisional Court justifies such distinctions on pragmatic grounds: the difficulties for magistrates in having to deal with complicated points of administrative law and the dangers of inconsistent decisions, both between different benches of magistrates and between magistrates and the Divisional Court. There is certainly weight in these arguments, although I do not think that magistrates should be underestimated and the practical risks of inconsistency are probably exaggerated. But the remedy proposed, which is in effect to have two systems of challenge to subordinate legislation or administrative action: one in magistrates' courts which is frozen in the pre-*Anisminic* mould and a modern version operated in the Divisional Court, is in my view both illogical and unfair.

H Finally, in relation to *Bugg's* case [1993] Q.B. 473, the consequences of the proposed distinction is that, in a case of "procedural" invalidity, a court (whether in civil or criminal proceedings) is to regard byelaws and other subordinate legislation as valid until set aside in judicial review proceedings; and that an individual who contravenes a byelaw commits an

offence and can be punished, even if the byelaw is later set aside as unlawful: p. 500C–D. I can think of no rational ground for holding that a magistrates’ court has jurisdiction to rule on the patent or substantive invalidity of subordinate legislation or an administrative act under it, but has no jurisdiction to rule on its latent or procedural invalidity, unless a statutory provision has that effect. In my judgment, this conclusion in substance revives the distinction between voidable and void administrative acts and is contrary to the decisions of this House to which I have already referred. If subordinate legislation is ultra vires on any basis, it is unlawful and of no effect in law. It follows that no citizen should be convicted and punished on the basis of it. For these reasons I would overrule *Bugg v. Director of Public Prosecutions*.

However, in every case it will be necessary to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or an administrative act under it. There are situations in which Parliament may legislate to preclude such challenges being made, in the interest, for example, of promoting certainty about the legitimacy of administrative acts on which the public may have to rely.

The recent decision of this House in *Reg. v. Wicks* [1998] A.C. 92 is an example of a particular context in which an administrative act triggering consequences for the purposes of the criminal law was held not to be capable of challenge in criminal proceedings, but only by other proceedings. The case concerned an enforcement notice issued by a local planning authority and served on the defendant under the then current version of section 87 of the Town and Country Planning Act 1971. The notice alleged a breach of planning control by the erection of a building and required its removal above a certain height. One month was allowed for compliance. The appellant appealed against the notice to the Secretary of State, under section 174 of the Town and Country Planning Act 1990, but the appeal was dismissed. The appellant still failed to comply with the notice and the local authority issued a summons alleging a breach of section 179(1) of the Act of 1990. In the criminal proceedings which ensued, the appellant sought to defend himself on the ground that the enforcement notice had been issued ultra vires, maintaining that the local planning authority had acted in bad faith and had been motivated by irrelevant considerations. The judge ruled that these contentions should have been made in proceedings for judicial review and that they could not be gone into in the criminal proceedings. The appellant then pleaded guilty and was convicted. This House upheld his conviction. Lord Hoffmann, in the leading speech, emphasised that the ability of a defendant to criminal proceedings to challenge the validity of an act done under statutory authority depended on the construction of the statute in question. This House held that the Town and Country Planning Act 1990 contained an elaborate code including provision for appeals against notices, and that on the proper construction of section 179(1) of the Act all that was required to be proved in the criminal proceedings was that the notice issued by the local planning authority was formally valid.

The decision of the Divisional Court in *Quietlynn Ltd. v. Plymouth City Council* [1988] 1 Q.B. 114 is justified on similar grounds: see *Reg. v. Wicks*

2 A.C. **Boddington v. British Transport Police (H.L.(E.))**

Lord Irvine
of Lairg L.C.

A [1998] A.C. 92, 117–118, *per* Lord Hoffmann. There, a company was
operating sex shops in Plymouth under transitional provisions which
allowed them to do so until their application for a licence under the
scheme introduced by the Local Government (Miscellaneous Provisions)
Act 1982 had been “determined.” The local authority refused the
application. The company was then prosecuted for trading without a
B licence. It sought to allege that the local authority had failed to comply
with certain procedural provisions and that its application had therefore
not yet been determined within the meaning of the Act. The Divisional
Court held as a matter of construction that the local authority’s decision
was a determination, whether or not it could be challenged by judicial
review. In the particular statutory context, therefore, an act which might
C turn out for a different purpose to be a nullity (e.g. so as to require the
local authority to hear the application again) was nevertheless a
determination for the purpose of bringing the transitional period to
an end.

However, in approaching the issue of statutory construction the courts
proceed from a strong appreciation that ours is a country subject to the
rule of law. This means that it is well recognised to be important for the
maintenance of the rule of law and the preservation of liberty that
D individuals affected by legal measures promulgated by executive public
bodies should have a fair opportunity to challenge these measures and to
vindicate their rights in court proceedings. There is a strong presumption
that Parliament will not legislate to prevent individuals from doing so: “It
is a principle not by any means to be whittled down that the subject’s
recourse to Her Majesty’s courts for the determination of his rights is not
E to be excluded except by clear words:” *Pyx Granite Co. Ltd. v. Ministry of
Housing and Local Government* [1960] A.C. 260, 286, *per* Viscount Simonds;
cited by Lord Fraser of Tullybelton in *Wandsworth London Borough
Council v. Winder* [1969] A.C. 461, 510.

As Lord Diplock put it in *F. Hoffmann-La Roche & Co. Ltd. v.
Secretary of State for Trade and Industry* [1975] A.C. 295, 366c: “the courts
lean very heavily against a construction of an Act which would have this
F effect (cf. *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C.
147).”

The particular statutory schemes in question in *Reg. v. Wicks* [1998]
A.C. 92 and in the *Quietlynn* case [1988] 1 Q.B. 114 did justify a
construction which limited the rights of the defendant to call the legality
of an administrative act into question. But in my judgment it was an
G important feature of both cases that they were concerned with
administrative acts specifically directed at the defendants, where there had
been clear and ample opportunity provided by the scheme of the relevant
legislation for those defendants to challenge the legality of those acts,
before being charged with an offence.

By contrast, where subordinate legislation (e.g. statutory instruments or
byelaws) is promulgated which is of a general character in the sense that it
H is directed to the world at large, the first time an individual may be affected
by that legislation is when he is charged with an offence under it: so also
where a general provision is brought into effect by an administrative act,
as in this case. A smoker might have made his first journey on the line on

the same train as Mr. Boddington; have found that there was no carriage free of no smoking signs and have chosen to exercise what he believed to be his right to smoke on the train. Such an individual would have had no sensible opportunity to challenge the validity of the posting of the no smoking signs throughout the train until he was charged, as Mr. Boddington was, under byelaw 20. In my judgment in such a case the strong presumption must be that Parliament did not intend to deprive the smoker of an opportunity to defend himself in the criminal proceedings by asserting the alleged unlawfulness of the decision to post no smoking notices throughout the train. I can see nothing in section 67 of the Transport Act 1962 or the byelaws which could displace that presumption. It is clear from *Wandsworth London Borough Council v. Winder* [1985] A.C. 461 and *Reg. v. Wicks* [1998] A.C. 92, 116, *per* Lord Hoffmann that the development of a statutorily based procedure for judicial review proceedings does not of itself displace the presumption.

Accordingly, I consider that the Divisional Court was wrong in the present case in ruling that Mr. Boddington was not entitled to raise the legality of the decision to post no smoking notices throughout the train, as a possible defence to the charge against him.

Lord Nicholls of Birkenhead noted in *Reg. v. Wicks*, at pp. 106–107, that there may be cases where proceedings in the Divisional Court are more suitable and convenient for challenging a byelaw or administrative decision made under it than by way of defence in criminal proceedings in the magistrates’ court or the Crown Court. None the less Lord Nicholls held that “the proper starting point” must be a presumption that “an accused should be able to challenge, on any ground, the lawfulness of an order the breach of which constitutes his alleged criminal offence:” see p. 106. No doubt the factors listed by Lord Nicholls may, where the statutory context permits, be taken into account when construing any particular statute to determine Parliament’s intention, but they will not usually be sufficient in themselves to support a construction of a statute which would preclude the right of a defendant to raise the legality of a byelaw or administrative action taken under it as a defence in other proceedings. This is because of the strength of the presumption against a construction which would prevent an individual being able to vindicate his rights in court proceedings in which he is involved. Nor do I think it right to belittle magistrates’ courts: they sometimes have to decide very difficult legal questions and generally have the assistance of a legally qualified clerk to give them guidance on the law. For example when the Human Rights Bill now before Parliament passes into law the magistrates’ courts will have to determine difficult questions of law arising from the European Convention on Human Rights. In my judgment only the clear language of a statute could take away the right of a defendant in criminal proceedings to challenge the lawfulness of a byelaw or administrative decision where his prosecution is premised on its validity.

Is Mr. Boddington's defence made out?

The burden was on Mr. Boddington to establish, on a balance of probabilities, that the decision of Network South Central to post no smoking notices in all the carriages of its trains was unlawful. His

with which I agree. For the reasons which he gives I would dismiss this appeal.

I have also read the speech of my noble and learned friend, Lord Irvine of Lairg L.C. with which, but for one point, I also agree. The Lord Chancellor attaches importance to the consideration that an invalid byelaw is and always has been a nullity. The byelaw will necessarily have been found to be ultra vires; therefore it is said it is a nullity having no legal effect. I adhere to my view that the juristic basis of judicial review is the doctrine of ultra vires. But I am far from satisfied that an ultra vires act is incapable of having any legal consequence during the period between the doing of that act and the recognition of its invalidity by the court. During that period people will have regulated their lives on the basis that the act is valid. The subsequent recognition of its invalidity cannot rewrite history as to all the other matters done in the meantime in reliance on its validity. The status of an unlawful act during the period before it is quashed is a matter of great contention and of great difficulty: see *Percy v. Hall* [1997] Q.B. 924, 950–952, per Schiemann L.J. and the authorities there referred to; *de Smith, Woolf and Jowell, Judicial Review of Administrative Action*, 5th ed. (1995), paras. 5.044–5.048 and *Calvin v. Carr* [1980] A.C. 574, 589–590.

I prefer to express no view at this stage on those difficult points. It is sufficient for the decision of the present case to agree with both my Lords in holding that a man commits no crime if he infringes an invalid byelaw and has the right to challenge the validity of the byelaw before any court in which he is being tried.

LORD SLYNN OF HADLEY. My Lords, I have had the advantage of reading in draft the speeches prepared by noble and learned friends, Lord Irvine of Lairg L.C. and Lord Steyn. Like them I hold that it is open to a defendant to raise in a criminal prosecution the contention that a byelaw or an administrative act undertaken pursuant to it is ultra vires and unlawful and that if he establishes that he has committed no crime. For magistrates to be required to convict when they are satisfied that an administrative act is unlawful is unacceptable. It is not a realistic or satisfactory riposte that defendants can always go by way of a judicial review. In any event although the procedural advantages of raising such questions by way of judicial review have long been recognised, an application for judicial review is not a straitjacket which must be put on before rights can be asserted. The decisions in cases in your Lordships' House cited by Lord Steyn make this clear.

The risk of divergent decisions by magistrates is of course present but if a decision by a court of criminal jurisdiction that a byelaw or administrative act pursuant to it is ultra vires is of importance to a prosecuting authority the latter can always challenge it. It is indeed a matter for consideration whether some simple form of reference by magistrates' courts to the Divisional Court of questions of invalidity could not be set up.

I further agree, for the reasons given by my noble and learned friends, that for this purpose the distinction between substantive and procedural error should not be upheld. Like Lord Steyn I am in agreement with the

2 A.C. **Boddington v. British Transport Police (H.L.(E.))**

A passage quoted by him of the opinion of Lord Nicholls of Birkenhead in *Reg. v. Wicks* [1998] A.C. 92, 108.

B I consider that the result of allowing a collateral challenge in
proceedings before courts of criminal jurisdiction can be reached without
it being necessary in this case to say that if an act or byelaw is invalid it
must be held to have been invalid from the outset for all purposes and
that no lawful consequences can flow from it. This may be the logical
C result and will no doubt sometimes be the position but courts have had to
grapple with the problem of reconciling the logical result with the reality
that much may have been done on the basis that an administrative act or
a byelaw was valid. The unscrambling may produce more serious difficulties
than the invalidity. The European Court of Justice has dealt with the
D problem by ruling that its declaration of invalidity should only operate for
the benefit of the parties to the actual case or of those who had began
proceedings for a declaration of invalidity before the courts' judgment. In
our jurisdiction the effect of invalidity may not be relied on if limitation
periods have expired or if the court in its discretion refuses relief, albeit
considering that the act is invalid. These situations are of course different
from those where a court has pronounced subordinate legislation or an
administrative act to be unlawful or where the presumption in favour of
their legality has been overruled by a court of competent jurisdiction. But
even in these cases I consider that the question whether the acts or byelaws
are to be treated as having at no time had any effect in law is not one
which has been fully explored and is not one on which it is necessary to
rule in this appeal and I prefer to express no view upon it. The cases
referred to in *Wade and Forsyth, Administrative Law* 7th ed. (1997),
E pp. 323–324, 342–344 lead the authors to the view that nullity is relative
rather than an absolute concept (p. 343) and that “void” is “meaningless
in any absolute sense. Its meaning is relative.” This may all be rather
imprecise but the law in this area has developed in a pragmatic way on a
case by case basis. The result, however, in the present case is clear that the
validity of the administrative act may be challenged by way of defence.

F Although the appellant has served a useful function in bringing this
appeal and establishing the right to raise in the magistrates' court the
invalidity of the administrative act of putting up no smoking notices in the
railway carriages, his appeal must still fail. For the reasons given by Lord
Irvine of Lairg L.C. it seems to me plain that on the wording of
section 67(1) of the Transport Act 1962 Network South Central acted
within their powers.

G I would accordingly dismiss the appeal.

LORD STEYN. My Lords.

I. *The general problem*

H It is a truth generally acknowledged among lawyers that the complexity
of a civil or criminal case does not depend on the level of the hierarchy of
courts where it is heard. On a given day a bench of magistrates may have
to decide a more difficult case than an appeal being heard by the Appellate
Committee of the House of Lords. Magistrates are the bedrock of the
English criminal justice system: they decide more than 95 per cent. of all

VIII. *Legislative reform*

Subject to suitable and effective safeguards to protect the individual, there is a case for legislation providing for a discretionary transfer by a criminal court of public law issues to the Divisional Court. But any such reform must confront the problem created by the fact that leave to apply for judicial review is required, and that the remedies are discretionary. Those features of judicial review procedure cannot readily be reconciled with the need to ensure justice in accordance with law to a defendant in a criminal trial. Moreover, it will be necessary to take into consideration the countervailing arguments of the type put forward by the Greenham Common defendant in *Ex parte Hutchinson* [1988] Q.B. 384 and to those mentioned by Lord Bridge of Harwich in *Chief Adjudication Officer v. Foster* [1993] A.C. 754. But, above all, it must be borne in mind that there “are grave objections to giving courts discretion to decide whether governmental action is lawful or unlawful.” *Wade, Administrative Law*, 6th ed. (1988), p. 354. In my view any reform must take account of such concerns.

IX. *The disposal of the appeal*

Mr. Boddington has vindicated his right to challenge the byelaw and the administrative decision of which he complained. But his defence has been rejected. I would therefore dismiss the appeal.

LORD HOFFMANN. My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Irvine of Lairg L.C. and Lord Steyn. For the reasons they have given I, too, would dismiss the appeal.

Appeal dismissed.
No order as to costs.

Solicitors: Kenwright & Lynch; Crown Prosecution Service; Treasury Solicitor.

J. A. G.



Neutral Citation Number: [2025] EWHC 2013 (Admin)

Case No: AC-2025-LON-002122

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2025

Before :

MR JUSTICE CHAMBERLAIN

Between :

THE KING
on the application of
HUDA AMMORI

Claimant

- and -

SECRETARY OF STATE FOR THE HOME
DEPARTMENT

Defendant

Raza Husain KC, Blinne Ní Ghrálaigh KC, Paul Luckhurst, Owen Greenhall, Audrey Cherryl Mogan, Mira Hammad and Grant Kynaston (instructed by Birnberg Peirce Solicitors) for the Claimant
James Eadie KC, David Blundell KC, Ben Watson KC, Stephen Kosmin, Andrew Deakin and Karl Laird (instructed by the Government Legal Department) for the Defendant
Tim Buley KC, Dominic Lewis and Jesse Nicholls (instructed by the Special Advocate Support Office) as Special Advocates

Hearing dates: 21 July 2025

Approved Judgment

This judgment was handed down in Court 72 at 2pm on Wednesday 30 July 2025.

Mr Justice Chamberlain:

Introduction

1. The claimant is one of the founders of Palestine Action (“PA”). She challenges the Home Secretary’s decision to make an order adding PA to the list of proscribed organisations in Schedule 2 to the Terrorism Act 2000 (“the 2000 Act”).
2. The Home Secretary announced on Monday 23 June 2025 that she would lay a draft order proscribing PA. The present claim, challenging that decision, was sent to the court on the evening of Friday 27 June. The order was laid in draft on Monday 30 June and approved by affirmative resolutions of the House of Commons (on 2 July) and House of Lords (on 3 July).
3. After an initial hearing on 30 June, I heard an application for interim relief on 4 July. In a judgment handed down that afternoon, I held that the claim raised at least one serious issue to be tried, but that the balance of public interest was against the grant of interim relief: [2025] EWHC 1708 (Admin). Later that evening, the Court of Appeal heard and refused an application for permission to appeal: [2025] EWCA Civ 848.
4. The proscription order was made on 4 July and came into force at 00:01 on 5 July.
5. After a CLOSED hearing on 16 July, at which the claimant’s interests were represented by Special Advocates, I announced in OPEN that I had decided to make a declaration under s. 6 of the Justice and Security Act 2013 (“the 2013 Act”) and had given the Home Secretary permission to withhold sensitive material for the purposes of permission only, on the basis that further directions would be given for the resolution of disclosure issues if permission were granted.
6. I have read the CLOSED material filed to date.
7. The defendant filed Summary Grounds of Defence. The claimant filed an Amended Statement of Facts and Grounds, incorporating points raised at the interim relief hearing, in respect of which I gave permission to amend on 4 July.
8. The hearing to determine permission to apply for judicial review was on 21 July. Submissions for the claimant were made in OPEN by Raza Husain KC and Blinne Ní Ghrálaigh KC and in CLOSED by Mr Tim Buley KC, lead Special Advocate. Sir James Eadie KC made submissions in OPEN and CLOSED for the defendant.

Background

9. A summary of the evidence adduced by the claimant in support of the claim and the background to the proscription order can be found at [8]-[25] of my judgment on interim relief. A summary of the applicable legal framework is set out at [27]-[39]. These are not repeated here.

effect on the legitimate political speech of many thousands of people, that would do considerable harm to the public interest. A decision requiring the Home Secretary to lay an order to deproscribe PA, given sometime in the middle of 2026, could not repair that injury in the way that a payment of interest could on the facts of the *Glencore* case.

38. This point had some substance even before the proscription order came into force. At [100] of my interim relief judgment, I said this:

“It is possible that some who have been protesting legitimately under the banner of PA will be deterred from continuing to protest for fear of incurring criminal liability (for example on the basis that continuing their protest might be perceived as expressing support for PA or as organising on its behalf). The evidence I have seen establishes that the broad criminal prohibitions imposed by the 2000 Act, and the very long sentences potentially available for breach of them, can cast a long shadow over legitimate speech. This, however, is the inherent consequence of a regime which aims to disrupt and disable organisations which meet the threshold for proscription and which the Secretary of State and Parliament decide to proscribe.”

39. The evidence filed by the claimant since the interim relief judgment suggests that some of the claimant’s predictions about the effects of the proscription order have been borne out by events.
40. First, there are cases where persons protesting against what they consider to be Israel’s genocide and in support of Palestine or Gaza—who are not on any view expressing support for PA—have attracted various kinds of police attention, from questioning to arrest. An example can be found in the witness statement of Laura Murton, who was questioned by armed officers from Kent Constabulary for holding a sign with the words “Free Gaza” and a Palestinian flag. She videoed the interaction and has produced a transcript. There are other reports of similar incidents. For example, the human rights campaigner Peter Tatchell posted on social media that he had been stopped by security staff at a concert in Trafalgar Square because he was wearing a badge in the colours of the Palestinian flag, bearing the words “Palestine Solidarity Campaign – Free PALESTINE” and the web address of that organisation.
41. On one level, it is important not to draw too much from the fact that police and others appear to have misunderstood the law on some occasions. It may be anticipated that the number of such misunderstandings will diminish over time and that, if they do not, the criminal courts will make matters clear in due course. As I said at [97] of my interim relief judgment, it remains lawful to express one’s opposition to Israel’s actions in Gaza and elsewhere, including by drawing attention to what some regard as Israel’s genocide and other serious violations of international law. This can be done lawfully in private conversations, in print, on social media and at protests. It also remains lawful to express one’s support for Palestine, Palestinians, or pro-Palestinian organisations not connected with PA. Nonetheless, reports of the kind of police conduct referred to in [35] above are liable to have a chilling effect on those wishing to express legitimate political views. This effect can properly be regarded as an indirect consequence of the proscription order.
42. Secondly, and more importantly, there are numerous examples of speech which have attracted police attention where the line between legitimate and proscribed speech is

more difficult to draw. Here, the police have the unenviable task of distinguishing between those seeking to express support for PA without saying so in terms and those whose intention is simply to call for action of one kind or another in relation to the situation in Palestine. Criminal courts may have to make decisions in individual cases about instances such as these. It would not be appropriate for me to say anything here about these cases, save that the existence of a large category of cases that are close to the line demonstrates that the proscription order is likely to have a significant deterrent effect on legitimate speech. This shows that the proscription order is likely to give rise to a substantial interference with rights guaranteed by the common law and by Articles 10 and 11 of the European Convention on Human Rights (“ECHR”).

43. Third, there are cases where individuals who have clearly expressed support for PA have been arrested and in some cases charged with offences under ss. 12 and 13 of the 2000 Act. In these cases, the individuals concerned have chosen to do something that—on the assumption that the proscription order is itself lawful—they know is now a criminal offence. As I said at [98] of the interim relief judgment, it would be wrong to accord significant weight to the interests of those who plan deliberately to flout the law. This category of affected persons seems to me to be relevant in another way, however. Persons charged with offences under ss. 12 and 13 of the 2000 Act may wish to test the assumption that the proscription order is lawful. I consider the relevance of this to the “alternative remedy” argument as factor 3 below.

Factor (3): Criminal cases

44. It is a premise of the Home Secretary’s “alternative remedy” argument that there are two routes by which the proscription can be challenged: (i) judicial review or (ii) application for deproscription followed by appeal to POAC. This leaves out of account a third possible route. Those charged with criminal offences under the 2000 Act in respect of alleged support for PA may seek to challenge the validity of the proscription order by way of defence to their criminal proceedings. On the face of it, since the order is secondary legislation, it seems likely that they would be entitled to do so, applying the principles set out by the House of Lords in *Boddington v British Transport Police* [1999] 2 AC 143.
45. As a matter of principle, it seems likely that the defence could include the incompatibility of the order with Articles 10 and 11 ECHR: see e.g. *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, [2019] 1 WLR 6430. Sir James would not be drawn on whether such a defence would be open to defendants in criminal proceedings, but suggested no plausible reason why not.
46. If the legality of the proscription order can properly be raised by way of defence to criminal proceedings, that would open up the spectre of different and possibly conflicting decisions on that issue in Magistrates’ Courts across England and Wales or before different judges or juries in the Crown Court. That would be a recipe for chaos. To avoid it, there is a strong public interest in allowing the legality of the order to be determined authoritatively as soon as possible. The obvious way to do that is in judicial review proceedings.
47. The public interest in such a determination would be at least as strong if the challenge fails as if it succeeds. If the proscription order is determined to be lawful, there would

a real benefit in making that clear to the general public as soon as possible, so as to prevent the criminal courts from becoming clogged up with unmeritorious defences.

48. At one stage it was suggested that those charged with criminal offences which depend on the validity of the proscription order could invite the criminal courts to adjourn their cases pending the outcome of an application for deproscription and appeal to POAC. That seems unlikely to provide a satisfactory solution, not least because an appeal to POAC does not render the proscription order void ab initio and the provisions of s. 7 of the 2000 Act (which provide for appeals against criminal convictions in respect of offences in relation to organisations that are subsequently deproscribed) apply only where the activity in respect of which the individual was convicted took place on or after the date of the refusal to deproscribe.
49. Sir James suggested that there might be a way around this: s. 3 of the Human Rights Act 1998 could be used to achieve an ECHR-compliant reading of s. 7. It is by no means obvious that such an argument would succeed, given the clear terms of s. 7. In any event, it is a complication that would not arise if the proscription order can be challenged in judicial review proceedings. The status of criminal convictions in respect of activity in relation to PA since proscription is far from a theoretical issue, given that large numbers of individuals have already been arrested for engaging in such activity.

Factor (4): Forum and procedure

50. Sir James placed heavy emphasis on the fact that Parliament had created a bespoke tribunal, POAC, with a special constitution and unique procedural rules, to hear challenges of this kind.
51. In my judgment, however, this point has relatively little force in the present context for three reasons. First, it is necessary to unpack what is meant by “challenges of this kind”. As noted above, Parliament created an appellate route to POAC for challenges to refusals of applications to deproscribe. It could have ousted, but did not oust, judicial review of the initial decision to proscribe. It may have proceeded on the assumption that applications to deproscribe would typically be made on the basis that, at the time of the application, the organisation in question is no longer concerned in terrorism, rather than on the basis that the initial decision to proscribe was unlawful.
52. Secondly, and in any event, the availability of a closed material procedure under the 2013 Act marks a significant difference between the position as it was at the time of the *Kurdistan Workers’ Party* case and the present day. In that case, Richards J identified two respects in which POAC was “at a clear advantage over the Administrative Court”: first, the availability of a closed material procedure with special advocates representing the interests of the excluded party in the CLOSED part of the proceedings; and secondly, the ability to receive certain kinds of evidence which were ordinarily inadmissible.
53. On the law as it then stood, Richards J speculated at [76] that the court “might be able to devise something equivalent to the closed material procedure”, but said that “it would be far less satisfactory to go down that route than to utilise the POAC procedure already carefully formulated for the purpose”. At [77], he addressed the suggestion that the provisions governing the inadmissibility of intercept evidence could be read down to

achieve compatibility with the ECHR. This, he said, was “at best very uncertain and would again be a less satisfactory route than reliance on the clear and general exception under s.18(1)(f) [of the Regulation of Investigatory Powers Act 2000] in respect of any proceedings before POAC or any proceedings arising out of proceedings before POAC”.

54. The position has moved on. Since the date of Richards J’s decision, the 2013 Act, taken together with CPR Part 82, makes available in High Court proceedings a closed material procedure with special advocates, which is in most respects similar to that applicable in POAC; and Sch. 3 to the Investigatory Powers Act 2016 makes intercept evidence (which is inadmissible in most other proceedings) admissible in proceedings in which a declaration under s. 6 of the 2013 Act has been made. This means that the two main advantages of POAC over the High Court identified by Richards J have now largely disappeared.
55. I accept that there is still a difference between the closed material procedure in POAC and that available in the High Court under the 2013 Act. In POAC, CLOSED material may be withheld on the ground that its disclosure would be contrary to “the interests of national security, the international relations of the United Kingdom or the detection and prevention of crime, or in any other circumstances where disclosure is contrary to the public interest” (see r. 4 of the POAC Procedure Rules). By contrast, in proceedings under the 2013 Act in the High Court, CLOSED material may only be withheld on the ground that its disclosure would be contrary to the interests of national security (s. 6(11) of the 2013 Act). The significance of this difference should not, however, be overstated.
56. In most cases where an organisation is proscribed under the 2000 Act, the material which the Home Secretary seeks to withhold will be material whose disclosure would be damaging to the interests of national security, even if it would also be damaging to some other public interest. In the present case, I have already made a declaration under s. 6 of the 2013 Act and given limited permission to withhold sensitive information under s. 8. If there had been material whose disclosure was damaging to another public interest, but not to the interests of national security, the Home Secretary would have had to issue a public immunity certificate. She has not. It cannot be entirely ruled out that such a certificate might become necessary at a later stage. At the present moment, however, this is a speculative possibility and, even if it were to eventuate, there is no reason to suppose that the material in question would be of central importance to the case. This minor difference between the closed material procedures available in the High Court and POAC does not justify the weight that Sir James sought to place on it.
57. There is, of course, a difference in constitution between the High Court and POAC. The former consists only of judges, though in a case such as this it is possible that any substantive hearing would be heard before a Divisional Court. The latter typically sits as a panel consisting of a judge, a lawyer and a member with expertise in security and intelligence matters. This difference is not, however, sufficient on its own, to render the High Court an inappropriate forum for the resolution of the issues likely to arise in a challenge to the lawfulness of the order. Judges sitting in the High Court regularly resolve issues relating to the legality and proportionality of measures designed to address terrorism when considering Terrorism Prevention and Investigation Measures, financial restrictions and sanctions.

58. Finally, Richards J placed some reliance on the fact that POAC had been designated as the appropriate tribunal for the purposes of s. 7 of the HRA: see the Proscribed Organisations Appeal Commission (Human Rights Act Proceedings) Rules 2001 (SI 2001/127). However, an examination of the terms of those rules seems to me to support the opposite conclusion. They designate POAC as the appropriate tribunal only for proceedings under s. 7(1) of the HRA against the Secretary of State “in respect of a refusal by him to exercise his power under section 3(3)(b) of the Terrorism Act 2000 to remove an organisation from Schedule 2 to that Act”.
59. On its face, that does not cover human rights claims arising from the initial decision to proscribe under s. 3(3)(a). If that is right, claims for human rights damages flowing from the initial decision to proscribe, like other human rights claims flowing from public decisions where quashing is sought, should be brought in judicial review proceedings under s. 31(4) of the Senior Courts Act 1981.

Factor (5): Would the availability of judicial review render the deproscription/POAC route a dead letter?

60. Sir James submitted that, if judicial review were available, no proscribed organisation would need to apply for deproscription or appeal to POAC. This, he said, would render the carefully calibrated statutory regime a dead letter. I do not accept that submission.
61. Many applications for deproscription will be made on the basis that, whatever the position when the initial proscription order was made, by the time of the application to deproscribe the organisation has ceased to be concerned in terrorism. The organisation will often be one that operates in another country or countries. The focus of the application for deproscription, and of any appeal from a refusal to deproscribe, will be on how the organisation has changed, whether it has renounced the methods it previously used and on how political changes in the countries where it operates affect the way it is properly to be characterised. As I have said, this was the focus of the appeals which POAC has heard to date. (POAC has heard appeals in respect of only two organisations: the People’s Mujahideen of Iran and the Tamil Tigers.)
62. An organisation wishing to advance an argument of this kind could not, of course, seek judicial review of the initial decision to proscribe. It follows that, in such cases, the availability in principle of judicial review of initial decisions to proscribe would not affect in any way the use of the statutory deproscription procedure (and, if necessary, the appeal to POAC).

The Kurdistan Workers’ Party case

63. Against this background, I can explain relatively briefly what I draw from Richards J’s judgment in the *Kurdistan Workers’ Party* case.
64. Richards J identified three considerations which, at [79], he said “tell strongly in favour of POAC being the appropriate tribunal” for consideration of issues about the proportionality of proscription. As I have sought to explain, the considerations at [76] and [77] flowed from the absence at the relevant time of a statutory closed material procedure in the High Court. The position in that respect has changed, so these parts of

976
Sheldrake v DPP (HL(E))

[2004] 3 WLR

House of Lords

A

Sheldrake v Director of Public Prosecutions
Attorney General's Reference (No 4 of 2002)

[2004] UKHL 43

B

2004 June 28, 29, 30;
Oct 14

Lord Bingham of Cornhill, Lord Steyn,
Lord Phillips of Worth Matravers MR,
Lord Rodger of Earlsferry and Lord Carswell

Crime — Belonging to proscribed organisation — Statutory defence — Defence to prove lack of participation in organisation's activities while proscribed — Whether incompatible with presumption of innocence and right to freedom of expression — Human Rights Act 1998 (c 42), s 3(1), Sch 1, Pt I, arts 6(2), 10 — Terrorism Act 2000 (c 11), s 11

C

Road traffic — Drunk in charge of motor vehicle — Likelihood of driving — Statutory defence for defendant to prove no likelihood of driving vehicle while remaining unfit through drink — Whether incompatible with presumption of innocence — Road Traffic Act 1988 (c 52), s 5(1)(b)(2) — Human Rights Act 1998 (c 42), s 3(1), Sch 1, Pt I, art 6(2)

D

The defendant in the appeal was charged before the justices with being in charge of a motor vehicle after having consumed so much alcohol that the proportion of it in his breath exceeded the prescribed limit, contrary to section 5(1)(b) of the Road Traffic Act 1988¹. He argued that the defence under section 5(2), which cast upon the defendant the burden of proving that there was no likelihood of his driving the vehicle while over the limit, was not compliant with the presumption of innocence guaranteed by article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998², unless the section was construed, in accordance with section 3(1) of the 1998 Act, as imposing only an evidential burden and not a legal burden on the defendant. The justices convicted the defendant, and he appealed by way of case stated. The Divisional Court allowed the appeal and held that the likelihood of the defendant driving whilst over the limit was the gravamen of the offence under section 5(1)(b), that section 5(1)(b) read with section 5(2) violated the presumption of innocence in article 6(2) of the Convention because it enabled a defendant to be convicted even though the court was not sure that there was a likelihood of his driving, that section 5(2) pursued a legitimate aim, and that it was not necessary in order to accomplish the objective of the 1988 Act to impose a legal burden on the defendant to show that there was no likelihood of his driving whilst over the limit, and therefore it was disproportionate to do so.

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The defendant in the Attorney General's reference was charged with two offences of belonging to and professing to belong to a proscribed organisation, contrary to section 11(1) of the Terrorism Act 2000³. At trial he raised the defence contained in section 11(2) that the organisation had not been proscribed at the time when he

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¹ Road Traffic Act 1988, s 5: see post, para 35.

² Human Rights Act 1998, s 3(1): "So far as it is possible to do so, primary legislation . . . must be read and given effect to in a way which is compatible with the Convention rights."

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Sch 1, Pt I, art 6(2): see post, para 8.

Art 10: "(1) Everyone has the right to freedom of expression . . . (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . ."

³ Terrorism Act 2000, s 11: see post, para 47.

- A became a member or professed to be a member of it and that he had not taken part in the activities of the organisation at any time while it was proscribed. The Crown conceded that section 11(2) imposed only an evidential and not a legal burden on the defendant. The judge found that the defendant had successfully raised the issue of when he first became a member or professed membership of the organisation and that the prosecution had failed to prove that he had taken part in the organisation's activities since proscription, and ruled that there was no case to answer. The
- B Attorney General referred to the Court of Appeal the questions what were the ingredients of the offence contrary to section 11(1); whether the defence contained in section 11(2) imposed a legal, rather than an evidential, burden upon a defendant; and, if so, whether such a legal burden was compatible with the presumption of innocence guaranteed by article 6(2) of the Convention. The Court of Appeal held that the ingredients of the offence were fully set out in section 11(1)(2) and that the defence in section 11(2) imposed a legal rather than an evidential burden on the
- C defendant and was compatible with articles 6(2) and 10 of the Convention, and referred the question to the House of Lords.

On appeal by the Director of Public Prosecutions and on the reference—

- Held*, (1) that the justifiability and fairness of provisions which imposed a burden of proof on a defendant in a criminal trial had to be judged in the particular context of each case, and the court's task was to decide whether Parliament had unjustifiably infringed the presumption of innocence; that the overriding concern was that a trial should be fair, and the presumption of innocence was a fundamental right directed to that end; that the Convention did not outlaw presumptions of fact or law but required that they should be kept within reasonable limits and should not be arbitrary; that it was open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea; but that the substance and effect of any presumption adverse to a defendant had to be examined on all the facts and circumstances of a particular provision and had to be reasonable; and that relevant to any judgment on reasonableness or proportionality would be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what was at stake and the difficulty which a prosecutor might find in the absence of a presumption (post, paras 21, 30, 31, 55–57, 80).
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- R v Lambert* [2002] 2 AC 545, HL(E), *R v A (No 2)* [2002] 1 AC 45, HL(E), *R v Johnstone* [2003] 1 WLR 1736, HL(E), *Ghaidan v Godin-Mendoza* [2004] 3 WLR 1113, HL(E) and *Attorney General's Reference (No 1 of 2004)* [2004] 1 WLR 2111, CA considered.
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- (2) Allowing the appeal, that section 5(2) of the 1988 Act imposed a legal burden on a defendant who was charged with an offence contrary to section 5(1)(b) and was directed to a legitimate objective, namely the prevention of death, injury and damage caused by unfit drivers; that the offence under section 5(1)(b) did not require proof that the defendant was likely to drive whilst unfit, but the defendant was given the opportunity by section 5(2) to exonerate himself if he could show that there was no such likelihood; that the likelihood of the defendant driving was a matter so closely conditioned by his own knowledge and state of mind at the material time as to make it much more appropriate for him to prove on the balance of probabilities that he would not have been likely to drive than for the prosecution to prove, beyond reasonable doubt, that he would; that the imposition of a legal burden upon the defendant did not go beyond what was necessary and reasonable, and was not in any
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- H way arbitrary; and that, accordingly, the defendant's conviction of an offence under section 5(1)(b) resulting from a failure to establish a defence under section 5(2) could not be regarded as unfair (post, paras 40–44, 55–57, 83–86).

Director of Public Prosecutions v Watkins [1989] QB 821, DC considered.

- (3) That section 11(2) of the 2000 Act did not add any new ingredient to the offence under section 11(1), so that participation in the activities of a proscribed

organisation was not an ingredient of the offence of belonging to or professing to belong to a proscribed organisation; that Parliament intended by section 11(2) to place a legal burden upon the defendant; that (Lord Rodger of Earlsferry and Lord Carswell dissenting) there was a real risk that a person who was innocent of any blameworthy or properly criminal conduct but who was unable to establish a defence under section 11(2) might fall within section 11(1), thereby resulting in a clear breach of the presumption of innocence and an unfair conviction; that, bearing in mind the difficulties a defendant would have in proving the matters contained in section 11(2) and the serious consequences for the defendant in failing to do so, the imposition of a legal burden upon the defendant was not a proportionate and justifiable legislative response to the threat of terrorism; that while security considerations always carried weight they did not absolve member states from their duty to ensure that basic standards of fairness were observed; and that since section 11(2) impermissibly infringed the presumption of innocence, it was appropriate, pursuant to section 3 of the 1998 Act, to read down section 11(2) so as to impose on the defendant an evidential burden only, even though that was not Parliament's intention when enacting the subsection (post, paras 48–53, 55, 56).

Decision of the Divisional Court of the Queen's Bench Division [2003] EWHC 273 (Admin); [2004] QB 487; [2003] 2 WLR 1629; [2003] 2 All ER 497 reversed.

Decision of the Court of Appeal (Criminal Division) [2003] EWCA Crim 762; [2003] 3 WLR 1153; [2004] 1 All ER 1 reversed.

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

AG v Malta (Application No 16641/90) (unreported) 10 December 1991, EComHR
Attorney General's Reference (No 1 of 2004) [2004] EWCA Crim 1025; [2004] 1 WLR 2111, CA

B (A Minor) v Director of Public Prosecutions [2000] 2 AC 428; [2000] 2 WLR 452; [2000] 1 All ER 833, HL(E)

Barberà, Messegue and Jabardo v Spain (1988) 11 EHRR 360

Bates v United Kingdom [1996] EHRLR 312

Bellinger v Bellinger (Lord Chancellor intervening) [2003] UKHL 21; [2003] 2 AC 467; [2003] 2 WLR 1174; [2003] 2 All ER 593, HL(E)

Bernard v France (1998) 30 EHRR 808

Brown v Stott [2003] 1 AC 681; [2001] 2 WLR 817; [2001] 2 All ER 97, PC

Brown v United Kingdom (Application No 44223/98) (unreported) 2 July 2002, ECtHR

Director of Public Prosecutions v Watkins [1989] QB 821; [1989] 2 WLR 966; [1989] 1 All ER 1126, DC

Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 3 WLR 113; [2004] 3 All ER 411, HL(E)

H v United Kingdom (Application No 15023/89) (unreported) 4 April 1990, EComHR

Heaney and McGuinness v Ireland (2000) 33 EHRR 264

Hoang v France (1992) 16 EHRR 53

Janosevic v Sweden (2002) 38 EHRR 473

Jayasena v The Queen [1970] AC 618; [1970] 2 WLR 448; [1970] 1 All ER 219, PC

M'Naghten's Case (1843) 10 Cl & Fin 200

Mancini v Director of Public Prosecutions [1942] AC 1; [1941] 3 All ER 272, HL(E)

Nimmo v Alexander Cowan & Sons Ltd [1968] AC 107; [1967] 3 WLR 1169; [1967] 3 All ER 187, HL (Sc)

Porras v The Netherlands (Application No 49226/99) (unreported) 18 January 2000, ECtHR

R v A (No 2) [2001] UKHL 25; [2002] 1 AC 45; [2001] 2 WLR 1546; [2001] 3 All ER 1, HL(E)

R v Carass [2001] EWCA Crim 2845; [2002] 1 WLR 1714, CA

- A *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326; [1999] 3 WLR 972; [1999] 4 All ER 801, HL(E)
R v Edwards [1975] QB 27; [1974] 3 WLR 285; [1974] 2 All ER 1085, CA
R v Gleeson [2001] EWCA Crim 2023 [2002] 1 Cr App R (S) 485, CA
R v Hundal [2004] EWCA Crim 389; [2004] 2 Cr App R 307, CA
R v Hunt (Richard) [1987] AC 352; [1986] 3 WLR 1115; [1987] 1 All ER 1, HL(E)
R v Johnstone [2002] EWCA Crim 194, CA; [2003] UKHL 28; [2003] 1 WLR 1736; [2003] 3 All ER 884, HL(E)
- B *R v K* [2001] UKHL 41; [2002] 1 AC 462; [2001] 3 WLR 471; [2001] 3 All ER 897, HL(E)
R v Lambert [2002] QB 1112; [2001] 2 WLR 211; [2001] 1 All ER 1014, CA; [2001] UKHL 37; [2002] 2 AC 545; [2001] 3 WLR 206; [2001] 3 All ER 577, HL(E)
R v S [2002] EWCA Crim 2558; [2003] 1 Cr App R 602, CA
R v Warner [1969] 2 AC 256; [1968] 2 WLR 1303; [1968] 2 All ER 356, HL(E)
- C *R v Z* [2004] NICA 23
R (Anderson) v Secretary of State for the Home Department [2002] UKHL 46; [2003] 1 AC 837; [2002] 3 WLR 1800; [2002] 4 All ER 1089, HL(E)
Salabiaku v France (1988) 13 EHRR 379
Saunders v United Kingdom (1996) 23 EHRR 313
Selvanayagam v United Kingdom (Application No 57981/00) (unreported) 12 December 2002, ECtHR
- D *Sweet v Parsley* [1970] AC 132; [1969] 2 WLR 470; [1969] 1 All ER 347, HL(E)
Telfner v Austria (Application No 33601/96) (unreported) 20 March 2001, ECtHR
Woolmington v Director of Public Prosecutions [1935] AC 462, HL(E)
X v United Kingdom (1972) 42 Collections of Decisions 135

The following additional cases were cited in argument:

- E *Attorney General of Hong Kong v Lee Kwong-Kut* [1993] AC 951; [1993] 3 WLR 329; [1993] 3 All ER 939, PC
Barnfather v Islington Education Authority [2003] EWHC 418 (Admin); [2003] 1 WLR 2318, DC
Chassagnou v France (1999) 29 EHRR 615
L v Director of Public Prosecutions [2001] EWHC Admin 882; [2003] QB 137; [2002] 3 WLR 863; [2002] 2 All ER 852, DC
McIntosh v Lord Advocate [2001] UKPC D1; [2003] 1 AC 1078; [2001] 3 WLR 107; [2001] 2 All ER 638, PC
- F *Ong Ah Chuan v Public Prosecutor* [1981] AC 648; [1980] 3 WLR 855, PC
Parker v Director of Public Prosecutions [2001] RTR 240, DC
R v Daniel [2002] EWCA Crim 959; [2003] 1 Cr App R 99, CA
R v Drummond [2002] EWCA Crim 527; [2002] 2 Cr App R 352, CA
R v Oakes (1986) 26 DLR (4th) 200
R v Whyte (1988) 51 DLR (4th) 481
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APPEAL from the Divisional Court of the Queen's Bench Division

- By leave of the House of Lords (Lord Bingham of Cornhill, Lord Hutton and Lord Rodger of Earlsferry) granted on 21 May 2003, the Director of Public Prosecutions appealed from a decision of the Queen's Bench Divisional Court (Clarke LJ, Henriques and Jack JJ) on 4 February 2003 allowing an appeal by way of case stated by the defendant, Peter Sheldrake, from his conviction before Colchester Justices on 23 July 2001 of being in charge of a motor vehicle in a public place, namely Five Ways Car Park, after consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit, contrary to section 5(1) of the Road Traffic Act 1988.
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980

Sheldrake v DPP (HL(E))
Lord Bingham of Cornhill

[2004] 3 WLR

The Divisional Court certified under section 1(2) of the Administration of Justice Act 1960 that a point of law of general importance was involved in its decision, namely:

“Having regard to article 6(2) of the European Convention on Human Rights and to section 3(1) of the Human Rights Act 1998, does the onus of proof provision in section 5(2) of the Road Traffic Act 1988 impose a legal burden, rather than an evidential burden, on an accused who is charged with an offence contrary to section 5(1)(b) of the Road Traffic Act 1988?”

The facts are stated in the opinion of Lord Bingham of Cornhill.

REFERENCE by the Court of Appeal (Criminal Division)

On a reference by the Attorney General, dated 23 October 2003, under section 36 of the Criminal Justice Act 1972, the Court of Appeal (Criminal Division) (Latham LJ, Hunt and Hedley JJ) considered the following points of law:

“(1) What are the ingredients of an offence contrary to section 11(1) of the Terrorism Act 2000? (2) Does the defence contained in section 11(2) of the Terrorism Act 2000 impose a legal, rather than an evidential, burden of proof on an accused, and if so, is such a legal burden compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in particular with articles 6(2) and 10 of the Convention?”

Having given its opinion on 21 March 2003, the Court of Appeal referred the question to the House of Lords.

The facts are stated in the opinion of Lord Bingham of Cornhill.

David Perry and *Jonathan Ashley-Norman* for the Director of Public Prosecutions.

James Turner QC, *Jamas Hodiola* and *Allan Compton* for the defendant in the appeal.

Tim Owen QC, *Anne Richardson* and *Danny Friedman* for the acquitted person.

David Perry and *Gareth Patterson* for the Attorney General.

Their Lordships took time for consideration.

14 October. **LORD BINGHAM OF CORNHILL**

1 My Lords, sections 5(2) of the Road Traffic Act 1988 and 11(2) of the Terrorism Act 2000, conventionally interpreted, impose a legal or persuasive burden on a defendant in criminal proceedings to prove the matters respectively specified in those subsections if he is to be exonerated from liability on the grounds there provided. That means that he must, to be exonerated, establish those matters on the balance of probabilities. If he fails to discharge that burden he will be convicted. In this appeal by the Director of Public Prosecutions and this reference by the Attorney General these reverse burdens (“reverse” because the burden is placed on the defendant and not, as ordinarily in criminal proceedings, on the prosecutor) are challenged as incompatible with the presumption of innocence

A (3) If section 11(2) were held to impose a legal burden, the court would retain a power to assess the evidence, on which it would have to exercise a judgment. But the subsection would provide no flexibility and there would be no room for the exercise of discretion. If the defendant failed to prove the matters specified in subsection (2), the court would have no choice but to convict him.

B (4) The potential consequence for a defendant of failing to establish a subsection (2) defence is severe: imprisonment for up to ten years.

(5) While security considerations must always carry weight, they do not absolve member states from their duty to ensure that basic standards of fairness are observed.

C (6) Little significance can be attached to the requirement in section 117 of the Act that the Director of Public Prosecutions give his consent to a prosecution (a matter mentioned by the Court of Appeal in para 42 of its judgment) for the reasons given by the Court of Appeal in para 91 of its judgment in *Attorney General's Reference (No 1 of 2004)* [2004] 1 WLR 2111.

D 52 I would accept that, in a case where the prosecutor is unable to charge the defendant with any offence related to terrorism other than under section 11, and where the defendant has raised an evidential issue under subsection (2), the prosecutor may well be unable to disprove the facts specified in subsection (2) (a) and (b). But if so, that will be because he cannot point to any conduct of the defendant which has contributed to the furtherance of terrorism. It is not offensive that a defendant should be acquitted in such circumstances.

E 53 It was argued for the Attorney General that section 11(2) could not be read down under section 3 of the 1998 Act so as to impose an evidential rather than a legal burden if (contrary to his submissions) the subsection were held to infringe, impermissibly, the presumption of innocence. He submitted that if the presumption of innocence were found to be infringed, a declaration of incompatibility should be made. I cannot accept this submission, which Mr Owen contradicted. In my opinion, reading down section 11(2) so as to impose an evidential instead of a legal burden falls well within the interpretative principles discussed above. The subsection should be treated as if section 118(2) applied to it. Such was not the intention of Parliament when enacting the 2000 Act, but it was the intention of Parliament when enacting section 3 of the 1998 Act. I would answer the first part of the Attorney General's second question by ruling that section 11(2) of the Act should be read and given effect as imposing on the defendant an evidential burden only.

H 54 In penalising the profession of membership of a proscribed organisation, section 11(1) does, I think, interfere with exercise of the right of free expression guaranteed by article 10 of the Convention. But such interference may be justified if it satisfies various conditions. First, it must be directed to a legitimate end. Such ends include the interests of national security, public safety and the prevention of disorder or crime. Section 11(1) is directed to those ends. Secondly, the interference must be prescribed by law. That requirement is met, despite my present doubt as to the meaning of "profess". Thirdly, it must be necessary in a democratic society and proportionate. The necessity of attacking terrorist organisations is in my

1008

Sheldrake v DPP (HL(E))
Lord Rodger of Earlsferry

[2004] 3 WLR

organisation and that he has not since then taken part in any of its activities at any time while it was a proscribed organisation. A

In this subsection the reference to a person becoming a member of an organisation shall be taken to be a reference to the only or last occasion on which he became a member.”

The provisions in the two Acts are drafted differently. In the 2000 Act section 11(2) makes it a defence for the defendant to prove the matters in question, whereas in the 1974 Act section 11(6) says that a person belonging to a proscribed organisation shall not be guilty of an offence if he shows the matters in question. I doubt whether the draftsman intended any change in the operation of the provision but, in any event, the current provision is clearly to be regarded as a defence. B

61 As under section 1(1) of the 1974 Act, a person commits an offence under section 11(1) of the 2000 Act if he does one of two things: if he belongs to a proscribed organisation or if he professes to belong to a proscribed organisation. Both limbs merit consideration for present purposes. C

62 The first alternative is that the defendant is a member of the proscribed organisation. The legislature has made it a crime for people simply to belong to such a murderous terrorist organisation. Criminalising membership serves a legitimate purpose by making it difficult for members of the organisation to demonstrate publicly in a manner that affronts law-abiding members of the public. Moreover, not only do people by their mere membership give credence to the claims of the organisation but, in addition, members are a potential network of people who may be called on to act for the organisation at some time in the future, even if they have not yet done so. It follows that it is no defence for most members of the organisation to show that they have never taken an active part in the activities of the organisation. The crime is being a member, not being an active member. D E

63 The second alternative in section 11(1) is designed to catch not only members of the proscribed organisation but people who, though not members, profess to belong to it. As the terms of subsection (2)(a) (“began to profess”) indicate, professing to be a member of an organisation is regarded as something which is not complete when the declaration is made, but continues thereafter. So once a person has begun to profess to belong to an organisation, other things being equal, he is regarded as continuing to do so after the organisation is proscribed—just as a person who joins is treated as continuing to be a member thereafter. That is the basis upon which such persons are convicted, in conformity with article 7 of the Convention. I take it to be clear, however, that a person can be convicted of professing to belong to a proscribed organisation, even if he is not a member or the prosecution cannot prove that he is. So, for example, if the present proceedings had run their course, the jury could competently have acquitted A of being a member of Hamas IDQ (count 1), while convicting him of professing to belong to that organisation (count 2). It is not hard either to see why the legislature would wish to prevent people from falsely claiming to belong to a proscribed organisation. By making such claims, especially as part of a public demonstration, people are liable to contribute to an exaggerated impression of the strength of the organisation in question. In this way they will tend to raise the morale of the actual members of the organisation, while lowering F G H

1010

Sheldrake v DPP (HL(E))
Lord Rodger of Earlsferry

[2004] 3 WLR

nature of the offence created by section 11(1) does not engage any right of the defendant under article 6, since that article is concerned with the fair trial of offences and not with the substance of the offences themselves. I am accordingly satisfied that, given the murderous aims of the proscribed organisations, it is open to the legislature, without in any way infringing a defendant's rights under the Convention, to make it a punishable offence for someone simply to be a member of, or to profess to belong to, such an organisation in the United Kingdom.

67 As Lord Bingham points out, section 11(1) is apt to catch people who joined the organisation before it was proscribed—at a stage, perhaps, when it was not even a terrorist organisation. It could catch someone who joined the organisation without knowing that it was proscribed, or when he was an immature youth. And it would cover someone who joined the organisation abroad, where it was legal, and came to this country without being aware that it was illegal here. All these are factors which may be relevant in at least three ways. First, and very importantly, under section 117(1) and (2) they will be relevant to the decision of the Director of Public Prosecutions—or for these purposes a senior Crown Prosecutor—or of the Attorney General to consent to the instituting of proceedings. Secondly, they will be relevant to any decision whether such proceedings should be summary or on indictment. Lastly, in the event of a conviction, they will fall to be considered by the court in mitigation of penalty. But, with one alleged exception, in my respectful opinion these are not matters which raise any issue whatever as to the compatibility of section 11 with article 6(2) of the Convention.

68 The alleged exception is the case, envisaged by section 11(2), where the defendant joined the organisation or began to profess to belong to it before it was proscribed. In this kind of case, from the Northern Irish legislation of 1973 onwards, Parliament has always made provision for the defendant to have a defence if he establishes two points: that he joined or began to profess to belong to the organisation when it was not proscribed and that he has not taken part in any of its activities while it has been proscribed. The form of this defence is designed precisely to meet the objection that terrorist organisations are not likely to have mechanisms by which people can safely give up their membership or dissociate themselves from the organisation. So it applies after the Crown has established that, at the relevant time, the defendant remains a member of the organisation or professes to belong to it and where, accordingly, in any other case he would fall to be convicted under section 11(1). Exceptionally, in this particular situation the defendant is to be acquitted if he proves that he has not taken an active part in any of the activities of the organisation while it was proscribed. Plainly, if section 3 of the Human Rights Act 1998 is left on one side, the wording of section 11(2) places the burden of proving the defence on the defendant.

69 By enacting section 11(2) Parliament has singled out for favourable treatment those defendants who became members or began to profess to belong to the organisation before it was proscribed. As I pointed out in para 65, there could have been no question of an infringement of the defendant's article 6 rights if this defence had not been included in section 11. On that hypothesis, whatever the circumstances of his initial involvement in the

3276

R v Sarti (Chiara) (CA)

[2025] 1 WLR

Court of Appeal

A

***Rex v Sarti (Chiara) and others**

[2025] EWCA Crim 61

2024 Dec 12;
2025 Feb 6

Lady Carr of Walton-on-the-Hill CJ, Bryan, Chamberlain JJ

B

Human rights — Freedom of expression and assembly — Interference with — Defendants convicted of interfering with use or operation of key national infrastructure during protest — Whether proof of ingredients of offence sufficient to ensure conviction proportionate interference with Convention rights — Human Rights Act 1998 (c 42), Sch 1, Pt 1, arts 10, 11 — Public Order Act 2023 (c 15), s 7

C

The three defendants and 61 others took part in a protest organised by the campaign group Just Stop Oil, which involved them walking very slowly down an A road in central London in a procession that was large enough to block the entire carriageway. The defendants were charged with interfering with the use or operation of key national infrastructure, contrary to section 7 of the Public Order Act 2023¹. The trial judge ruled that although the defendants' rights under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms² were engaged, the ingredients of the offence created by section 7 of the 2023 Act were sufficient in themselves to guarantee that a conviction of that offence would constitute a proportionate interference with those rights. The defendants were convicted.

D

On the defendants' applications for leave to appeal against conviction—

Held, granting leave to appeal but dismissing the appeals, that although the offence of interfering with the use or operation of key national infrastructure, contrary to section 7 of the Public Order Act 2023, interfered with the rights of protesters who were exercising their rights under articles 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms, such interference was prescribed by law, pursued legitimate aims, including ensuring public safety, preventing disorder or crime and protecting the rights and freedoms of others, and was necessary in a democratic society, striking a fair balance between the interests of the individuals caught by it and the general interests of the community; that, in particular, on the question of a fair balance, it was relevant that (i) the section 7 offence did not prevent protesters from protesting on public land which was not a highway, or at the side of the road, or (given the limits in section 8(2) of the 2023 Act on the types of road transport infrastructure that constituted "key national infrastructure") on the majority of highways, (ii) even on the roads to which section 7 applied, the offence was likely to be committed only where the protesters' acts significantly delayed the use of the road by others and the protesters intended this effect or were reckless as to whether it would ensue, (iii) those participating in a lawfully notified protest in accordance with sections 11 and 12 of the Public Order Act 1986 would be able to rely on the defence of reasonable excuse contained in section 7(2)(a) of the 2023 Act and (iv) under the jurisprudence of the European

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F

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¹ Public Order Act 2023, s 7: see post, para 33.

² Human Rights Act 1998, Sch 1, Pt 1, art 10: "(1) Everyone has the right to freedom of expression . . . (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of . . . public safety, for the prevention of disorder or crime, . . . for the protection of the . . . rights of others . . ."

H

Art 11: "(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others . . . (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of . . . public safety, for the prevention of disorder or crime, . . . or for the protection of the rights and freedoms of others . . ."

- A Court of Human Rights limitations on the location, time or manner of protests attracted a wider margin of appreciation than content-based prohibitions; and that it followed that once the ingredients of the section 7 offence were made out, any conviction would be a proportionate interference with the defendant's rights under articles 10 or 11 of the Convention (post, paras 57–63, 70–78).

In re Abortion Services (Safe Access Zones) (Northern Ireland) Bill [2023] AC 505, SC(NI) applied.

- B *Kudrevičius v Lithuania* (2015) 62 EHRR 34, ECtHR (GC), *Lashmankin v Russia* (2017) 68 EHRR 1, ECtHR and *Director of Public Prosecutions v Ziegler* [2022] AC 408, SC(E) considered.

The following cases are referred to in the judgment of the court:

Abortion Services (Safe Access Zones) (Northern Ireland) Bill, *In re* [2022] UKSC 32; [2023] AC 505; [2023] 2 WLR 33; [2023] 2 All ER 209, SC(NI)

- C *Animal Defenders International v United Kingdom* (Application No 48876/08) (2013) 57 EHRR 21, ECtHR (GC)

Attorney General's Reference (No 1 of 2022) [2022] EWCA Crim 1259; [2023] KB 37; [2023] 2 WLR 651; [2023] 1 All ER 549; [2023] 1 Cr App R 1, CA

Director of Public Prosecutions v Cuciurean [2022] EWHC 736 (Admin); [2022] QB 888; [2022] 3 WLR 446; [2022] 4 All ER 1043; [2022] 2 Cr App R 8, DC

Director of Public Prosecutions v Jones (Margaret) [1999] 2 AC 240; [1999] 2 WLR 625; [1999] 2 All ER 257; [1999] 2 Cr App R 348, HL(E)

- D *Director of Public Prosecutions v Ziegler* [2021] UKSC 23; [2022] AC 408; [2021] 3 WLR 179; [2021] 4 All ER 985; [2021] 2 Cr App R 19, SC(E)

Gifford v HM Advocate [2011] HCJAC 101; 2011 SCCR 751

James v Director of Public Prosecutions [2015] EWHC 3296 (Admin); [2016] 1 WLR 2118, DC

Kablis v Russia (Application Nos 48310/16 and 59663/17) (unreported) 30 April 2019, ECtHR

- E *Kudrevičius v Lithuania* (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)

Lashmankin v Russia (Application No 57818/09) (2017) 68 EHRR 1, ECtHR

R v Brown (James Hugh) [2022] EWCA Crim 6; [2022] 1 Cr App R 18, CA

R v Jones (Margaret) [2006] UKHL 16; [2007] 1 AC 136; [2006] 2 WLR 772; [2006] 2 All ER 741; [2006] 2 Cr App R 9, HL(E)

R v Thacker [2021] EWCA Crim 97; [2021] QB 644; [2021] 2 WLR 1087; [2021] 4 All ER 1199; [2021] 1 Cr App R 21, CA

- F

No additional cases were cited in argument.

The following additional cases, although not cited, were referred to in the skeleton arguments:

- G *Attorney General v HRH Prince Ernest Augustus of Hanover* [1957] AC 436; [1957] 2 WLR 1; [1957] 1 All ER 49, HL(E)

Attorney General's Reference (No 1 of 2023) [2024] EWCA Crim 243; [2024] 1 WLR 3205; [2025] 1 All ER 946; [2024] 2 Cr App R 2, CA

Balcik v Turkey (Application No 25/02) (unreported) 29 November 2007, ECtHR
Bauer v Director of Public Prosecutions [2013] EWHC 634 (Admin); [2013] 1 WLR 3617, DC

Christian Democratic People's Party v Moldova (Application No 28793/02) (2006) 45 EHRR 13, ECtHR

- H *City of London Corp'n v Samede* [2012] EWCA Civ 160; [2012] PTSR 1624; [2012] 2 All ER 1039, CA

Connolly v Director of Public Prosecutions [2007] EWHC 237 (Admin); [2008] 1 WLR 276; [2007] 2 All ER 1012; [2007] 2 Cr App R 5, DC

Dehal v Crown Prosecution Service [2005] EWHC 2154 (Admin); (2005) 169 JP 581

3278

R v Sarti (Chiara) (CA)

[2025] 1 WLR

- Director of Public Prosecutions v Stonehouse* [1978] AC 55; [1977] 3 WLR 143; [1977] 2 All ER 909; (1977) 65 Cr App R 192, HL(E) A
- Ezelin v France* (Application No 11800/85) (1991) 14 EHRR 362, ECtHR
- Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 WLR 113; [2004] 3 All ER 411, HL(E)
- Hammond v Director of Public Prosecutions* [2004] EWHC 69 (Admin); (2004) 168 JP 601, DC
- Hirst v Chief Constable of West Yorkshire* (1986) 85 Cr App R 143, DC B
- Molnár v Hungary* (Application No 10346/05) (unreported) 7 October 2008, ECtHR
- Nagy v Weston* [1965] 1 WLR 280; [1965] 1 All ER 78, DC
- Norwood v Director of Public Prosecutions* [2003] EWHC 1564 (Admin), DC
- Percy v Director of Public Prosecutions* [2001] EWHC Admin 1125; (2001) 166 JP 93, DC
- Perincek v Switzerland* (Application No 27510/08) (2015) 63 EHRR 6, ECtHR (GC) C
- Plattform “Ärzte für das Leben” v Austria* (Application No 10126/82) (1988) 13 EHRR 204, ECtHR
- Primov v Russia* (Application No 17391/06) (unreported) 12 June 2014, ECtHR
- R v A (No 2)* [2001] UKHL 25; [2002] 1 AC 45; [2001] 2 WLR 1546; [2001] 3 All ER 1; [2001] 2 Cr App R 21, HL(E)
- R v Asmeron* [2013] EWCA Crim 435; [2013] 1 WLR 3457; [2013] 2 Cr App R 19, CA
- R v Casserly (Thomas)* [2024] EWCA Crim 25; [2024] 1 WLR 2760; [2025] 1 All ER 82; [2024] 1 Cr App R 18, CA D
- R v G* [2009] UKHL 13; [2010] 1 AC 43; [2009] 2 WLR 724; [2009] 2 All ER 409; [2009] 2 Cr App R 4, HL(E)
- R v Nicholson* [2006] EWCA Crim 1518; [2006] 1 WLR 2857; [2006] 2 Cr App R 30, CA
- R v Quayle* [2005] EWCA Crim 1415; [2005] 1 WLR 3642; [2006] 1 All ER 988; [2005] 2 Cr App R 34, CA E
- R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539; [1997] 3 WLR 492; [1997] 3 All ER 577, HL(E)
- R v Shayler* [2002] UKHL 11; [2003] 1 AC 247; [2002] 2 WLR 754; [2002] 2 All ER 477, HL(E)
- R v Wang* [2005] UKHL 9; [2005] 1 WLR 661; [2005] 1 All ER 782; [2005] 2 Cr App R 8, HL(E)
- R (Director of Public Prosecutions) v Manchester City Magistrates’ Court* [2023] EWHC 2938 (Admin); [2024] 1 Cr App R 12, DC F
- R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55; [2007] 2 AC 105; [2007] 2 WLR 46; [2007] 2 All ER 529, HL(E)
- R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255; [2022] 2 WLR 343; [2022] 4 All ER 95, SC(E)
- Steel v United Kingdom* (Application No 24838/94) (1998) 28 EHRR 603, ECtHR
- Zilibierberg v Moldova* (Application No 61821/00) (unreported) 1 February 2005, ECtHR G

APPLICATIONS for leave to appeal against conviction

On 15 May 2024 in the Crown Court at Southwark, before HHJ Hehir and a jury, the defendants, Chiara Sarti, Daniel Hall and Phoebe Plummer, were each convicted of an offence of interfering with key national infrastructure, contrary to section 7 of the Public Order Act 2023. On 27 September 2024 Chiara Sarti and Daniel Hall were each sentenced to a 12-month community order with 100 hours of unpaid work. In Chiara Sarti’s case there was also a 15-day rehabilitation requirement. Phoebe Plummer was sentenced on the same day for two offences: an offence of criminal damage (for throwing soup over Van Gogh’s *Sunflowers* in the National H

A Gallery) and the section 7 offence. She was sentenced to 27 months' imprisonment: 24 months for criminal damage and a consecutive term of three months for the section 7 offence. The defendants' applications for leave to appeal against conviction were referred to by the full court.

The facts and grounds of appeal are stated in the judgment of the court, post, paras 3–14.

B *Adrian Waterman KC* and *Raj Chada* (assigned by the Registrar of Criminal Appeals) for the defendants.

David Perry KC and *Ben Lloyd* (instructed by *Crown Prosecution Service*) for the Crown.

The court took time for consideration.

C 6 February 2025. **LADY CARR OF WALTON-ON-THE-HILL CJ** handed down the following judgment of the court.

Introduction

D 1 On 15 May 2024, after a trial lasting six days in the Crown Court at Southwark, the applicants, Chiara Sarti, Daniel Hall and Phoebe Plummer, were convicted before HHJ Hehir and a jury of interfering with key national infrastructure contrary to section 7 of the Public Order Act 2023 (section 7) (“POA 2023”). The offences arose in the context of a protest organised by Just Stop Oil (“JSO”), a group which campaigns against the use of fossil fuels.

E 2 On 27 September 2024, Ms Sarti and Mr Hall were each sentenced to a 12-month community order with 100 hours of unpaid work. In Ms Sarti's case there was also a 15-day rehabilitation requirement. Ms Plummer was sentenced on the same day for two offences: an offence of criminal damage (for throwing soup over Van Gogh's *Sunflowers* in the National Gallery) and the section 7 offence. Her sentence was 27 months' imprisonment: 24 months for criminal damage and three months for the section 7 offence.

F 3 The applicants seek leave to appeal against their convictions on two grounds. The first is that the judge erred in concluding that the ingredients of the section 7 offence were sufficient in themselves to ensure that any conviction will be compatible with articles 10 and 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”). The second, which arises only if the first succeeds, is that the judge erred in concluding that he could decide the issue of proportionality himself and in concluding that the convictions were proportionate interferences with the applicants' article 10 and 11 rights. The Registrar of Criminal Appeals referred the applications to the full court. We grant leave.

The facts in outline

H 4 At 10.36 a.m. on 15 November 2023, members of the public informed the police that activists were protesting on Earl's Court Road in West London. The appellants and 61 others had gathered outside Earl's Court Underground station and proceeded to walk down the road towards the junction with Cathcart Road. Both Earl's Court Road and Cathcart Road are designated as A roads.

5 The police attended and noted that the protesters were walking very slowly in a procession large enough to block the entire carriageway. Police officers observed significant disruption and frustration amongst motorists.

excluded) was irrelevant: the court’s role was to construe the POA 2023 as it was. To allow the appellants’ status as protesters to afford them a defence would be contrary to the analysis in *R v Jones (Margaret)* [2007] 1 AC 136 (see in particular Lord Hoffmann’s speech at paras 81–94), that analysis being of general application in protest cases: *R v Thacker* [2021] QB 644 at para 100.

17 The judge did, however, leave to the jury the question whether they were sure that the prosecution had proved that the demonstration as a whole—the appellants’ participation having come to an end only because they were arrested—had caused “significant delay” to the use of the relevant roads by others. He said that “delay which would not go beyond what might reasonably be expected by road users in central London would not amount to significant delay for these purposes”. There is no challenge before us to these directions.

The legal framework

Articles 10, 11 and 17 of the ECHR

18 Article 10 guarantees the right to freedom of expression. Article 11 guarantees the right to freedom of peaceful assembly. Both are qualified rights, so interferences with them are permissible if they are prescribed by law, serve a legitimate aim and are “necessary in a democratic society” (ie proportionate). Legitimate aims include ensuring public safety, preventing disorder or crime and protecting the rights and freedoms of others.

19 Article 17 provides:

“Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

The offence of wilfully obstructing the highway

20 Section 137 of the Highways Act 1980 (section 137) (“HA 1980”) makes it an offence for a person, without lawful authority or excuse, in any way wilfully to obstruct the free passage along a highway. This offence and its statutory predecessors have been considered by the courts before and after the coming into force of the Human Rights Act 1998 (“HRA”). A high-level summary of the relevant case law can be found in para 22 of Lord Reed PSC’s judgment (with which the other members of a seven-strong Supreme Court agreed) in *Abortion Services*.

21 *Abortion Services* concerned the compatibility with articles 10 and 11 of the Abortion Services (Safe Access Zones) (Northern Ireland) Bill. The Bill created safe access zones adjacent to facilities where abortion services were provided and made it an offence to do an act in such a zone with the intent to influence patients, accompanying persons and staff, or being reckless as to whether it would have that effect. Although the appeal was thus not concerned with an offence of obstructing a highway or delaying traffic, the court considered *Director of Public Prosecutions v Ziegler* [2022] AC 408 (“Ziegler”), a case that did concern a section 137 offence, and also *Director of Public Prosecutions v Cuciurean* [2022] QB 888 (“Cuciurean”),

A of the individual case. But the proposition that an individualised proportionality assessment is required in every case is mistaken. Questions of proportionality are often decided as a matter of general principle: paras 28–29;

B (vi) Determination whether an interference is proportionate is not an exercise in fact-finding. It involves the application, in a factual context (often not in material dispute), of the series of legal tests in paras 63 and 64 of the Divisional Court’s judgment in *Ziegler*. This is reflected in the approach to appellate review, which does not involve according deference to the court below. The standard of review is flexible, depending on whether the analysis is of the proportionality of a decision in an individual case or a general measure: paras 30–33;

C (vii) Furthermore, it is possible for a general legislative measure in itself to ensure that its application in individual circumstances will meet the requirements of proportionality under the Convention, without any need for the evaluation of the circumstances in the individual case: see *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21 (“*Animal Defenders*”) (in the context of article 10) and *Kablis v Russia* (Application Nos 48310/16 and 59663/17) (unreported) judgment 30 April 2019 (in the context of article 11). This applied even in cases where the legislation
D created criminal offences: paras 34–39.

28 At paras 46–50, Lord Reed PSC set out the cases considered in *Cuciurean*, where the elements of the offence themselves guaranteed that a conviction would be a proportionate interference with article 10 and 11 rights. At para 51, he endorsed the Divisional Court’s conclusion in *Cuciurean* that *Ziegler* should not be read as establishing a general principle
E that, whenever articles 10 and 11 are engaged, the prosecution must prove that a conviction would be a proportionate interference with those rights.

29 However, at paras 52 and 53, Lord Reed PSC said that it was a mistake to suppose that all cases can be placed into one or other of the categories identified in *James*. The position was more nuanced than that. At paras 54–61, he set out a new approach to cases where a defendant relied on articles 9, 10 or 11 as a defence to a protest-related charge. The approach is
F as follows:

(i) The first question is whether articles 9, 10 and/or 11 are engaged at all. Conduct will lie outside the protection of those articles if it involves violent intentions, or incites violence, or otherwise rejects the foundations of a democratic society, or if article 17 applies. (This provides that the Convention does not confer any right on a person to engage in any activity or
G perform any act aimed at the destruction of any of the rights and freedoms set out in the Convention or at their limitation to a greater extent than is provided in the Convention);

(ii) If articles 9, 10 or 11 are engaged, the second question is whether the ingredients of the offences themselves strike the proportionality balance. If so, a conviction will be proportionate once the ingredients are made out. The cases discussed in *Cuciurean*, and *Cuciurean* itself, are examples of offences of this kind. Many commonly encountered offences of violence and damage to property will also fall into this category, either because the conduct in question falls outside the protection of the Convention altogether or because the elements of the offence ensure the proportionality
H of any conviction. Furthermore, decision-makers (whether Parliament

or subordinate legislators) enjoy a margin of appreciation in relation to interferences with rights protected by articles 9, 10 or 11;

(iii) Where proof of the ingredients of the offence does not ensure the proportionality of any conviction, the possibility arises that a conviction might be incompatible with Convention rights. Then, given the court's duty under section 6 of the HRA not to act incompatibly with the Convention, it will be necessary to consider a third question: whether there is a means by which the proportionality of the conviction can be ensured. For statutory offences, a defence of lawful or reasonable excuse may provide a route by which a proportionality assessment can be carried out, having recourse if need be to section 3 of the HRA;

(iv) But it is a mistake to assume that the presence of a reference to lawful or reasonable excuse necessarily means that a proportionality assessment in respect of Convention rights is appropriate. It may be that the offending conduct falls outside the protection of articles 9, 10 and 11, with the consequence that no proportionality assessment is required. This was the case in *Attorney General's Reference (No 1 of 2022)* [2023] KB 37 (where the protesters were acquitted on a charge of criminal damage to the statue of Edward Colston in Bristol). A similar analysis might apply to the defence of lawful excuse to the offence of making threats to kill in section 16 of the Offences against the Person Act 1861 ("OAPA 1861");

(v) Where the offence does require an individualised assessment of the proportionality of a conviction, this need not be carried out by the body responsible for determining the facts. The assessment of proportionality is not itself a question of fact. Who determines it depends on the relevant rules of criminal procedure. As to the position in England and Wales (at para 67):

"There may be a question as to whether the issue is appropriate for determination by a jury, having regard to the complexity of the analysis of proportionality . . . and the other, equally complex, questions which may arise (eg as to the application of sections 3 and 6 of the Human Rights Act, where the challenge is to the proportionality of legislation, or the potential development of the common law, where it is not), or whether some other procedure, such as an application to stay proceedings as an abuse of process, might be more apt. However, it is unnecessary to consider the matter for the purpose of the present proceedings."

30 Lord Reed PSC then went on to consider the relevant provisions of the Northern Ireland Bill, holding that those provisions themselves guaranteed that any conviction would be compatible with protesters' rights under articles 9, 10 or 11. In reaching that conclusion he cited the Strasbourg Court's decision in *Kudrevičius* at para 173:

"the intentional serious disruption, by demonstrators, to ordinary life and to the activities lawfully carried out by others, to a more significant extent than that caused by the normal exercise of the right of peaceful assembly in a public place, might be considered a 'reprehensible act' within the meaning of the court's case law. Such behaviour might therefore justify the imposition of penalties, even of a criminal nature."

Lord Reed PSC added this:

"In that case [*Kudrevičius*], the obstruction of major roads, 'in blatant disregard of police orders and of the needs and rights of the road users'

only consistent with the view that it is the inclusion of the “reasonable excuse” defence which made it so. A

44 In any event, satisfaction of the elements of the offence is not sufficient to ensure the proportionality of any conviction. All A and B roads are included within the definition of “key national infrastructure”; there is no requirement that the roads should be trunk roads or roads forming part of the Primary Road Network. The actus reus (interference with the use or operation of key national infrastructure) includes cases where that operation or use is “significantly delayed”; any measurable or discernible delay counts, as the judge’s direction to the jury (anything that would go beyond “what might reasonably be expected by road users in central London”) made clear. As to mens rea, mere recklessness as to whether the act will interfere with the use or operation of the infrastructure is sufficient. As to seriousness, the offence qualifies for trial in the Crown Court, with a maximum 12-month prison sentence upon conviction. B C

45 In this case, the offence is not materially different from that in issue in *Ziegler* and the analysis there applies.

Submissions for the Crown

46 Mr Perry KC for the Crown submitted that, in section 7, the proportionality balance had been struck by Parliament through the legislative process. There was an obvious and pressing social need for restrictions to be imposed to protect the use or operation of key national infrastructure. The section 7 offence required proof of intention that or recklessness as to whether the act would interfere with key national infrastructure, so the position was a fortiori that in the *Abortion Services* case (where the offence was one of strict liability). D E

47 As the judge rightly noted, the section 7 offence was enacted to criminalise particular forms of disruptive protest. It would therefore be surprising if Parliament had intended persons prosecuted for the offence to nevertheless be able to rely upon the fact that they are engaging in a disruptive protest as a defence to the charge. The type of disruption caused is intrinsically serious and extends beyond the normal exercise of the right of peaceful assembly in a public place. F

48 The offence does not prevent the exercise of the rights protected by articles 10 and 11, but simply imposes a limitation upon the places where and the manner in which those rights might be exercised. In that respect it is on all fours with the offence considered in *Abortion Services*: see in particular para 127. Because its application is limited to cases where the defendant intentionally or recklessly disrupts the lawful activities of others, Parliament enjoys a wider margin of appreciation: see *Cucuirean* at para 37; *Abortion Services* at para 45. G

49 The reliance upon a ministerial statement of compatibility made in accordance with section 19 of the HRA is misconceived: that statement is no more than a statement of opinion by the relevant Minister, which cannot be ascribed to Parliament. The appellants’ reliance upon *Ziegler* is also misplaced. The essential reasoning in that decision has since been undermined by Lord Reed PSC’s analysis in *Abortion Services*. H

50 The High Court has held in a long line of cases that the provisions of the Public Order Act 1986 (“POA 1986”) contain the necessary balance between the right of freedom of expression and the right of others not to be

- A (ii) Secondly, do the ingredients of the offence strike the proportionality balance themselves? (see para 55);
- (iii) Thirdly, if not, is there a means by which proportionality can be ensured? (In the case of statutory offences, a defence of lawful or reasonable excuse may provide a route, if necessary with the help of section 3 of the HRA) (see paras 56 and 57).

B *The application of the structured approach to section 7*

69 As to the first question, it is clearly not possible to say that the conduct criminalised by section 7 necessarily falls outside the protection of articles 9, 10 and 11. The offence may be committed by protesters who have no violent intentions, do not incite violence and do not reject the foundations of a democratic society. If there were any doubt about this, C *Kudrevičius* 62 EHRR 34 would resolve it. In that case, the degree of delay and disruption very substantially exceeded the “significant” threshold in the section 7 offence. Yet, as Lords Hamblen and Stephens JJSC pointed out at para 67 of their judgment in *Ziegler*, the article 10 and 11 rights of the protesters were still engaged.

- D 70 As to the second question, it is common ground that the section 7 offence is prescribed by law and pursues legitimate aims, namely the prevention of disorder or crime and the protection of the rights and freedoms of others. There was no real dispute that these aims are sufficiently important to justify the interference with a fundamental right. Conduct that causes significant delay on special roads or A or B roads has the potential to affect the public in large numbers. Those delayed can include emergency service personnel, as well as workers in other critical jobs and those E delivering time-critical goods. Frustration on the part of motorists can give rise to public disorder, even when the protesters themselves are non-violent. Preventing these effects supplies a proper reason in principle for limiting the important rights to freedom of expression and assembly; and there is a rational connection between the means chosen and the aim in view. This means that the first three questions in para 63 of the Divisional Court’s F judgment in *Ziegler* are answered affirmatively.

71 As in many cases, the real issue here is whether section 7 strikes a fair balance between the interests of the individuals caught by it and the general interests of the community.

- G 72 Here, the approach of the Strasbourg Court in *Animal Defenders* 57 EHRR 21 (to which Lord Reed PSC attached particular importance in *Abortion Services* at paras 34 and 35) is of relevance. In that case, the measure challenged was the UK’s blanket ban on political advertising on the broadcast media. In upholding the compatibility of the ban with article 10, the court regarded it as especially important that there were other media (apart from TV and radio) on which political advertising was permitted: see para 124. This chimes with the approach of the Supreme Court to the compatibility of the provisions at issue in *Abortion Services*. There, at H para 127, it was considered important that the legislation “does not prevent the exercise of any right protected by article 9, 10 or 11 . . . but merely imposes a limitation upon the places where those rights may be exercised”.

73 In this respect, we do not consider that the analysis in *Ziegler* can simply be applied, mutatis mutandis to the section 7 offence. This is because the section 7 offence is materially narrower than the section 137 offence in

respect of the roads to which it applies. It therefore leaves protesters with a wider variety of ways in which to make their point lawfully. As with the section 137 offence, it does not prevent protesters from protesting on public land which is not a highway, or at the side of the road. But, unlike the section 137 offence, it also does not prevent them from protesting on the majority of highways. Even on the roads to which section 7 applies, on its proper construction (see para 60 above), the offence is likely to be committed only where the protesters' acts *significantly* delay the use of the road by others, and where the protesters intend this effect or are reckless as to whether it will ensue.

74 Moreover, the mechanism in sections 11 and 12 of the POA 1986 is relevant. It provides a means by which those wishing to protest, even on A or B roads, can do so, whilst allowing the police to impose conditions capable of mitigating the disruptive effect on others. As we have said (see para 63 above), those participating in a lawfully notified protest, in accordance with any conditions imposed on it, would have a defence under section 7(2).

75 The question then is whether the legislature has struck an appropriate balance. As to that, we note that there is Strasbourg authority for the proposition that limitations on the location, time or manner of protests attract a wider margin of appreciation than content-based prohibitions: see *Lashmankin v Russia* (2017) 68 EHRR 1 at para 417, cited in *Abortion Services* at para 127. Parliament was entitled to consider that legal certainty was promoted by identifying the roads on which acts causing significant delay would give rise to the offence by reference to a well-established classification system. We do not consider that Parliament exceeded the relatively broad margin of appreciation open to it by extending the scope of the new offence to all A and B roads, as well as special roads. Nor do we consider that the Convention requires an individual examination of the proportionality of a conviction where a defendant has caused significant delay on a road in this category, intending that consequence or reckless as to whether it would occur.

76 That being so, and contrary to the (unexplained) view expressed in the ECHR Memorandum, once the ingredients of the section 7 offence are made out, section 7(2)(a) does not require a court to consider whether a conviction would be a proportionate interference with the defendant's article 10 or 11 rights. The judge was right in his conclusion to this effect, as he was right to conclude that the defence of reasonable excuse did not arise on the facts of this case.

77 Ground 1 therefore fails.

Conclusion

78 Our conclusion on ground 1 is sufficient to dispose of the appeal. It follows that ground 2 does not arise. The appeal is dismissed.

Appeals dismissed.

CLARE BARSBY, Barrister

[2023] 2 WLR

In re Abortion Services (Safe Access Zones) (NI) Bill (SC(NI))

A

Supreme Court

In re Abortion Services (Safe Access Zones)
(Northern Ireland) Bill

[2022] UKSC 32

B

2022 July 19, 20;
Dec 7

Lord Reed PSC, Lord Kitchin, Lord Burrows,
Lady Rose, Lord Lloyd-Jones JJSC,
Lord Carloway, Dame Siobhan Keegan

C

Devolution — Northern Ireland — Devolution issue — Bill passed by Northern Ireland Assembly protecting right of women to access lawful abortion services — Specified behaviour prohibited within safe access zones adjacent to premises where services provided — Offence to do act with intent of, or reckless as to whether act having effect of, influencing patients and staff — Whether disproportionate interference with freedom of conscience, speech and assembly of anti-abortion protesters — Whether outside legislative competence of Assembly — Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 9, 10, 11 — Northern Ireland Act 1998 (c 47), ss 6, 11

D

The Northern Ireland Assembly passed the Abortion Services (Safe Access Zones) (Northern Ireland) Bill, which was intended to protect the right of women to access services relating to the lawful termination of pregnancy, in circumstances where anti-abortion protesters had subjected such women to pressure and had prevented some women from accessing those services. The Bill made provision for the designation of “safe access zones” adjacent to the premises where such services were provided, within which specified types of behaviour were prohibited. Clause 5(2)(a) made it an offence to do an act in a safe access zone with the intent of, or reckless as to whether it had the effect of, influencing patients, accompanying persons and staff, whether directly or indirectly. Pursuant to section 11(1) of the Northern Ireland Act 1998¹, the Attorney General for Northern Ireland referred to the Supreme Court the question whether the penal sanction, with no provision for reasonable excuse, created by clause 5(2)(a) of the Bill was outside the legislative competence of the Northern Ireland Assembly by virtue of section 6(2)(c) of that Act since it involved a disproportionate interference with the Convention rights of those who sought to express opposition to the provision of abortion treatment services in Northern Ireland, namely the rights to freedom of conscience, speech and assembly guaranteed by articles 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms².

E

On the reference—

Held, answering the question, (1) that a provision of devolved legislation would only be beyond legislative competence by virtue of section 6(2)(c) of the Northern Ireland Act 1998 if it was incapable of being applied in a way which was compatible with rights under the Convention for the Protection of Human Rights and Fundamental Freedoms, whatever the facts might be; and that, accordingly, if the provision was capable of being applied compatibly with the Convention, it would survive a challenge based on legislative competence (post, paras 13–19).

F

Christian Institute v Lord Advocate 2017 SC (UKSC) 29, SC(Sc) applied.

H

¹ Northern Ireland Act 1998, s 6: “(1) A provision of an Act is not law if it is outside the legislative competence of the Assembly. (2) A provision is outside that competence if any of the following paragraphs apply— . . . (c) it is incompatible with any of the Convention rights . . .”

S 11(1): “The . . . Attorney General for Northern Ireland may refer the question of whether a provision of a Bill would be within the legislative competence of the Assembly to the Supreme Court for decision . . .”

² Human Rights Act 1998, Sch 1, Pt I, arts 9, 10, 11: see post, para 3.

Dictum of Baroness Hale of Richmond PSC in *In re McLaughlin* [2018] 1 WLR 4250, para 43, SC(NI) disapproved. A

(2) That, where the exercise of rights under articles 9, 10 or 11 of the Convention was raised by the defendant to a criminal prosecution, there did not always have to be an assessment of the proportionality of any interference with those rights on the facts of the individual case; that, further, where an offence was liable to give rise to an interference with those rights, the ingredients of the offence did not have to include, or be interpreted as including, the absence of reasonable or lawful excuse in order for a conviction to be compatible with those rights; that, rather, it was possible for the ingredients of an offence in themselves to ensure the compatibility of a conviction with articles 9, 10 and 11; that, in particular, an assessment of proportionality was not a question of fact, but rather involved the application of a series of legal tests in a factual context; and that, as a result, an assessment of proportionality in criminal proceedings did not necessarily have to be conducted by the body responsible for determining the facts at the trial of the offence (post, paras 28–34, 53–59, 63–67). B C

Director of Public Prosecutions v Cuciurean [2022] QB 888, DC applied.

James v Director of Public Prosecutions [2016] 1 WLR 2118, DC considered.

Dictum of Lord Hamblen and Lord Stephens JJSC in *Director of Public Prosecutions v Ziegler* [2022] AC 408, para 59, SC(E) not applied.

(3) That clause 5 of the Abortion Services (Safe Access Zones) (Northern Ireland) Bill imposed a restriction on behaviour falling within the scope of one or more of articles 9 to 11 of the Convention, but it was a restriction that was prescribed by law, pursued a legitimate aim and was necessary in a democratic society; that, in particular, on the question of necessity, (i) the protection of the article 8 privacy rights of patients and staff was, in principle, a sufficiently important aim to justify the limitation of rights under articles 9 to 11, (ii) the restriction imposed by clause 5 had a rational connection to that aim, being a rational means of protecting the privacy and dignity of women and staff accessing abortion facilities, and thereby promoting public health, (iii) there were no less restrictive means available to achieve that aim, a defence of reasonable excuse having been considered and rejected by the Assembly on the basis of relevant considerations, and (iv) clause 5(2)(a) struck a fair balance between the rights of protesters and the general interest of the community, including the rights of the persons protected; that, in considering whether clause 5(2)(a) struck a fair balance, a number of considerations were of particular importance, including the facts that (a) the context was one in which the protection of the private lives and autonomy of women was of particular importance, (b) women had a reasonable expectation of being able to attend the relevant hospitals and clinics without having their autonomy challenged and diminished, (c) the Bill did not prevent the exercise of any right protected by articles 9 to 11, but merely imposed a limitation upon the places where those rights could be exercised, (d) the maximum penalty for an offence under clause 5 was a fine and (e) a wide margin of appreciation was generally appropriate when it was necessary to strike a balance between competing Convention rights, especially in a context, such as abortion, which raised sensitive and controversial questions of ethical and social policy; that, thus, balancing all the competing considerations, the restrictions on Convention rights which would result from clause 5(2)(a) were justifiable; and that, accordingly, clause 5(2)(a) was not incompatible with the Convention rights of those who sought to express opposition to the provision of abortion services in Northern Ireland and it was, therefore, not outside the legislative competence of the Assembly by virtue of section 6(2)(c) of the 1998 Act (post, paras 111–115, 117–118, 121–131, 140, 154, 157). D E F G H

Per curiam. (i) The European Court of Human Rights has repeatedly emphasised that the Convention is intended to protect rights that are practical and effective, and that its concern is therefore with matters of substance rather than form. It would be inconsistent with that approach to draw a fundamental distinction in our domestic application of the Convention, in relation to legal measures restricting protesters'

- A rights under articles 9 to 11, according to the domestic classification of the measures as civil or criminal (post, para 41).

Perinçek v Switzerland (2015) 63 EHRR 6, ECtHR (GC) considered.

- (ii) The right of women in Northern Ireland to access abortion services has now been established in law through the processes of democracy. That legal right should not be obstructed or impaired by the accommodation of claims by opponents of the legislation based, some might think ironically, on the liberal values protected by the Convention. A legal system which enabled those who had lost the political debate to undermine the legislation permitting abortion, by relying on freedom of conscience, freedom of expression and freedom of assembly, would in practice align the law with the values of the opponents of reform and deprive women of the protection of rights which have been legislatively enacted (post, para 156).
- B

The following cases are referred to in the judgment of Lord Reed PSC:

- C *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68; [2005] 2 WLR 87; [2005] 3 All ER 169, HL(E)
A, B and C v Ireland (Application No 25579/05) (2010) 53 EHRR 13, ECtHR (GC)
Animal Defenders International v United Kingdom (Application No 48876/08) (2013) 57 EHRR 21, ECtHR (GC)
Appleby v United Kingdom (Application No 44306/98) (2003) 37 EHRR 38, ECtHR
Arrowsmith v United Kingdom (Application No 7050/75) (1978) 3 EHRR 218, EComHR
- D *Attorney General of Ontario v Dieleman* (1994) 117 DLR (4th) 449
Attorney General's Reference (No 1 of 2022) [2022] EWCA Crim 1259; [2023] 1 Cr App R 1, CA
B (A Child) (Care Proceedings: Threshold Criteria), In re [2013] UKSC 33; [2013] 1 WLR 1911; [2013] 3 All ER 929, SC(E)
Bank Mellat v HM Treasury [2013] UKSC 39; [2014] AC 700; [2013] 3 WLR 179; [2013] 4 All ER 533, SC(E)
- E *Bauer v Director of Public Prosecutions* [2013] EWHC 634 (Admin); [2013] 1 WLR 3617, DC
Boddington v British Transport Police [1999] 2 AC 143; [1998] 2 WLR 639; [1998] 2 All ER 203, HL(E)
Buchanan v Crown Prosecution Service [2018] EWHC 1773 (Admin); [2018] LLR 668, DC
- F *Christian Institute v Lord Advocate* [2016] UKSC 51; 2017 SC (UKSC) 29, SC(Sc)
Clubb v Edwards [2019] HCA 11; 267 CLR 171
Cooper v Metropolitan Police Comr (1985) 82 Cr App R 238, DC
Delfi AS v Estonia (Application No 64569/09) (2015) 62 EHRR 6, ECtHR (GC)
Director of Public Prosecutions v Cuciurean [2022] EWHC 736 (Admin); [2022] QB 888; [2022] 3 WLR 446, DC
Director of Public Prosecutions v Jones [1999] 2 AC 240; [1999] 2 WLR 625; [1999] 2 All ER 257, HL(E)
- G *Director of Public Prosecutions v Ziegler* [2019] EWHC 71 (Admin); [2020] QB 253; [2019] 2 WLR 1451, DC; [2021] UKSC 23; [2022] AC 408; [2021] 3 WLR 179; [2021] 4 All ER 985, SC(E)
Dulgheriu v Ealing London Borough Council [2019] EWCA Civ 1490; [2020] 1 WLR 609; [2020] PTSR 79; [2020] 3 All ER 545, CA
Edwards v Bairstow [1956] AC 14; [1955] 3 WLR 410; [1955] 3 All ER 48, HL(E)
- H *Gifford v HM Advocate* [2011] HCJAC 101; 2011 SCCR 751
H-W (Children), In re [2022] UKSC 17; [2022] 1 WLR 3243; [2022] 4 All ER 683, SC(E)
Hirst v Chief Constable of West Yorkshire (1986) 85 Cr App R 143, DC
James v Director of Public Prosecutions [2015] EWHC 3296 (Admin); [2016] 1 WLR 2118, DC

- Kablis v Russia* (Application Nos 48310/16 and 59663/17) (unreported) 30 April 2019, ECtHR A
- Kudrevičius v Lithuania* (Application No 37553/05) (2015) 62 EHRR 34, ECtHR (GC)
- Lashmankin v Russia* (Application Nos 57818/09, 51169/10, 4618/11, 19700/11, 31040/11, 47609/11, 55306/11, 59410/11, 7189/12, 16128/12, 16134/12, 20273/12, 51540/12, 64243/12, 37038/13) (2017) 68 EHRR 1, ECtHR
- Lehman v City of Shaker Heights* (1974) 418 US 298 B
- Lilliendahl v Iceland* (Application No 29297/18) (unreported) 12 May 2020, ECtHR
- Lowdens v Keaveney* [1903] 2 IR 82
- Lucas v United Kingdom* (Application No 39013/02) (unreported) 18 March 2003, ECtHR
- McLaughlin, In re* [2018] UKSC 48; [2018] 1 WLR 4250; [2019] 1 All ER 471, SC(NI)
- Nagy v Weston* [1965] 1 WLR 280; [1965] 1 All ER 78, DC C
- Northern Ireland Human Rights Commission, In re* [2021] NIQB 91
- P and S v Poland* (Application No 57375/08) (2012) 129 BMLR 120, ECtHR
- Perinçek v Switzerland* (Application No 27510/08) (2015) 63 EHRR 6, ECtHR (GC)
- R v Cousins* [1982] QB 526; [1982] 2 WLR 621; [1982] 2 All ER 115, CA
- R v Lewis* (1996) 24 BCLR (3d) 247
- R v Spratt* 2008 BCCA 340, CA (British Columbia)
- R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53; [2009] AC 287; [2008] 3 WLR 549; [2008] 3 All ER 1094, HL(E) D
- R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56; [2022] 2 WLR 133; [2022] 2 All ER 1, SC(E)
- R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2015] AC 657; [2014] 3 WLR 200; [2014] 3 All ER 843, SC(E)
- R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47; [2018] 1 WLR 4079; [2019] 1 All ER 391, SC(E) E
- R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26; [2022] AC 223; [2021] 3 WLR 428; [2022] 3 All ER 95, SC(E)
- R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869; [2017] 3 WLR 409; [2017] ICR 1037; [2017] 4 All ER 903, SC(E)
- R (Z) v Hackney London Borough Council* [2020] UKSC 40; [2020] 1 WLR 4327; [2020] PTSR 1830; [2021] 2 All ER 539, SC(E)
- RR v Secretary of State for Work and Pensions* [2019] UKSC 52; [2019] 1 WLR 6430; [2020] 2 All ER 477, SC(E) F
- Richardson v Director of Public Prosecutions* [2014] UKSC 8; [2014] AC 635; [2014] 2 WLR 288; [2014] 2 All ER 20, SC(E)
- SPUC Pro-Life Ltd's Application for Judicial Review, In re* [2022] NIQB 9
- S v L* [2012] UKSC 30; 2013 SC (UKSC) 20, SC(Sc)
- Sáska v Hungary* (Application No 58050/08) (unreported) 27 November 2012, ECtHR (GC)
- Van den Dungen v The Netherlands* (Application No 22838/93) (unreported) 22 February 1995, EComHR G

The following additional cases were cited in argument:

- Abdul v Director of Public Prosecutions* [2011] EWHC 247 (Admin); [2011] HRLR 16, DC
- Brown v Public Prosecution Service for Northern Ireland* [2022] NICA 5, CA(NI) H
- Connolly v Director of Public Prosecutions* [2007] EWHC 237 (Admin); [2008] 1 WLR 276; [2007] 2 All ER 1012, DC
- DS v HM Advocate* [2007] UKPC D1; 2007 SC (PC) 1, PC
- Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557; [2004] 3 WLR 113; [2004] 3 All ER 411, HL(E)

- A *Hammond v Director of Public Prosecutions* [2004] EWHC 69 (Admin); 168 JP 601, DC
Handzhiyski v Bulgaria (Application No 10783/14) (2021) 73 EHRR 15, ECtHR
Montgomery v Lanarkshire Health Board [2015] UKSC 11; [2015] AC 1430; [2015] 2 WLR 768; [2015] 2 All ER 1031, SC(Sc)
Pur v Director of Public Prosecutions [2022] UKSC 2; [2022] 1 WLR 789; [2022] 3 All ER 789, SC(E)
- B *R v Waya* [2012] UKSC 51; [2013] 1 AC 294; [2012] 3 WLR 1188; [2013] 1 All ER 889, SC(E)
R (Bibi) v Secretary of State for the Home Department [2015] UKSC 68; [2015] 1 WLR 5055; [2016] 2 All ER 193, SC(E)
Recovery of Medical Costs for Asbestos Diseases (Wales) Bill, In re [2015] UKSC 3; [2015] AC 1016; [2015] 2 WLR 481; [2015] 2 All ER 899, SC(E)
Scottow v Crown Prosecution Service [2020] EWHC 3421 (Admin); [2021] 1 WLR 1828, DC
- C *United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, In re* [2021] UKSC 42; [2021] 1 WLR 5106; [2022] 3 All ER 413, SC(Sc)

REFERENCE under section 11(1) of the Northern Ireland Act 1998

- Pursuant to section 11(1) of the Northern Ireland Act 1998, the Attorney General for Northern Ireland referred to the Supreme Court clause 5(2)(a) of the Abortion Services (Safe Access Zones) (Northern Ireland) Bill, which was passed by the Northern Ireland Assembly on 24 March 2022, for determination as to whether that clause was within the legislative competence of the Assembly. The question referred was whether the penal sanction with no provision for reasonable excuse created by clause 5(2)(a) of the Bill was outside the legislative competence of the Northern Ireland Assembly by virtue of section 6(2)(c) of the 1998 Act as it involved a disproportionate interference with the rights under article 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms of those who sought to express opposition to the provision of abortion treatment services in Northern Ireland.

- In accordance with rule 41 of the Supreme Court Rules 2009 (SI 2009/1603), the reference was served on, inter alia, the Lord Advocate, who then appeared as respondent. On 28 June 2022 the Supreme Court granted permission to JUSTICE and the Northern Ireland Human Rights Commission to intervene.

The facts are stated in the judgment of Lord Reed PSC, post, paras 1–2, 68–109.

- Tony McGleenan KC* and *Laura Curran* (instructed by *Office of the Attorney General for Northern Ireland, Belfast*) for the Attorney General for Northern Ireland.

Dorothy Bain, KC, *Lord Advocate*, *Ruth Crawford KC* and *Paul Reid* (instructed by *Scottish Government Legal Directorate, Edinburgh*) for the Lord Advocate.

- Blinne Ní Ghrálaigh*, *Tim James-Matthews* and *Robbie Stern* (instructed by *Hodge Jones & Allen LLP*) for JUSTICE, intervening.

David Blundell KC and *Yaaser Vanderman* (instructed by *Northern Ireland Human Rights Commission, Belfast*) for the Northern Ireland Human Rights Commission, intervening.

The court took time for consideration.

- A 9 On this basis, JUSTICE submits that the reasoning in *Cuciurean* is erroneous in so far as it suggests that a reference to lawful or reasonable excuse is necessary for a proportionality assessment to be made. Rather, it is submitted that in accordance with the reasoning in *Ziegler* there must always be an assessment of proportionality, as a question of fact, which must necessarily be carried out by the body responsible for determining the facts at the trial of the offence in each individual case. In holding that the ingredients of an offence can in themselves ensure the proportionality of a conviction, the decision in *Cuciurean* is submitted to be erroneous and inconsistent with the jurisprudence of the European Court of Human Rights (“the European court”). JUSTICE accordingly invites the court to answer the question referred in the negative, for different reasons from those advanced either by the Lord Advocate or by the Human Rights Commission.
- B
- C 10 The submissions accordingly raise a question as to the appropriate test to apply when deciding whether a provision of devolved legislation is beyond legislative competence on the ground that it is a disproportionate interference with a Convention right. They also raise a number of questions in relation to the decisions in *Ziegler* and *Cuciurean*. The first is whether, in a case where the exercise of rights under articles 9 to 11 of the Convention is in question, there must always be an assessment of the proportionality of any interference with those rights on the facts of the individual case. The second is whether, where an offence is liable to give rise to an interference with the exercise of rights under articles 9, 10 or 11 of the Convention, it is necessary for the ingredients of the offence to include the absence of reasonable or lawful excuse in order for a conviction to be compatible with the Convention rights. The third is whether it is possible for the ingredients of an offence in themselves to ensure the compatibility of a conviction with articles 9, 10 and 11. The fourth is whether an assessment of proportionality is a question of fact. The fifth is whether any assessment of proportionality in criminal proceedings must necessarily be carried out by the body responsible for determining the facts at the trial of the offence. As will be apparent, there is a considerable degree of overlap between these questions.
- D
- E
- F 11 I shall begin by addressing those preliminary questions, in order to clarify the legal context in which the question referred has to be answered, before turning to consider the Bill, and the question referred, in greater detail.

2. The preliminary questions

- G (1) What is the test of whether a provision is beyond legislative competence on the ground that it will result in a disproportionate interference with a Convention right?

- H 12 As I have explained, the Lord Advocate submits that a provision of devolved legislation can only be said to be beyond legislative competence on the ground that it is a disproportionate interference with a Convention right if it would always, or almost always, have that effect. In support of that proposition she relies upon this court’s judgment in the case of *Christian Institute v Lord Advocate* 2017 SC (UKSC) 29 (“*Christian Institute*”). In response, counsel for the Attorney argue that the test laid down in that case was superseded in *In re McLaughlin* [2018] 1 WLR 4250, where a less demanding test was laid down, according to which it is sufficient that the

A ‘lawful excuse’” (para 62). The court did not explain what the relevant “interference” might be. It did, however, make it clear at paras 63–64 that the district judge or magistrates would have to apply a **complex legal test**:

“63. That then calls for the usual inquiry which needs to be conducted under the HRA. It requires consideration of the following questions:

B “(1) Is what the defendant did in exercise of one of the rights in articles 10 or 11?

“(2) If so, is there an interference by a public authority with that right?

“(3) If there is an interference, is it ‘prescribed by law’?

“(4) If so, is the interference in pursuit of a legitimate aim as set out in paragraph 2 of article 10 or article 11, for example the protection of the rights of others?

C “(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?

D “(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?”

E 25 The Divisional Court also decided that the correct approach to be taken to appeals by way of case stated, where the proportionality of an interference with a Convention right was in issue, was not that traditionally adopted in appeals against conviction under section 137, but was that set out by Lord Neuberger of Abbotsbury PSC in *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911 (“*In re B*”), para 92, namely whether the judge’s conclusion on proportionality was “wrong”.

F 26 On the subsequent appeal to this court, the decision of the Divisional Court was reversed. However, it was agreed between the parties, and this court accepted, that section 137 has to be read and given effect, in accordance with section 3 of the Human Rights Act, on the basis that the availability of the defence of lawful excuse, in a case raising issues under articles 10 or 11, depends on a proportionality assessment carried out in accordance with the approach set out by the Divisional Court: see paras 10–12 and 16. As that question is not in issue in the present case, we make no comment upon it.

G 27 One of the issues in dispute in the appeal was whether there can be a lawful excuse for the purposes of section 137 in respect of deliberate physically obstructive conduct by protesters, where the obstruction prevented, or was capable of preventing, other highway users from passing along the highway. Lord Hamblen and Lord Stephens JJSC concluded that there could be (*Jones* was neither cited nor referred to). Lady Arden and Lord Sales JJSC expressed agreement in general terms with what they said on this issue.

28 In the course of their discussion of this issue, Lord Hamblen and Lord Stephens JJSC stated at [2022] AC 408, para 59:

“Determination of the proportionality of an interference with ECHR rights is a fact-specific inquiry which requires the evaluation of the circumstances in the individual case.”

One might expect that to be the usual position at the trial of offences charged under section 137 in circumstances where articles 9, 10 or 11 are engaged, if the section is interpreted as it was in *Ziegler*; and that was the only situation with which Lord Hamblen and Lord Stephens JJSC were concerned. The dictum has, however, been widely treated as stating a universal rule; and that was the position adopted by counsel for JUSTICE in the present case.

29 That view is mistaken. In the first place, questions of proportionality, particularly when they concern the compatibility of a rule or policy with Convention rights, are often decided as a matter of general principle, rather than on an evaluation of the circumstances of each individual case. Domestic examples include *R (Baiai) v Secretary of State for the Home Department* [2009] 1 AC 287, the nine-judge decision in *R (Nicklinson) v Ministry of Justice* [2015] AC 657, and the seven-judge decisions in *R (UNISON) v Lord Chancellor* [2020] AC 869 and *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223.

30 Those cases also demonstrate the related point that the determination of whether an interference with a Convention right is proportionate is not an exercise in fact-finding. It involves the application, in a factual context (often not in material dispute), of the series of legal tests set out at para 24 above, together with a sophisticated body of case law, and may also involve the application of statutory provisions such as sections 3 and 6 of the Human Rights Act, or the development of the common law. As Lord Bingham of Cornhill stated in the *Belmarsh* case (*A v Secretary of State for the Home Department* [2005] 2 AC 68, para 44), with the agreement of the majority of a nine-member Appellate Committee of the House of Lords: “The European Court does not approach questions of proportionality as questions of pure fact: see, for example, *Smith and Grady v United Kingdom* (1999) 29 EHRR 493. Nor should domestic courts do so.”

31 That is reflected in the approach adopted by this court to appeals on questions of proportionality. In cases such as those cited in the previous two paragraphs, the court (or, in the *Belmarsh* case, the House of Lords) did not accord any deference to the assessment of proportionality by the courts below, or limit its review to an assessment of the rationality of their conclusion, but carried out its own assessment. The same is true of other appeals concerned with rules or policies in which the facts of the individual case were of greater significance, such as *Bank Mellat v HM Treasury* [2014] AC 700 and *R (Elan-Cane) v Secretary of State for the Home Department* [2022] 2 WLR 133.

32 That also reflects the related fact that the judicial protection of statutory rights by appellate courts is not secured merely by review according to a standard of unreasonableness. Nor does such a restricted review meet the requirements of the Convention, as this court, and the House of Lords before it, have pointed out on many occasions: see, for example, the *Belmarsh* case, para 44, where Lord Bingham referred to

A “The greater intensity of review now required in determining questions of proportionality”.

33 However, in *Ziegler* [2022] AC 408, the majority of the court treated issues of proportionality as being susceptible to appeal by way of case stated only on the basis explained in *Edwards v Bairstow* [1956] AC 14: that is to say, if an error of law was apparent on the face of the case, or if the decision was one which no reasonable court properly instructed as to the relevant law could have reached (see *Ziegler* at paras 29, 36 and 42–52). In arriving at that approach, Lord Hamblen and Lord Stephens JJSC interpreted the decision in *In re B* [2013] 1 WLR 1911, in the light of a dictum of Lord Carnwath JSC in *R (R) v Chief Constable of Greater Manchester Police* [2018] 1 WLR 4079 (“*R (R)*”), para 64, as meaning that appellate courts should adopt a standard of unreasonableness when considering issues of proportionality. *In re B*, like C the more recent case of *In re H-W (Children)* [2022] 1 WLR 3243, was concerned with the proportionality of a specific care order in the light of the circumstances of a particular child: a one-off decision, affecting only persons involved in the proceedings, which the judge who heard the evidence was particularly well placed to take. The approach adopted by this court was that D proportionality was wrong. That approach is capable of being applied flexibly, since the test or standard applied in deciding whether a decision is wrong can be adapted to the context, as Lady Arden JSC noted in *Ziegler* at paras 102–103, and as Lord Sales JSC emphasised in his judgment. The case of *R (R)* was a judicial review concerned with the disclosure of particular information about an individual’s past in an enhanced criminal record certificate. Lord Carnwath JSC followed the approach laid down in *In re B*, E but added the observation cited by Lord Hamblen and Lord Stephens JJSC, that “for the decision to be ‘wrong’ . . . it is not enough that the appellate court might have arrived at a different evaluation.” It would, however, be a mistake to attach undue significance to a statement which was made by Lord Carnwath JSC in the context of a particular case without reference to a plethora of other cases, some of which have been mentioned in paras 29–31 F above, in which a more interventionist approach was adopted by this court in order to enable it to fulfil its constitutional function and to perform its duty under the Human Rights Act.

34 There is a further reason why the dictum cited at para 28 above, that the determination of proportionality is a fact-specific inquiry which requires the evaluation of the circumstances in the individual case, cannot be taken to be a universal rule. It is possible for a general legislative measure in itself to ensure that its application in individual circumstances will meet the requirements of proportionality under the Convention, without any need for the evaluation of the circumstances in the individual case. G

35 Even in the particularly sensitive context of restrictions on freedom of political speech under article 10, the European court has accepted that general restrictions imposed by legislation can sometimes be justifiable. In its judgment in *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21 (“*Animal Defenders*”), which concerned a statutory prohibition of political advertising, the Grand Chamber said that: H

(1) “[A] state can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual

facts of each case even if this might result in individual hard cases” (para 106). A

(2) The European court attaches particular importance to “The quality of the parliamentary and judicial review of the necessity of the measure” (para 108). In that regard, the court made clear at paras 115–116 the importance which it attaches to judicial consideration of proportionality issues in the light of the Convention case law. B

(3) “It is also relevant to take into account the risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the state to assess” (para 108). C

(4) “A general measure has been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty, of litigation, expense and delay as well as of discrimination and arbitrariness” (para 108). C

(5) “[The] more convincing the general justifications for the general measure are, the less importance the [European] court will attach to its impact in the particular case” (para 109). D

(6) “The central question as regards such measures is not . . . whether less restrictive rules should have been adopted or, indeed, whether the state could prove that, without the prohibition, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it” (para 110). D

36 The position is similar in relation to article 11. In *Kablis v Russia* (Application Nos 48310/16 and 59663/17) (unreported) 30 April 2019, the European court considered a complaint concerning a law which prohibited demonstrations and other public events in the main square of a Russian town. The European court stated at para 54, under reference to *Animal Defenders*, that “a state can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case, even if this might result in individual hard cases”. E F

37 Counsel for JUSTICE submits that the approach adopted in *Animal Defenders* has no application to criminal proceedings, relying principally on the judgment of the majority of the Grand Chamber in *Perinçek v Switzerland* (2015) 63 EHRR 6 (“*Perinçek*”). That case concerned the applicant’s conviction of an offence of grossly trivialising a genocide on racial grounds, after he made public statements denying that the Armenian genocide had taken place. The critical issue was whether the Swiss authorities had struck a proper balance between the applicant’s rights under article 10 and the right of the Armenian people to the protection of their dignity under article 8. The European court observed at para 198 that “in principle the rights under these articles deserve equal respect”. It added that the choice of the means to secure compliance with article 8, and the assessment of whether and to what extent an interference with the right to freedom of expression is necessary, are both matters falling within the state’s margin of appreciation. As the court stated, the margin of appreciation goes hand in hand with European supervision. However: G H

A “If the balancing exercise has been carried out by the national authorities in conformity with the criteria laid down in the [European] court’s case law, the [European] court would require strong reasons to substitute its view for theirs.”

B 38 At para 272, the European court pointed out that the form of interference at issue in that case—a criminal conviction which could result in a term of imprisonment—was much more serious in terms of its consequences for the applicant than the interference considered in *Animal Defenders*, and called for stricter scrutiny. The question in issue in the present case, however (where the maximum penalty on conviction of an offence under the Bill is a fine), is whether there must be an assessment of proportionality on the facts of the individual case. In that regard, counsel
C relied on a passage in para 275 of the judgment in *Perinçek*:

D “Indeed, an interference with the right to freedom of expression that takes the form of a criminal conviction inevitably requires detailed judicial assessment of the specific conduct sought to be punished. In this type of case, it is normally not sufficient that the interference was imposed because its subject matter fell within a particular category or was caught by a legal rule formulated in general terms; what is rather required is that it was necessary in the specific circumstances.”

E 39 In that passage, the word “normally” is important. Although the first sentence provides general guidance, the European court did not lay down an absolute principle. On the facts of the case, the majority of the European court based their decision to uphold the complaint on their view
F that the Swiss Government, in promoting the legislation in question, had accepted that proof of the ingredients of the offence would not in itself satisfy the proportionality balance, but that the balance needed to be struck in individual situations (para 275). Furthermore, the reasoning of the Swiss courts in the applicant’s case “does not show that they paid any particular heed to this balance” (para 276). I would also observe that the measure in question criminalised the expression of a political opinion, rather than
merely regulating the time, place or manner of its expression.

G 40 Two other points need to be borne in mind. First, the European court confines itself, as far as possible, to an examination of the concrete case before it. As it has often said, its task is not to review legal provisions and practice in abstracto, but to determine whether the manner in which they were applied to or affected the applicant gave rise to a violation of the Convention. Domestic courts are not required to proceed on the same basis, and this court cannot do so on a reference of the present kind.

H 41 Secondly, the European court has repeatedly emphasised that the Convention is intended to protect rights that are practical and effective, and that its concern is therefore with matters of substance rather than form. It would be inconsistent with that approach to draw a fundamental distinction in our domestic application of the Convention, in relation to legal measures restricting protesters’ rights under articles 9 to 11, according to the domestic classification of the measures as civil or criminal. That is illustrated by the fact that one of the Government’s responses to the decision in *Ziegler* [2022] AC 408 was to obtain civil injunctions, covering the national network of motorways and other major roads, and prohibiting activities which would

obstruct them. Such injunctions, although classified as civil remedies, are generally directed against “persons unknown” as well as any protesters whose identities are known, and contain a power of arrest. They are enforceable by proceedings for contempt, in which unlimited fines or sentences of imprisonment can be imposed. Those are more serious penalties than are available under the present Bill.

(ii) *Cuciurean*

42 The decision in *Ziegler* was widely understood as having established that every criminal conviction of protesters involved a restriction upon their Convention rights, and must be proved to be justified and proportionate on the basis of an assessment of the particular facts. As explained, that understanding was mistaken. The issue reached an appellate court in the case of *Cuciurean* [2022] QB 888, which concerned a protester who trespassed on land adjacent to the West Coast railway. He dug a tunnel there and occupied it with the intention of obstructing the construction of the HS2 project. He was charged with an offence of aggravated trespass under section 68 of the Criminal Justice and Public Order Act 1994 (“the 1994 Act”), which provides (so far as material):

“(1) A person commits the offence of aggravated trespass if he trespasses on land and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land, does there anything which is intended by him to have the effect— (a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity, (b) of obstructing that activity, or (c) of disrupting that activity.”

43 In the magistrates’ court, the deputy district judge acquitted the defendant on the basis that, following *Ziegler*, the prosecution had to establish that a conviction would be a proportionate interference with his article 10 and 11 rights, and had failed to do so. The prosecution appealed by way of case stated to the Divisional Court, which allowed the appeal on the basis that the ingredients of the offence under section 68 ensured that a conviction of that offence was a proportionate interference with those rights.

44 The central issue in the appeal was whether the decision in *Ziegler* requires a proportionality test to be made an ingredient of any offence which impinges on the exercise of rights under articles 10 or 11 of the Convention. The court held that *Ziegler* did not have that effect, and upheld the submission by the prosecution that a conviction of the offence of aggravated trespass was—intrinsically and without the need for a separate consideration of proportionality in individual cases—a justified and proportionate interference with those rights.

45 In its judgment, delivered by Lord Burnett of Maldon CJ, the court noted at para 37 that the Grand Chamber of the European court had stated that intentional serious disruption by demonstrators to ordinary life and to the activities lawfully carried out by others, to a more significant extent than that caused by the normal exercise of the right of peaceful assembly in a public place, may be considered a “reprehensible act” within the meaning of the court’s case law, so as to justify a criminal sanction: *Kudrevičius v Lithuania* (2015) 62 EHRR 34 (“*Kudrevičius*”), para 173. As the Divisional Court noted, the case law of the European court contains numerous

- A examples of cases where criminal sanctions, imposed on protesters who obstructed roads or otherwise disrupted the ordinary activities of others, were held to be a reaction proportionate to the legitimate aim of protecting the rights and freedoms of others or protecting public order. The court also cited *Animal Defenders* 57 EHRR 21 (at para 71) as an example of a case where the European court accepted that a general measure enacted by
- B Parliament had satisfactorily addressed proportionality, making case-by-case assessment unnecessary.

46 The Divisional Court also noted a number of domestic cases in which it had been held that a criminal offence with which protesters were charged was inherently proportionate, without any need for a fact-specific assessment in individual cases.

- C 47 One such case was *Bauer v Director of Public Prosecutions* [2013] 1 WLR 3617 (“*Bauer*”), concerned with section 68 of the 1994 Act. The Divisional Court held at paras 39–40 that the state was entitled, for the purpose of preventing disorder or crime, to prevent aggravated trespass, and that if the ingredients of section 68 were proved, there was nothing more to prove, including proportionality, in order to convict of the offence.

- D 48 Another such case was *James v Director of Public Prosecutions* [2016] 1 WLR 2118 (“*James*”), which concerned the offence of failing to comply with a condition imposed by a police officer on the holding of a public assembly, contrary to section 14(5) of the Public Order Act 1986. The ingredients of the offence included that a senior police officer (a) had reasonably believed that the assembly might result in serious public disorder, serious damage to property or serious disruption to the life of the community
- E or that the object of the organisers was to intimidate others into not doing something that they had a right to do or into doing something they had a right not to do, and (b) had given a direction imposing conditions appearing to him to be necessary to prevent such disorder, damage, disruption or intimidation. The Divisional Court held that where the prosecution satisfied those statutory tests, that was proof that the imposition of the conditions
- F was proportionate.

- 49 Another example was the decision of the High Court of Justiciary in *Gifford v HM Advocate* 2011 SCCR 751 (“*Gifford*”), which concerned the common law offence of breach of the peace, which in Scots law requires conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community. The court stated that “the Convention rights to freedom of expression and freedom of assembly do not entitle protesters to commit a breach of the peace” (para 15). In support of that proposition, the court cited inter alia the decision of the European court in *Lucas v United Kingdom* (Application No 39013/02) (unreported) 18 March 2003, which concerned a complaint following a conviction of a protester for breach of the peace. The European court held the complaint to be manifestly inadmissible, since the actions of the police in arresting and detaining the applicant, and of the national court in convicting and sentencing her, were proportionate to the legitimate aim pursued, in view of the dangers posed by her conduct in sitting in a public road and the interest in maintaining public order, and a relatively minor penalty had been imposed. In *Gifford*, the court observed (para 17):
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“Accordingly, if the jury are accurately directed as to the nature of the offence of breach of the peace, their verdict will not constitute a violation of the Convention rights under articles 10 and 11, as those rights have been interpreted by this court in the light of the case law of the Strasbourg court. It is unnecessary, and inappropriate, to direct the jury in relation to the Convention.”

50 Another relevant authority was *Richardson v Director of Public Prosecutions* [2014] AC 635, a decision of this court which concerned an offence under section 68 of the 1994 Act. In a passage which was obiter, but with which all the members of the court agreed, Lord Hughes JSC stated at para 3:

“References in the course of argument to the rights of free expression conferred by article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms were misplaced. Of course a person minded to protest about something has such rights. But the ordinary civil law of trespass constitutes a limitation on the exercise of this right which is according to law and unchallengeably proportionate. Put shortly, article 10 does not confer a licence to trespass on other people’s property in order to give voice to one’s views.”

51 In *Cuciurean* [2022] QB 888, the Divisional Court noted that there was no need to consider those authorities in *Ziegler* [2022] AC 408, as it was a case concerned solely with the “lawful excuse” defence in section 137 of the 1980 Act, and proceeded upon a concession that the availability of that defence, in cases concerned with protests, depended on an assessment of the proportionality of an interference with the defendant’s rights under articles 10 and 11 of the Convention. The court in *Ziegler* had no need to consider, and expressed no views about, offences where the balance required for proportionality under articles 10 and 11 may be struck by the terms of the legislation setting out the ingredients of the offence (or, in the case of a common law offence, by the relevant case law). Accordingly, as the Divisional Court stated in *Cuciurean* at para 67:

“For these reasons, it is impossible to read the judgments in *Ziegler* as deciding that there is a general principle in our criminal law that where a person is being tried for an offence which does engage articles 10 and 11, the prosecution, in addition to satisfying the ingredients of the offence, must also prove that a conviction would be a proportionate interference with those rights.”

52 One more observation should be made about the case of *James* [2016] 1 WLR 2118. In its judgment in that case the Divisional Court distinguished between two categories of offence: first, those whose ingredients include a requirement for the prosecution to prove that the conduct of the defendant was not reasonable, where any restrictions on the exercise of rights under articles 10 and 11, and the proportionality of those restrictions, are relevant to whether that ingredient is proved; and secondly, offences where, once the ingredients of the offence have been proved, the defendant’s conduct has gone beyond what could be regarded as reasonable conduct in the exercise of Convention rights, so that the necessary balance for proportionality is struck by the terms of the offence itself.

A 53 It is important not to make the mistake of supposing that all offences can be placed into one of those categories, or to suppose that a reference to lawful or reasonable excuse in the definition of an offence necessarily means, in cases concerned with protests, that an assessment of proportionality can or should be carried out. The position is more nuanced than that.

B 54 Where a defendant relies on article 9, 10 or 11 Convention rights as a defence to a protest-related offence with which he is charged, the first question which arises is whether those articles are engaged. The conduct in question will fall outside the scope of those articles altogether if it involves violent intentions, or incites violence, or otherwise rejects the foundations of a democratic society (*Kudrevičius* 62 EHRR 34, para 92), or if article 17 of the Convention applies (article 17 provides that the Convention does not confer any right on a person to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set out in the Convention or at their limitation to a greater extent than is provided in the Convention). A recent domestic example is *Attorney General's Reference (No 1 of 2022)* [2023] 1 Cr App R 1, where conduct causing significant damage to property, contrary to section 1(1) of the Criminal Damage Act 1971, was held by the Court of Appeal to fall outside the scope of articles 9, 10 and 11. Equally, if a protester were physically to assault another person, knowing that the assault, being news-worthy, would provide him with an opportunity to communicate to the public his views on a matter of public concern, Convention rights would not shield him from the criminal law.

E 55 If articles 9, 10 or 11 are engaged, the second question which arises is whether the offence is one where the ingredients of the offence 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. If the offence is so defined as to ensure that any conviction will meet the requirements of proportionality, the court does not have to go through the process of verifying that a conviction would be proportionate on the facts of every individual case. The cases discussed in paras 47–50 above, and *Cuciurean*, are examples of circumstances where that approach was applied. Indeed, many commonly encountered criminal offences, such as offences of violence, and offences concerned with damage to property, are likely to be defined in such a way as to make an assessment of proportionality unnecessary, either because the conduct in question falls outside the scope of protection under the Convention or because proportionality is inherent in the ingredients of the offence. In considering whether the ingredients of the offence ensure the proportionality of a conviction, it is also necessary to bear in mind that decision-makers enjoy a margin of appreciation in relation to interferences with rights protected by articles 9, 10 and 11: see, for example, *Delfi AS v Estonia* (2015) 62 EHRR 6, para 131, and more recently *Lilliendahl v Iceland* (Application No 29297/18) (unreported) 12 May 2020, paras 30–31. Courts therefore have to accord appropriate respect to the assessment made by the decision-maker, whether that be Parliament in the case of primary legislation or, in the case of offences created by subordinate or devolved legislation, the Government or the devolved legislatures or executives.

H 56 Where the conduct in question falls within the scope of articles 9, 10 or 11, and proof of the ingredients of the offence does not in itself ensure the proportionality of a conviction, then the possibility arises that a conviction

might be incompatible with the Convention rights. Given the court's general duty not to act incompatibly with Convention rights under section 6(1) of the Human Rights Act, subject to the exceptions set out in section 6(2), it is accordingly necessary to consider a third question: whether there is a means by which the proportionality of a conviction can be ensured.

57 If the offence is statutory, the interpretative duty imposed by section 3 of the Human Rights Act may enable the court to construe the relevant provision in a way which renders it compatible with the Convention rights, either by interpreting it in such a way that a conviction will always meet the requirements of proportionality, or by interpreting it so as to allow for an assessment of the proportionality of a conviction in the circumstances of individual cases. For example, a defence of lawful or reasonable excuse may provide a route by which a proportionality assessment can be carried out, where the defence can properly be interpreted, having recourse if need be to section 3 of the Human Rights Act, as including the exercise of Convention rights.

58 But the mistake should not be made of assuming that the presence of a reference to lawful or reasonable excuse in the definition of an offence necessarily means that a proportionality assessment in respect of Convention rights is appropriate. As has been explained, offending conduct may fall outside the scope of articles 9 to 11, with the consequence that no proportionality assessment is required, even though the ingredients of the offence may include the absence of lawful excuse. That was held to be the case, in relation to section 1(1) of the Criminal Damage Act 1971, in *Attorney General's Reference (No 1 of 2022)* [2023] 1 Cr App R 1. Similarly, there is a defence of lawful excuse to the offence of threatening to kill, under section 16 of the Offences against the Person Act 1861 (24 & 25 Vict c 100). That defence caters for threats to kill that are made in circumstances where they are justifiable under our substantive criminal law, such as threats made in self-defence (*R v Cousins* [1982] QB 526). The defence would not arise merely because the defendant made the threat in the course of a protest, or as a means of drawing attention to an issue of current debate: as explained earlier, violent offences fall outside the scope of articles 9 to 11 (para 54 above). Further, where the ingredients of the offence in themselves do strike the appropriate balance, there is no need for a Convention proportionality assessment when considering the lawful excuse defence. That defence can be relied on in other circumstances that do not raise Convention issues, such as where the defendant asserts that he acted in self-defence or out of necessity, or had been lawfully authorised to engage in the conduct alleged.

59 If interpretation in accordance with section 3 cannot resolve the incompatibility, then the court must give effect to primary legislation notwithstanding the violation of Convention rights: section 6(2) of the Human Rights Act.

60 The position in relation to subordinate legislation (including devolved legislation: section 21 of the Human Rights Act) is more complex, having regard to sections 3 and 6(2)(b) of the Human Rights Act, and to authorities such as *Boddington v British Transport Police* [1999] 2 AC 143 and *RR v Secretary of State for Work and Pensions* [2019] 1 WLR 6430.

61 Where the offence arises at common law, resort cannot be had to section 3 of the Human Rights Act, since there is no legislation capable of

- A being given a Convention-compliant interpretation. Instead, the question arises whether the court can develop the common law so as to render the offence compatible with Convention rights, either on ordinary principles or by virtue of the duty imposed by section 6(1) of the Human Rights Act.

(iii) The questions arising from *Ziegler* and *Cuciurean*

- B 62 In the light of that discussion of *Ziegler* [2022] AC 408 and *Cuciurean* [2022] QB 888, the questions raised about those cases by counsel's submissions in the present case can be answered quite briefly.

- C 63 The first question was whether, in a case where the exercise of rights under articles 9 to 11 of the Convention is raised by the defendant to a criminal prosecution, there must always be an assessment of the proportionality of any interference with those rights on the facts of the individual case. The answer is no: see paras 29, 34–41 and 45–51 above.

- D 64 The second question was whether, where an offence is liable to give rise to an interference with the exercise of rights under articles 9, 10 or 11 of the Convention, it is necessary for the ingredients of the offence to include (or be interpreted as including) the absence of reasonable or lawful excuse in order for a conviction to be compatible with the Convention rights. The answer is no: see paras 44–55 above.

- D 65 The third question was whether it is possible for the ingredients of an offence in themselves to ensure the compatibility of a conviction with the Convention rights under articles 9, 10 and 11. The answer is yes: see paras 34–41, 45–51 and 55 above.

- E 66 The fourth question was whether an assessment of proportionality is a question of fact. The answer is no: see paras 30–34 above.

- F 67 The fifth question was whether an assessment of proportionality in criminal proceedings must necessarily be carried out by the body responsible for determining the facts at the trial of the offence. The answer is no. As has been explained, the assessment of proportionality is not a question of fact, and therefore need not necessarily be decided by the body responsible for finding the facts at any trial. Who determines it must depend on the relevant rules of criminal procedure. In Northern Ireland a devolution issue may arise, which has to be determined in accordance with the relevant legislation, and may be decided prior to trial, either by the court before which the issue has been raised, or by a higher court to which the issue has been referred. In Scotland, the statutory provisions governing compatibility issues apply, and again enable the issue to be decided or referred to a higher court prior to trial, commonly in the context of a plea in bar of trial on the ground of oppression (analogous, in English procedure, to an application for a stay on the ground of abuse of process). In relation to England and Wales, the Court of Appeal provided guidance in *Attorney General's Reference (No 1 of 2022)* [2023] 1 Cr App R 1, para 118, as to the circumstances in which a jury need not be directed on the issue of proportionality, or in which a judge might withdraw the issue from the jury. There may be a question as to whether the issue is appropriate for determination by a jury, having regard to the complexity of the analysis of proportionality (set out in para 24 above) and the other, equally complex, questions which may arise (e.g. as to the application of sections 3 and 6 of the Human Rights Act, where the challenge is to the proportionality of legislation, or the potential development of the common law, where it is not), or whether some other

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protection of public order”), “the protection of health”, and “the protection of the rights and freedoms of others”.

115 However, the matter goes beyond there being an aim falling within the scope of articles 9(2), 10(2) and 11(2). The right to access healthcare in conditions of privacy and dignity, and the right to pursue employment, are protected by article 8 of the Convention. Indeed, it has been established that states are under a positive obligation, under article 8, to create a procedural framework enabling a pregnant woman to exercise effectively her right of access to a lawful abortion: *P and S v Poland* (2012) 129 BMLR 120, para 99. The same principle would appear to entail that there is also a positive obligation on states, under article 8, to enable a pregnant woman physically to access the premises where abortion services are lawfully provided, without being hindered or harmed in the various ways described in the evidence before the court.

(4) *Is the restriction of the Convention rights necessary in a democratic society?*

116 The remaining issue is whether the restriction is “necessary in a democratic society” to achieve the legitimate aims pursued: in other words, whether the restriction is proportionate. That question can be broken down into four elements, following the customary analysis.

(i) *Is the aim sufficiently important to justify interference with a fundamental right?*

117 It is accepted by the parties that the protection of the article 8 rights of patients and staff is in principle a sufficiently important objective to justify the limitation of rights under articles 9 to 11. That can scarcely be doubted, particularly against the background to the Bill. Enabling women to access premises at which abortion services are lawfully provided in an atmosphere of privacy and dignity, without intimidation, shaming, disorder, or intrusions upon their privacy is of such obvious importance as to constitute a compelling justification for legislative intervention. The same can be said of the importance of enabling the staff of such facilities to access their place of work under acceptable conditions.

(ii) *Is there a rational connection between the means chosen and the aim in view?*

118 The restrictions imposed by clause 5 have a rational connection to the purpose of protecting the privacy and dignity of women and staff accessing abortion facilities, and thereby promoting public health. A measure that seeks to ensure that women seeking a safe termination of pregnancy have unimpeded access to clinics where such treatment is provided, and are not driven to less safe procedures by shaming behaviour, intrusions upon their privacy, or other means of undermining their autonomy, is a rational response to a serious public health issue. The fact that the restrictions are a rational means of achieving the objectives pursued is also demonstrated by experience in other jurisdictions where similar restrictions have been imposed: see para 87 above.

- A (iii) Are there less restrictive alternative means available to achieve that aim?

119 It is argued on behalf of the Attorney that the aim pursued could be achieved by less restrictive means. In that regard, counsel for the Attorney argue that clause 5(2)(a) of the Bill is unduly restrictive, on the basis that clause 5(2)(b) and (c) would have been sufficient in themselves to provide adequate protection.

B 120 Clause 5(2)(a) has to be seen in the context of clause 5(2) as a whole. It is convenient to repeat its terms:

- C “It is an offence for D to do an act in a safe access zone with the intent of, or reckless as to whether it has the effect of— (a) influencing a protected person, whether directly or indirectly, (b) preventing or impeding access by a protected person, or (c) causing harassment, alarm or distress to a protected person, in connection with the protected person attending protected premises for a purpose mentioned in section 3.”

- D 121 Putting the matter broadly, clause 5(2) as whole prohibits behaviour in the immediate vicinity of abortion clinics which, intentionally or recklessly, is liable to cause women not to access the healthcare services available there. The behaviour is prohibited whether it takes the form of influencing the behaviour of protected persons, physically obstructing their access to the premises where the services are provided, or causing them harassment, alarm or distress. Influencing the behaviour of patients, visitors and staff, or attempting to do so, is one way of stopping women from accessing the healthcare services in question. It is therefore rational for it to be prohibited.

- E 122 In addition, there is a practical need for clause 5(2)(a) to be in place if clause 5(2)(b) and (c) are to be effective. In the absence of clause 5(2)(a), the obvious defence to a charge under clause 5(2)(b) or (c) would be that the defendant had no intention of preventing or impeding access or causing harassment, alarm or distress, but was merely trying to persuade the complainant to change her mind. For the prosecution to prove the charge beyond reasonable doubt in the face of such a defence, would be difficult in all but flagrant cases. The presence of clause 5(2)(a) is therefore not only rationally coherent with the legitimate aim pursued, but is necessary if the legislation is to achieve its intended aim.

- F 123 Counsel for the Attorney argue in the alternative that the absence from clause 5(2)(a) of a defence of reasonable excuse renders it unduly restrictive. As explained in para 101 above, such a defence was considered and rejected by the Assembly, on the ground that, if such a defence were available, protesters would claim that they were excusably ignorant of the fact that the person whom they approached was a protected person, notwithstanding the breadth of the definition of that expression in clause 3 (para 103 above), or that they did not realise that they were within a safe access zone, notwithstanding the provisions of clause 7 relating to notification of the public (para 108 above). Those were clearly relevant considerations. As the European court stated in *Animal Defenders* 57 EHRR 21, para 108 (omitting citations):

“It is also relevant to take into account the risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the

state to assess. A general measure has been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty, of litigation, expense and delay as well as of discrimination and arbitrariness.”

A

(iv) Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?

B

124 Counsel for the Attorney contend that clause 5(2)(a) fails to strike a fair balance between the rights of protesters and the general interest of the community, including the rights of the persons protected. In considering that contention, a number of considerations are of particular importance.

125 First, it is necessary to bear in mind that women and girls of reproductive age who visit hospitals and clinics where treatment or advice relating to abortion are available are likely to be in the early stages of an unwanted pregnancy. They may be feeling ill. The fact that their pregnancy is unwanted and that they have decided to have an abortion, or are contemplating doing so, may very well be placing them under acute emotional and psychological strain. Their personal circumstances may exacerbate that strain. Some will be minors. Some will be victims of sexual offences. Some will be carrying foetuses with abnormalities. Some will be women or girls whose own health is at risk. The women and girls who leave the hospitals and clinics in question may well have just undergone an abortion. They too are likely to be in a highly emotional condition, as well as being in discomfort. Whether pregnant or having just had an abortion, these women will reasonably wish that their condition should be kept private, and that they should not be the focus of intrusive public attention. The present context is therefore one in which the protection of the private lives and autonomy of women, recognised under article 8 of the Convention (as, for example, in *A, B and C v Ireland* (2010) 53 EHRR 13, paras 212–214 and *P and S v Poland* 129 BMLR 120, paras 111 and 128), is of particular importance.

C

D

E

126 Secondly, these women have no way of arriving at and leaving the hospitals and clinics where they can access the treatment and advice that they have decided to obtain, except by means of spaces to which the public have access. They have a reasonable expectation of being able to access that treatment and advice with no greater incursion upon their privacy than is inevitable in accessing a clinic or hospital from a public highway. They have a reasonable expectation of being able to do so without having their autonomy challenged and diminished, whether by attempts by protesters to persuade them to change their minds, or by protesters praying for the souls of foetuses with the intention or effect of provoking feelings of guilt, or by other means calculated to undermine their resolve.

F

G

127 Thirdly, an important aspect of the present case is that the Bill does not prevent the exercise of any right protected by articles 9 to 11 of the Convention, but merely imposes a limitation upon the places where those rights may be exercised. The importance of this feature has been noted by the European court in a number of cases. For example, in *Appleby v United Kingdom* (2003) 37 EHRR 38, the court observed at para 47, in relation to article 10, that “That provision, notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum

H



Terrorism Act 2000

2000 CHAPTER 11

PART II

PROSCRIBED ORGANISATIONS

Procedure

3 Proscription.

- (1) For the purposes of this Act an organisation is proscribed if—
 - (a) it is listed in Schedule 2, or
 - (b) it operates under the same name as an organisation listed in that Schedule.
- (2) Subsection (1)(b) shall not apply in relation to an organisation listed in Schedule 2 if its entry is the subject of a note in that Schedule.
- (3) The Secretary of State may by order—
 - (a) add an organisation to Schedule 2;
 - (b) remove an organisation from that Schedule;
 - (c) amend that Schedule in some other way.
- (4) The Secretary of State may exercise his power under subsection (3)(a) in respect of an organisation only if he believes that it is concerned in terrorism.
- (5) For the purposes of subsection (4) an organisation is concerned in terrorism if it—
 - (a) commits or participates in acts of terrorism,
 - (b) prepares for terrorism,
 - (c) promotes or encourages terrorism, or
 - (d) is otherwise concerned in terrorism.

[^{F1}(5A) The cases in which an organisation promotes or encourages terrorism for the purposes of subsection (5)(c) include any case in which activities of the organisation—

- (a) include the unlawful glorification of the commission or preparation (whether in the past, in the future or generally) of acts of terrorism; or

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- (b) are carried out in a manner that ensures that the organisation is associated with statements containing any such glorification.
- (5B) The glorification of any conduct is unlawful for the purposes of subsection (5A) if there are persons who may become aware of it who could reasonably be expected to infer that what is being glorified, is being glorified as—
 - (a) conduct that should be emulated in existing circumstances, or
 - (b) conduct that is illustrative of a type of conduct that should be so emulated.
- (5C) In this section—
 - “ glorification ” includes any form of praise or celebration, and cognate expressions are to be construed accordingly;
 - “ statement ” includes a communication without words consisting of sounds or images or both.]
- [^{F2}(6) Where the Secretary of State believes—
 - (a) that an organisation listed in Schedule 2 is operating wholly or partly under a name that is not specified in that Schedule (whether as well as or instead of under the specified name), or
 - (b) that an organisation that is operating under a name that is not so specified is otherwise for all practical purposes the same as an organisation so listed,he may, by order, provide that the name that is not specified in that Schedule is to be treated as another name for the listed organisation.
- (7) Where an order under subsection (6) provides for a name to be treated as another name for an organisation, this Act shall have effect in relation to acts occurring while—
 - (a) the order is in force, and
 - (b) the organisation continues to be listed in Schedule 2,as if the organisation were listed in that Schedule under the other name, as well as under the name specified in the Schedule.
- (8) The Secretary of State may at any time by order revoke an order under subsection (6) or otherwise provide for a name specified in such an order to cease to be treated as a name for a particular organisation.
- (9) Nothing in subsections (6) to (8) prevents any liability from being established in any proceedings by proof that an organisation is the same as an organisation listed in Schedule 2, even though it is or was operating under a name specified neither in Schedule 2 nor in an order under subsection (6).]

Textual Amendments

- F1** S. 3(5A)-(5C) inserted (13.4.2006) by [Terrorism Act 2006 \(c. 11\), s. 21](#); [S.I. 2006/1013, art. 2](#)
- F2** S. 3(6)-(9) inserted (13.4.2006) by [Terrorism Act 2006 \(c. 11\), s. 22\(2\)](#); [S.I. 2006/1013, art. 2](#)

4 Deproscription: application.

- [^{F3}(1) An application may be made to the Secretary of State for an order under section 3(3) or (8)—
 - (a) removing an organisation from Schedule 2, or

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- (b) providing for a name to cease to be treated as a name for an organisation listed in that Schedule.]
- (2) An application may be made by—
 - (a) the organisation, or
 - (b) any person affected by the organisation’s proscription [^{F4}or by the treatment of the name as a name for the organisation.] .
- (3) The Secretary of State shall make regulations prescribing the procedure for applications under this section.
- (4) The regulations shall, in particular—
 - (a) require the Secretary of State to determine an application within a specified period of time, and
 - (b) require an application to state the grounds on which it is made.

Textual Amendments

- F3** S. 4(1) substituted (13.4.2006) by [Terrorism Act 2006 \(c. 11\), s. 22\(3\)](#); [S.I. 2006/1013, art. 2](#)
F4 Words in s. 4(2)(b) inserted (13.4.2006) by [Terrorism Act 2006 \(c. 11\), s. 22\(4\)](#); [S.I. 2006/1013, art. 2](#)

Commencement Information

- II** S. 4 wholly in force at 19.2.2001; s. 4 not in force at Royal Assent see s. 128; s. 4(3)(4) in force at 31.10.2000 by [S.I. 2000/2944, art. 2\(a\)](#); s. 4 in force at 19.2.2002 in so far as not already in force by [S.I. 2001/421, art. 2](#)

5 Deproscription: appeal.

- (1) There shall be a commission, to be known as the Proscribed Organisations Appeal Commission.
 - (2) Where an application under section 4 has been refused, the applicant may appeal to the Commission.
 - (3) The Commission shall allow an appeal against a refusal to deproscribe an organisation [^{F5}or to provide for a name to cease to be treated as a name for an organisation] if it considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review.
 - (4) Where the Commission allows an appeal under this section ^{F6}. . . , it may make an order under this subsection.
 - (5) Where an order is made under subsection (4) [^{F7}in respect of an appeal against a refusal to deproscribe an organisation,] the Secretary of State shall as soon as is reasonably practicable—
 - (a) lay before Parliament, in accordance with section 123(4), the draft of an order under section 3(3)(b) removing the organisation from the list in Schedule 2, or
 - (b) make an order removing the organisation from the list in Schedule 2 in pursuance of section 123(5).
- [^{F8}(5A) Where an order is made under subsection (4) in respect of an appeal against a refusal to provide for a name to cease to be treated as a name for an organisation, the Secretary of State shall, as soon as is reasonably practicable, make an order under section 3(8)

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providing that the name in question is to cease to be so treated in relation to that organisation.]

(6) Schedule 3 (constitution of the Commission and procedure) shall have effect.

Textual Amendments

- F5** Words in s. 5(3) inserted (13.4.2006) by [Terrorism Act 2006 \(c. 11\)](#), [s. 22\(5\)\(a\)](#); [S.I. 2006/1013](#), [art. 2](#)
- F6** Words in s. 5(4) repealed (13.4.2006) by [Terrorism Act 2006 \(c. 11\)](#), ss. {22(5)(b)}, 37(5), {Sch. 3}; [S.I. 2006/1013](#), [art. 2](#)
- F7** Words in s. 5(5) inserted (13.4.2006) by [Terrorism Act 2006 \(c. 11\)](#), [s. 22\(5\)\(c\)](#); [S.I. 2006/1013](#), [art. 2](#)
- F8** S. 5(5A) inserted (13.4.2006) by [Terrorism Act 2006 \(c. 11\)](#), [s. 22\(6\)](#); [S.I. 2006/1013](#), [art. 2](#)

Commencement Information

- I2** S. 5 wholly in force at 19.2.2001; s. 5 not in force at Royal Assent see s. 128; s. 5(1) wholly in force and s. 5(6) in force for certain purposes at 31.10.2000 by [S.I. 2000/2944](#), [art. 2\(b\)](#); s. 5 in force at 19.2.2001 in so far as not already in force by [S.I. 2001/421](#), [art. 2](#)

6 Further appeal.

- (1) A party to an appeal under section 5 which the Proscribed Organisations Appeal Commission has determined may bring a further appeal on a question of law to—
- the Court of Appeal, if the first appeal was heard in England and Wales,
 - the Court of Session, if the first appeal was heard in Scotland, or
 - the Court of Appeal in Northern Ireland, if the first appeal was heard in Northern Ireland.
- (2) An appeal under subsection (1) may be brought only with the permission—
- of the Commission, or
 - where the Commission refuses permission, of the court to which the appeal would be brought.
- (3) An order under section 5(4) shall not require the Secretary of State to take any action until the final determination or disposal of an appeal under this section (including any appeal to the [^{F9}Supreme Court]).

Textual Amendments

- F9** Words in s. 6(3) substituted (1.10.2009) by [Constitutional Reform Act 2005 \(c. 4\)](#), ss. 40(4), 148, [Sch. 9 para. 71](#); [S.I. 2009/1604](#), [art. 2\(d\)](#)

7 Appeal: effect on conviction, &c.

- (1) This section applies where—
- an appeal under section 5 has been allowed in respect of an organisation,
 - an order has been made under section 3(3)(b) in respect of the organisation in accordance with an order of the Commission under section 5(4) (and, if the order was made in reliance on section 123(5), a resolution has been passed by each House of Parliament under section 123(5)(b)),

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- (c) a person has been convicted of an offence in respect of the organisation under any of sections 11 to 13, 15 to 19 and 56, and
- (d) the activity to which the charge referred took place on or after the date of the refusal to depose against which the appeal under section 5 was brought.

[^{F10}(1A) This section also applies where—

- (a) an appeal under section 5 has been allowed in respect of a name treated as the name for an organisation,
 - (b) an order has been made under section 3(8) in respect of the name in accordance with an order of the Commission under section 5(4),
 - (c) a person has been convicted of an offence in respect of the organisation under any of sections 11 to 13, 15 to 19 and 56, and
 - (d) the activity to which the charge referred took place on or after the date of the refusal, against which the appeal under section 5 was brought, to provide for a name to cease to be treated as a name for the organisation.]
- (2) If the person mentioned in subsection (1)(c) [^{F11}or (1A)(c)] was convicted on indictment—
- (a) he may appeal against the conviction to the Court of Appeal, and
 - (b) the Court of Appeal shall allow the appeal.
- (3) A person may appeal against a conviction by virtue of subsection (2) whether or not he has already appealed against the conviction.
- (4) An appeal by virtue of subsection (2)—
- (a) must be brought within the period of 28 days beginning with the date on which the order mentioned in subsection (1)(b) [^{F12}or (1A)(b)] comes into force, and
 - (b) shall be treated as an appeal under section 1 of the ^{M1}Criminal Appeal Act 1968 (but does not require leave).
- (5) If the person mentioned in subsection (1)(c) [^{F13}or (1A)(c)] was convicted by a magistrates' court—
- (a) he may appeal against the conviction to the Crown Court, and
 - (b) the Crown Court shall allow the appeal.
- (6) A person may appeal against a conviction by virtue of subsection (5)—
- (a) whether or not he pleaded guilty,
 - (b) whether or not he has already appealed against the conviction, and
 - (c) whether or not he has made an application in respect of the conviction under section 111 of the ^{M2}Magistrates' Courts Act 1980 (case stated).
- (7) An appeal by virtue of subsection (5)—
- (a) must be brought within the period of 21 days beginning with the date on which the order mentioned in subsection (1)(b) [^{F14}or (1A)(b)] comes into force, and
 - (b) shall be treated as an appeal under section 108(1)(b) of the ^{M3}Magistrates' Courts Act 1980.
- (8) In section 133(5) of the ^{M4}Criminal Justice Act 1988 (compensation for miscarriage of justice) after paragraph (b) there shall be inserted—
- “or
- (c) on an appeal under section 7 of the Terrorism Act 2000”.

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Textual Amendments

- F10** S. 7(1A) inserted (13.4.2006) by [Terrorism Act 2006 \(c. 11\)](#), [s. 22\(7\)](#); S.I. 2006/1013, [art. 2](#)
- F11** Words in s. 7(2) inserted (13.4.2006) by [Terrorism Act 2006 \(c. 11\)](#), [s. 22\(8\)\(a\)](#); S.I. 2006/1013, [art. 2](#)
- F12** Words in s. 7(4)(a) inserted (13.4.2006) by [Terrorism Act 2006 \(c. 11\)](#), [s. 22\(8\)\(b\)](#); S.I. 2006/1013, [art. 2](#)
- F13** Words in s. 7(5) inserted (13.4.2006) by [Terrorism Act 2006 \(c. 11\)](#), [s. 22\(8\)\(c\)](#); S.I. 2006/1013, [art. 2](#)
- F14** Words in s. 7(7)(a) inserted (13.4.2006) by [Terrorism Act 2006 \(c. 11\)](#), [s. 22\(8\)\(d\)](#); S.I. 2006/1013, [art. 2](#)

Marginal Citations

- M1** [1968 c. 19](#).
- M2** [1980 c. 43](#).
- M3** [1980 c. 43](#).
- M4** [1988 c. 33](#).

8 Section 7: Scotland and Northern Ireland.

(1) In the application of section 7 to Scotland—

- (a) for every reference to the Court of Appeal or the Crown Court substitute a reference to the High Court of Justiciary,
- (b) in subsection (2)(b), at the end insert “ and quash the conviction ”,
- (c) in subsection (4)—
 - (i) in paragraph (a), for “28 days” substitute “ two weeks ”, and
 - (ii) in paragraph (b), for “section 1 of the Criminal Appeal Act 1968” substitute “ section 106 of the Criminal Procedure (Scotland) Act 1995 ”,
- (d) in subsection (5)—
 - (i) for “by a magistrates’ court” substitute “ in summary proceedings ”, and
 - (ii) in paragraph (b), at the end insert “ and quash the conviction ”,
- (e) in subsection (6), paragraph (c) is omitted, and
- (f) in subsection (7)—
 - (i) in paragraph (a) for “21 days” substitute “ two weeks ”, and
 - (ii) for paragraph (b) substitute—
 - “(b) shall be by note of appeal, which shall state the ground of appeal,
 - (c) shall not require leave under any provision of Part X of the Criminal Procedure (Scotland) Act 1995, and
 - (d) shall be in accordance with such procedure as the High Court of Justiciary may, by Act of Adjournal, determine.”.

(2) In the application of section 7 to Northern Ireland—

- (a) the reference in subsection (4) to section 1 of the ^{M5}Criminal Appeal Act 1968 shall be taken as a reference to section 1 of the ^{M6}Criminal Appeal (Northern Ireland) Act 1980,
- (b) references in subsection (5) to the Crown Court shall be taken as references to the county court,

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- (c) the reference in subsection (6) to section 111 of the ^{M7}Magistrates' Courts Act 1980 shall be taken as a reference to Article 146 of the ^{M8}Magistrates' Courts (Northern Ireland) Order 1981, and
- (d) the reference in subsection (7) to section 108(1)(b) of the ^{M9}Magistrates' Courts Act 1980 shall be taken as a reference to Article 140(1)(b) of the ^{M10}Magistrates' Courts (Northern Ireland) Order 1981.

Marginal Citations

- M5** 1968 c. 19.
M6 1980 c. 47.
M7 1980 c. 43.
M8 S.I. 1981/1675 (N.I. 26).
M9 1980 c. 43.
M10 S.I. 1981/1675 (N.I. 26).

9 Human Rights Act 1998.

- (1) This section applies where rules (within the meaning of section 7 of the ^{M11}Human Rights Act 1998 (jurisdiction)) provide for proceedings under section 7(1) of that Act to be brought before the Proscribed Organisations Appeal Commission.
- (2) The following provisions of this Act shall apply in relation to proceedings under section 7(1) of that Act as they apply to appeals under section 5 of this Act—
 - (a) section 5(4) [^{F15}, (5) and (5A)] ,
 - (b) section 6,
 - (c) section 7, and
 - (d) paragraphs 4 to [^{F16}7] of Schedule 3.
- (3) The Commission shall decide proceedings in accordance with the principles applicable on an application for judicial review.
- (4) In the application of the provisions mentioned in subsection (2)—
 - (a) a reference to the Commission allowing an appeal shall be taken as a reference to the Commission determining that an action of the Secretary of State is incompatible with a Convention right, [^{F17}and]
 - (b) a reference to the refusal to deproscribe against which an appeal was brought shall be taken as a reference to the action of the Secretary of State which is found to be incompatible with a Convention right [^{F18}, and
 - (c) a reference to a refusal to provide for a name to cease to be treated as a name for an organisation shall be taken as a reference to the action of the Secretary of State which is found to be incompatible with a Convention right].

Textual Amendments

- F15** Words in s. 9(2)(a) substituted (13.4.2006) by [Terrorism Act 2006 \(c. 11\)](#), [s. 22\(9\)\(a\)](#); [S.I. 2006/1013](#), [art. 2](#)
- F16** Words in s. 9(2)(d) substituted (2.10.2000) by [2000 c. 23](#), [s. 82](#), [Sch. 4 para. 12\(1\)](#) (with [s. 82\(3\)](#)); [S.I. 2000/2543](#), [art. 3](#)
- F17** S. 9(4): it is provided that the word "and" at the end of para. (b) is repealed (13.4.2006) by [Terrorism Act 2006 \(c. 11\)](#), [s. 37\(5\)](#), [Sch. 3](#); [S.I. 2006/1013](#), [art. 2](#)

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F18 S. 9(4)(c) and preceding word inserted (13.4.2006) by [Terrorism Act 2006 \(c. 11\)](#), [s. 22\(9\)\(b\)](#); S.I. 2006/1013, [art. 2](#)

Marginal Citations

M11 [1998 c. 42.](#)

10 Immunity.

- (1) The following shall not be admissible as evidence in proceedings for an offence under any of sections 11 to 13, 15 to 19 and 56—
- (a) evidence of anything done in relation to an application to the Secretary of State under section 4,
 - (b) evidence of anything done in relation to proceedings before the Proscribed Organisations Appeal Commission under section 5 above or section 7(1) of the ^{M12}Human Rights Act 1998,
 - (c) evidence of anything done in relation to proceedings under section 6 (including that section as applied by section 9(2)), and
 - (d) any document submitted for the purposes of proceedings mentioned in any of paragraphs (a) to (c).
- (2) But subsection (1) does not prevent evidence from being adduced on behalf of the accused.

Marginal Citations

M12 [1998 c. 42.](#)

Offences

11 Membership.

- (1) A person commits an offence if he belongs or professes to belong to a proscribed organisation.
- (2) It is a defence for a person charged with an offence under subsection (1) to prove—
- (a) that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and
 - (b) that he has not taken part in the activities of the organisation at any time while it was proscribed.
- (3) A person guilty of an offence under this section shall be liable—
- (a) on conviction on indictment, to imprisonment for a term not exceeding [^{F19}14] years, to a fine or to both, or
 - (b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.
- (4) In subsection (2) “proscribed” means proscribed for the purposes of any of the following—
- (a) this Act;
 - (b) the ^{M13}Northern Ireland (Emergency Provisions) Act 1996;

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- (c) the ^{M14}Northern Ireland (Emergency Provisions) Act 1991;
- (d) the ^{M15}Prevention of Terrorism (Temporary Provisions) Act 1989;
- (e) the ^{M16}Prevention of Terrorism (Temporary Provisions) Act 1984;
- (f) the ^{M17}Northern Ireland (Emergency Provisions) Act 1978;
- (g) the ^{M18}Prevention of Terrorism (Temporary Provisions) Act 1976;
- (h) the ^{M19}Prevention of Terrorism (Temporary Provisions) Act 1974;
- (i) the ^{M20}Northern Ireland (Emergency Provisions) Act 1973.

Textual Amendments

F19 Word in s. 11(3)(a) substituted (29.6.2021) by [Counter-Terrorism and Sentencing Act 2021 \(c. 11\)](#), ss. [26\(1\)\(a\)](#), [50\(2\)\(m\)](#) (with s. 26(3))

Marginal Citations

M13 1996 c. 22.
M14 1991 c. 24.
M15 1989 c. 4.
M16 1984 c. 8.
M17 1978 c. 5.
M18 1976 c. 8.
M19 1974 c. 56.
M20 1973 c. 53.

12 Support.

- (1) A person commits an offence if—
- (a) he invites support for a proscribed organisation, and
 - (b) the support is not, or is not restricted to, the provision of money or other property (within the meaning of section 15).

[^{F20}(1A) A person commits an offence if the person—

- (a) expresses an opinion or belief that is supportive of a proscribed organisation, and
- (b) in doing so is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.]

- (2) A person commits an offence if he arranges, manages or assists in arranging or managing a meeting which he knows is—

- (a) to support a proscribed organisation,
- (b) to further the activities of a proscribed organisation, or
- (c) to be addressed by a person who belongs or professes to belong to a proscribed organisation.

- (3) A person commits an offence if he addresses a meeting and the purpose of his address is to encourage support for a proscribed organisation or to further its activities.

- (4) Where a person is charged with an offence under subsection (2)(c) in respect of a private meeting it is a defence for him to prove that he had no reasonable cause to believe that the address mentioned in subsection (2)(c) would support a proscribed organisation or further its activities.

Changes to legislation: *Terrorism Act 2000, Part II is up to date with all changes known to be in force on or before 11 July 2025. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

- (5) In subsections (2) to (4)—
- (a) “meeting” means a meeting of three or more persons, whether or not the public are admitted, and
 - (b) a meeting is private if the public are not admitted.
- (6) A person guilty of an offence under this section shall be liable—
- (a) on conviction on indictment, to imprisonment for a term not exceeding [^{F21}14] years, to a fine or to both, or
 - (b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

Textual Amendments

- F20** S. 12(1A) inserted (12.4.2019) by [Counter-Terrorism and Border Security Act 2019 \(c. 3\)](#), **ss. 1, 27(3)** (with [s. 25\(1\)](#))
- F21** Word in [s. 12\(6\)\(a\)](#) substituted (29.6.2021) by [Counter-Terrorism and Sentencing Act 2021 \(c. 11\)](#), **ss. 26(1)(b), 50(2)(m)** (with [s. 26\(3\)](#))

13 Uniform [^{F22}and publication of images].

- (1) A person in a public place commits an offence if he—
- (a) wears an item of clothing, or
 - (b) wears, carries or displays an article,
- in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation.

- [^{F23}(1A) A person commits an offence if the person publishes an image of—
- (a) an item of clothing, or
 - (b) any other article,
- in such a way or in such circumstances as to arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation.

- (1B) In subsection (1A) the reference to an image is a reference to a still or moving image (produced by any means).]

^{F24}(2)

- (3) A person guilty of an offence under this section shall be liable on summary conviction to—
- (a) imprisonment for a term not exceeding six months,
 - (b) a fine not exceeding level 5 on the standard scale, or
 - (c) both.

- [^{F25}(4) A constable may seize an item of clothing or any other article if the constable—
- (a) reasonably suspects that it is evidence in relation to an offence under subsection (1), and
 - (b) is satisfied that it is necessary to seize it in order to prevent the evidence being concealed, lost, altered or destroyed.

- (5) In connection with exercising the power in subsection (4), a constable may require a person to remove the item of clothing or other article if the person is wearing it.

Changes to legislation: *Terrorism Act 2000, Part II is up to date with all changes known to be in force on or before 11 July 2025. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

- (6) But the powers conferred by subsections (4) and (5) may not be exercised so as to seize, or require a person to remove, an item of clothing being worn next to the skin or immediately over a garment being worn as underwear.]

Textual Amendments

- F22** Words in s. 13 heading inserted (12.4.2019) by [Counter-Terrorism and Border Security Act 2019](#) (c. 3), **ss. 2(2), 27(3)** (with [s. 25\(1\)](#))
- F23** [S. 13\(1A\)\(1B\)](#) inserted (12.4.2019) by [Counter-Terrorism and Border Security Act 2019](#) (c. 3), **ss. 2(3), 27(3)** (with [s. 25\(1\)](#))
- F24** [S. 13\(2\)](#) omitted (12.4.2019) by virtue of [Counter-Terrorism and Border Security Act 2019](#) (c. 3), [s. 27\(3\)](#), **Sch. 4 para. 36**
- F25** [S. 13\(4\)-\(6\)](#) inserted (12.4.2019) by [Counter-Terrorism and Border Security Act 2019](#) (c. 3), **ss. 2(4), 27(3)** (with [s. 25\(1\)](#))

Changes to legislation:

Terrorism Act 2000, Part II is up to date with all changes known to be in force on or before 11 July 2025. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.

[View outstanding changes](#)

Changes and effects yet to be applied to :

- Sch. 4 para. 11(1)(aa) inserted by [2003 c. 44 Sch. 36 para. 14\(2\)](#)
- Sch. 4 para. 11(2A) inserted by [2003 c. 44 Sch. 36 para. 14\(3\)](#)

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- Sch. 4 para. 11(1)(aa) inserted by [2003 c. 44 Sch. 36 para. 14\(2\)](#)
- Sch. 4 para. 11(2A) inserted by [2003 c. 44 Sch. 36 para. 14\(3\)](#)



Terrorism Act 2000

2000 CHAPTER 11

PART VI

MISCELLANEOUS

Terrorist offences

56 Directing terrorist organisation.

- (1) A person commits an offence if he directs, at any level, the activities of an organisation which is concerned in the commission of acts of terrorism.
- (2) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for life.

Changes to legislation:

Terrorism Act 2000, Section 56 is up to date with all changes known to be in force on or before 16 October 2025. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.

[View outstanding changes](#)

Changes and effects yet to be applied to :

- Sch. 4 para. 11(1)(aa) inserted by [2003 c. 44 Sch. 36 para. 14\(2\)](#)
- Sch. 4 para. 11(2A) inserted by [2003 c. 44 Sch. 36 para. 14\(3\)](#)

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- Sch. 4 para. 11(1)(aa) inserted by [2003 c. 44 Sch. 36 para. 14\(2\)](#)
- Sch. 4 para. 11(2A) inserted by [2003 c. 44 Sch. 36 para. 14\(3\)](#)



as amended by Protocols Nos. 11,
14 and 15

supplemented by Protocols Nos. 1, 4,
6, 7, 12, 13 and 16

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 7

No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 11

Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

ARTICLE 12

Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

ARTICLE 13

Right to an effective remedy

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

ARTICLE 14

Prohibition of discrimination

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

ARTICLE 15

Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

ARTICLE 16

Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

ARTICLE 17

Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

ARTICLE 18

Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

SECTION II EUROPEAN COURT OF HUMAN RIGHTS

ARTICLE 19

Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

ARTICLE 20

Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

ARTICLE 21

Criteria for office

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
2. Candidates shall be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly, further to Article 22.
3. The judges shall sit on the Court in their individual capacity.
4. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.



Human Rights Act 1998

1998 CHAPTER 42

Legislation

3 Interpretation of legislation.

- (1) 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.
- (2) This section—
 - (a) applies to primary legislation and subordinate legislation whenever enacted;
 - (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
 - (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Modifications etc. (not altering text)

- C1** [S. 3](#) excluded (25.4.2024) by [Safety of Rwanda \(Asylum and Immigration\) Act 2024](#) (c. 8), [ss. 2\(5\)\(b\), 3, 10\(1\)](#) (with [ss. 4, 10\(2\)](#))

Changes to legislation:

Human Rights Act 1998, Section 3 is up to date with all changes known to be in force on or before 25 June 2025. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.

[View outstanding changes](#)

Changes and effects yet to be applied to :

- s. 3 excluded by [2023 c. 37 s. 1\(5\)](#)
- s. 3 excluded by 1997 c. 43, s. 34A (as inserted) by [2024 c. 21 s. 69](#)
- s. 3 excluded by 2003 c. 44, s. 268A (as inserted) by [2024 c. 21 s. 70](#)
- s. 3 excluded by 2012 c. 10, s. 128(7) (as inserted) by [2024 c. 21 s. 71](#)



Human Rights Act 1998

1998 CHAPTER 42

Public authorities

6 Acts of public authorities.

- (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
- (2) Subsection (1) does not apply to an act if—
 - (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
 - (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
- (3) In this section “public authority” includes—
 - (a) a court or tribunal, and
 - (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
- ^{F1}(4)
- (5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.
- (6) “An act” includes a failure to act but does not include a failure to—
 - (a) introduce in, or lay before, Parliament a proposal for legislation; or
 - (b) make any primary legislation or remedial order.

Textual Amendments

- F1** S. 6(4) repealed (1.10.2009) by [Constitutional Reform Act 2005 \(c. 4\)](#), ss. 40, 146, 148, Sch. 9 para. 66(4), [Sch. 18 Pt. 5](#); [S.I. 2009/1604](#), [art. 2\(d\)\(f\)](#)

Changes to legislation: There are currently no known outstanding effects
for the Human Rights Act 1998, Section 6. (See end of Document for details)

Modifications etc. (not altering text)

- C1** S. 6 excluded (5.3.2015) by [Infrastructure Act 2015 \(c. 7\)](#), **ss. 8(3)(b)**, 57(1); S.I. 2015/481, reg. 2(a)
- C2** [Ss. 6-9](#) excluded (25.4.2024) by [Safety of Rwanda \(Asylum and Immigration\) Act 2024 \(c. 8\)](#), **ss. 2(5)(b)**, **3**, 10(1) (with [ss. 4](#), 10(2))
- C3** S. 6(1) applied (2.10.2000) by 1999 c. 33, **ss. 65(2)**, 170(4); S.I. 2000/2444, art. 2, **Sch. 1** (subject to transitional provisions in [arts. 3](#), 4, **Sch. 2**)
- C4** S. 6(3)(b) modified (1.12.2008 with exception in art. 2(2) of commencing S.I.) by [Health and Social Care Act 2008 \(c. 14\)](#), **ss. 145(1)-(4)**, 170 (with s. 145(5)); S.I. 2008/2994, **art. 2(1)**
- C5** S. 6(3)(b) applied (1.4.2015) by [Care Act 2014 \(c. 23\)](#), **s. 73(2)(3)**127; S.I. 2015/993, art. 2(r) (with transitional provisions in [S.I. 2015/995](#))

Changes to legislation:

There are currently no known outstanding effects for the Human Rights Act 1998, Section 6.



Human Rights Act 1998

1998 CHAPTER 42

Public authorities

7 Proceedings.

- (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
 - (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
 - (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.
- (2) In subsection (1)(a) “appropriate court or tribunal” means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.
- (3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.
- (4) If the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act.
- (5) Proceedings under subsection (1)(a) must be brought before the end of—
 - (a) the period of one year beginning with the date on which the act complained of took place; or
 - (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.
- (6) In subsection (1)(b) “legal proceedings” includes—
 - (a) proceedings brought by or at the instigation of a public authority; and
 - (b) an appeal against the decision of a court or tribunal.

Changes to legislation: There are currently no known outstanding effects for the Human Rights Act 1998, Section 7. (See end of Document for details)

- (7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.
- (8) Nothing in this Act creates a criminal offence.
- (9) In this section “rules” means—
- (a) in relation to proceedings before a court or tribunal outside Scotland, rules made by ^{F1} . . . [^{F2}the Lord Chancellor or] the Secretary of State for the purposes of this section or rules of court,
 - (b) in relation to proceedings before a court or tribunal in Scotland, rules made by the Secretary of State for those purposes,
 - (c) in relation to proceedings before a tribunal in Northern Ireland—
 - (i) which deals with transferred matters; and
 - (ii) for which no rules made under paragraph (a) are in force,rules made by a Northern Ireland department for those purposes, and includes provision made by order under section 1 of the ^{M1}Courts and Legal Services Act 1990.
- (10) In making rules, regard must be had to section 9.
- (11) The Minister who has power to make rules in relation to a particular tribunal may, to the extent he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1), by order add to—
- (a) the relief or remedies which the tribunal may grant; or
 - (b) the grounds on which it may grant any of them.
- (12) An order made under subsection (11) may contain such incidental, supplemental, consequential or transitional provision as the Minister making it considers appropriate.
- (13) “The Minister” includes the Northern Ireland department concerned.

Textual Amendments

- F1** Words in s. 7(9)(a) repealed (19.8.2003) by [The Secretary of State for Constitutional Affairs Order 2003 \(S. I. 2003/1887\)](#), art. 9, **Sch. 2 para. 10(2)**
- F2** Words in s. 7(9)(a) inserted (12.1.2006) by [The Transfer of Functions \(Lord Chancellor and Secretary of State\) Order 2005 \(S.I. 2005/3429\)](#), art. 8, **Sch. para. 3**,

Modifications etc. (not altering text)

- C1** [S. 7](#) amended (2.10.2000) by [Regulation of Investigatory Powers Act 2000 \(c. 23\)](#), ss. **65(2)(a)**, 83 (with s. 82(3)); [S.I. 2000/2543](#), art. 3
- C2** [S. 7](#): referred to (11.3.2005) by [Prevention of Terrorism Act 2005 \(c. 2\)](#), s. **11(2)**
- C3** [Ss. 6-9](#) excluded (25.4.2024) by [Safety of Rwanda \(Asylum and Immigration\) Act 2024 \(c. 8\)](#), ss. **2(5)(b)**, **3**, **10(1)** (with ss. 4, 10(2))
- C4** [S. 7\(9\)\(a\)](#): functions of the Secretary of State to be exercisable concurrently with the Lord Chancellor (12.1.2006) by [The Transfer of Functions \(Lord Chancellor and Secretary of State\) Order 2005 \(S.I. 2005/3429\)](#), art. **3(2)** (with arts. 4, 5)
- C5** [S. 7\(11\)](#): functions of the Secretary of State to be exercisable concurrently with the Lord Chancellor (12.1.2006) by [The Transfer of Functions \(Lord Chancellor and Secretary of State\) Order 2005 \(S.I. 2005/3429\)](#), art. **3(2)** (with arts. 4, 5)

Changes to legislation: *There are currently no known outstanding effects
for the Human Rights Act 1998, Section 7. (See end of Document for details)*

Marginal Citations

M1 1990 c. 41.

Changes to legislation:

There are currently no known outstanding effects for the Human Rights Act 1998, Section 7.